

IN THE HIGH COURT AT CALCUTTA
(CRIMINAL APPELLATE JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

CRA 293 of 2017

KAMAL DEBNATH

VS.

THE STATE OF WEST BENGAL & ANR.

For the Appellant : Mr. Prabir Kumar Mitra, Adv.
Ms. Subhanwita Ghosh, Adv.
Mr. Yash Vardhan Shaw, Adv.

For the Respondents : Ms. Debjani Sahu, Adv.

Hearing concluded on : 17th January, 2023

Judgement on : 31st January, 2023

Siddhartha Roy Chowdhury, J.:

1. Challenge in this appeal is to the judgement passed by learned Additional Sessions Judge, 1st Court, Jalpaiguri in Sessions Case No. 390 of 2014 on 28th March, 2017 whereby learned Trial Court recorded an order of conviction and sentenced the convict to suffer rigorous imprisonment for three and half years for committing offence within the meaning of Section 376/511 of the Indian Penal Code and rigorous imprisonment for one year for the offence punishable under Section 448 of the Indian Penal Code subject to the provision of Section 428 of the Cr.P.C.
2. Briefly stated, the victim girl was 15 years of age as on 1st November, 2012. On the fateful day at about 1.30 p.m., while she was

engaged in her study, the accused persons, who happened to be her next door neighbours, entered into the room and embraced her from behind. They also tried to take off her wearing apparels with an intention to ravish her. The victim girl screamed for help and the accused persons fled away. At the relevant point of time mother of the victim was not present in the house, after she came back the victim narrated the entire incident. However, they could not gather courage to inform the matter to police primarily being intimidated by the accused persons. After five days of incident the victim girl informed the police in writing. As the information disclosed offence cognizable in nature, Moinaguri P.S. Case No. 425/12 dated 6th November, 2012 was registered under Section 448/376/511 of the Indian Penal Code. Trial was commenced on 1st July, 2015 and accused persons stood trial pleading their innocence.

3. To bring home charges, prosecution examined as many as 7 witnesses. After scrutiny of the evidence both oral and documentary, learned Trial Court was pleased to pass the judgement impugned.
4. Assailing the impugned judgement and order Ms. Subhanwita Ghosh, learned Counsel for the appellant Kamal Debnath, submits that prosecution case suffers from serious infirmity. Learned Trial Court passed the impugned judgement without any cogent and reliable evidence. Drawing my attention to the testimony of the victim who adduced evidence as P.W. 1, Ms. Ghosh submits that according to P.W. 1, being attracted by her scream Suniti Adhikary, Shyamapada Mandal, Chanchala Mandal and others came to the place of occurrence

and she was taken to the house of Suniti Adhikary. But none of the aforesaid persons adduced evidence to support the prosecution case. Therefore, uncorroborated testimony of P.W. 1 cannot be said to be sufficient to enchain accused with criminal liability. There was enmity between the families over a piece of land and because of such enmity the accused persons have been falsely implicated.

5. From the attending facts of the case it is admitted that the victim girl was all alone in the house. She was preparing for her ensuing Secondary Examination when the accused persons came into her room and embraced her from behind and even tried to disrobe her. During cross-examination as P.W.1, the victim girl stated:- “The accused persons hugged me, tried to whip off my wearing apparels and all these took 5/7 minutes. The accused persons tried to whip off my wearing apparels after felling me on the floor”. Thus I feel no hesitation to hold that P.W. 1 the victim girl has stood the test of cross-examination. She has been thoroughly cross-examined but nothing has come out to impeach her credibility.

6. Corroboration is a rule of prudence and not a mandate of law. Evidence Act never demands in particular number of witnesses to prove any fact in issue. It has now become well settled principle of law that testimony of solitary witness is sufficient to record an order of conviction if Court finds a ring of truth in her testimony. The victim girl as I have already pointed out, stood the test of cross-examination. There is nothing to shake her credibility. True it is the neighbouring people who adduced evidence as P.W. 4 and P.W. 5 did not support the

prosecution case. They were examined in the light of Section 154 of the Evidence Act but such refusal to support the testimony of victim girl on the part of aforesaid witnesses cannot be said to have any consequence upon the case of prosecution, more so when both P.W. 4 and P.W. 5 are post occurrence witnesses. P.W. 2, is the mother of the victim who also did not have any direct knowledge about the incident. P.W. 3 is learned Judicial Magistrate who recorded statement of victim girl under Section 164 of Cr.P.C. which is admitted as Exhibit 2. P.W. 6 is the Doctor who examined the accused persons which is also of no consequence in this case and P.W. 7 is the Investigating Officer who of course is not witness to the occurrence. Ms. Ghosh, learned Counsel for the appellant submits that there is no evidence on record to show as to how the accused persons entered into the room of the victim and committed the offence as alleged. Victim ought to have perceived the presence of the accused persons soon after they entered into the room. Therefore, the narrative of the victim girl that she was hugged from behind raises serious doubt about the presence of the accused persons. Victim girl cannot be considered to be a sterling witness as she cannot be taken on the face value. Her version on the core spectrum of crime cannot be said to have remained intact.

7. To buttress her argument Ms. Ghosh relied upon the judgement of Hon'ble Supreme Court pronounced in the case of **SANTOSH PRASAD VS. THE STATE OF BIHAR** reported in **(2020) 3 SCC 443**, particularly in the backdrop of dispute over land and delay in informing the police. I have perused the said judgement which was

pronounced in the backdrop of a factual matrix different from the case at hand.

8. True it is in this case the victim girl informed the police after five days of incident on 6th November, 2012 and she has given a plausible explanation for such delay. When delay has been explained it cannot be considered as an element to disbelieve the case of prosecution or the testimony of the victim. It is the prerogative of the defence counsel to take any probable or even improbable defense. P.W. 2, the mother of the victim admitted that the property over which they are residing is not owned by her family but it was never suggested that accused persons have the ownership of the property.
9. The accused persons were examined under Section 313 of the Cr.P.C. and object of such examination is to give an opportunity to the accused person to explain the incriminating circumstances. The accused person simply denied such incriminating circumstances to be correct but did not spend words to say that they have been falsely implicated because of dispute over property. Under such circumstances, the judgements relied upon by the learned Counsel for the appellant is of any help. Section 448 of the Indian Penal Code speaks of punishment for house trespass as defined under Section 442 of the I.P.C. To constitute an offence under Section 448 sufficient is to prove that the accused persons entered into the dwelling, tent or vessel used as her dwelling with an intention to commit crime. Since it has been proved that the appellant and the co-accused person hugged the victim after entering into the room where she was studying, there is no

reason to interfere with the order of conviction under Section 448 of the Indian Penal Code. But to constitute an offence within the meaning of Section 511 an attempt must be there coupled with the intention to commit an offence and its preparation. The accused at first intends to commit the offence, then makes preparation for committing it and whatever he attempts to commit the offence or in other words it can be stated that attempt to commit an offence begins with the preparation and is completed when the accused person commences to do something in furtherance of commission of offence. Hon'ble Supreme Court ***IN KOPPULA VENKAT RAO VS. STATE OF ANDHRA PRADESH*** reported in **AIR 2004 SC 1874** held that:-

“8. The plea relating to applicability of Section 376 read with Section 511 IPC needs careful consideration. In every crime, there is first, intention to commit, secondly, preparation to commit it, and thirdly, attempt to commit it. If the third stage, that is, attempt is successful, then the crime is complete. If the attempt fails, the crime is not complete, but law punishes the person attempting the act. Section 511 is a general provision dealing with attempts to commit offences not made punishable by other specific sections. It makes punishable all attempts to commit offences punishable with imprisonment and not only those punishable with death. An attempt is made punishable, because every attempt, although it falls short of success, must create alarm, which by itself is an injury, and the moral guilt of the offender is the same as if he had succeeded. Moral guilt must be united to injury in order to justify punishment. As the injury is not as great as if the act had been committed, only half the punishment is awarded.”

10. There are different stages in a crime. First intention & commit it, second preparation to commit and third attempt to commit. Section 511 of the I.P.C. makes attempt to commit an offence punishable. The offence attempted should be punishable by the Penal Code with imprisonment. The conditions stipulated in the provision for completion of the said offence are :- i) The offender should have done some act towards commission of main offence. ii) Such attempt is not expressly covered by as a penal provision elsewhere in the Code. Thus 'attempt' to commit offence is a sine quo non for offence under Section 511 of I.P.C.
11. Here in this case by hugging and making attempt to disrobe the girl the accused persons committed offence which is expressly made punishable under Section 354 of the I.P.C. Thus, the act invoked therein stands lifted out of the purview of Section 511 of the I.P.C. Section 511 of I.P.C. is a residuary provision. When the appellant found to have committed an act punishable under the Penal law, he cannot be convicted u/s 511 of the I.P.C.
12. In this regard we can rely upon the decision of Hon'ble Apex Court in **Satvir Singh & Ors. vs. state of Punjab** reported in **(2001) 8 SCC 693 / 2001 AIR SC 2828**.
13. In this case the accused persons by hugging the victim from behind undoubtedly committed an offence within the meaning of Section 354 of the I.P.C., not under Section 376/511 of the I.P.C. as held by learned Trial Court, for which minimum prescribed punishment is three years. Therefore, while modifying the order of

conviction as one under Section 354 of I.P.C. instead of Section 376/511 of the I.P.C.

14. Therefore, the appellant is found guilty for committing offence within the meaning of Section 448 and 354 of the I.P.C. instead of Section 448/376/511 of the I.P.C. Consequently the sentencing part shall be altered. The appellant/convict shall undergo imprisonment for 2 years and shall pay fine of Rs. 5000/- i.d. S.I. for 3 months, subject to provision as laid down under Section 428 of Cr.P.C. instead of 3 ¹/₂ years as imposed by learned Trial Court.
15. The appellant is directed to surrender to the jurisdiction of learned Trial Court to serve out the sentence within four weeks from the date, failing which the learned Trial Court will be at liberty to take steps according to law, to make the convict serve out sentence. The criminal appeal is thus disposed of on contest.
16. Let a copy of this judgement be sent down along with lower Court record to the learned Trial Court for information and necessary compliance.
17. Urgent photostat certified copy of this judgement, if applied therefor, should be made available to the parties upon compliance with the requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)

❖ ***Modified vide order dated 02.02.2023.***