



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

Criminal Appeal No.244/2019

Shrihari @ Hari Mahadeo Bawane,
Aged about 45 years, Occ.-Driver,
R/o. Karanji (Kaji), Tah & Distt.Wardha.

.... Appellant
(in Jail)

Versus

State of Maharashtra,
through P.S.O. Sewagram, Tah and District Wardha. Respondent.

Ms Sonali B. Khobragade, Advocate for appellant (appointed).
Mrs Mayuri Deshmukh, Assistant Public Prosecutor for respondent.

CORAM : Nitin B. Suryawanshi &
M.W. Chandwani, JJ.

Reserved on : 09-01-2025

Pronounced on : 22-01-2025

J u d g m e n t (Per Nitin B. Suryawanshi, J.)

This appeal is directed against the judgment and order of conviction passed by learned Special Judge (Protection of Children from Sexual Offences), Wardha in Special (Ch.) No.80/2016, thereby convicting the appellant for offence punishable under Section 376(2)(f)(i) of the Indian Penal Code (for short, 'IPC') and sentencing him to suffer imprisonment for remainder of his natural

life and to pay a fine of Rs. 5000/- with a default sentence of two months.

ii. Prosecution case in short is that, in the year 2016 the victim was studying in 8th. Standard. Her parents were residing separately. Accused is her father, who brought her and her brother from the custody of mother, before 4/5 days of the incident. On 30-06-2016 at 9.30 pm, she slept with her brother on cot and accused-father was sleeping on mattress on the floor beside the cot. In the midnight, accused woke her up. She saw that her brother was not there on cot and he was sleeping on the mattress. Accused was calling her on the floor but she did not go to him. Then accused came on the cot near her. He then went to the washroom and came back and slept near the victim. He removed her slacks, nicker and lifted her frock up. Accused then removed his nickers and towel wrapped by him around his waist. He took coconut oil in his hand and applied it to his penis and also to the private part of the victim. He then pulled victim near him and inserted his penis in the private part of the victim. Because of the same, victim had inflammation in her private part, she kicked the accused. Accused

started slapping her on cheek. Victim tried to raise shouts but accused gagged her mouth with his hands and threatened her not to shout. Because of the pain victim started crying. After some time accused left her and went to sleep on the mattress. Due to pain victim could not sleep for the whole night. Victim did not disclose the incident to anybody. On 01-07-2016, after the accused left at 10.00 am, victim wrote the incident on the page of her note book and asked her teacher for help. Due to the incident victim could not go to school on the next day and she remained at home. On 02-07-2016, she went to the school. Lohakare madam asked her the cause for her absence on previous day, but she did not disclose anything. After the school was over, she gave the chit written by her to Lohakare madam. When madam read the chit, she got frightened and showed it to her colleagues. Then all the teachers went to the house of Pradip Timande and called Sarpanch Padmakar Shambharkar. All of them read the contents of the chit and as it was serious in nature, they decided to lodge police complaint. Lohakare madam, Burande Sir, Sarpanch and others went to Police Station Sewagram. Lohakare madam lodged report. Pursuant to lodging of the First Information Report (FIR),

investigation was conducted and chargesheet was filed. Charge was framed against the accused for offence punishable under Section 376(2)(f)(i) of IPC and Section 6 of the Protection of Children from Sexual Offences Act (for short, 'POCSO'). In support of the prosecution case, 11 witnesses were examined. Defence of the accused was of total denial. He claimed false implication in the crime. Learned trial Judge convicted the accused as stated above. Hence, the appeal.

iii. Heard learned Advocate for appellant and learned APP for State. Perused the record.

iv. Learned Advocate for the appellant submits that admittedly there was quarrel between the parents of the victim which has led to false implication of the appellant in the present crime. If there is delay in lodging of FIR, the benefit of which should be given to the appellant. Informant is the interested witness and her evidence is not reliable. (PW-3) Mehmmuddin Wahauddin Kazi is a habitual Police panch, therefore his testimony is not believable. (PW-4) Sangita Dhandhaye is President of Bal Kalyan Samiti who has stated that victim was not in a fit mental

condition and was confused. She has also admitted that without inquiry she sent her opinion to the Police. She has deposed as per the say of Police. It has come in the evidence of (PW-5) Sarpanch-Padmakar Shambharkar that mother of the victim had lodged complaint against one Diwakar Bele making similar allegations with a view to grab money. According to her, therefore possibility cannot be ruled out that victim's mother has instigated her to make allegations against appellant-father. Further submission is, evidence of PW-8 victim is not reliable. It is submitted that medical evidence does not support the allegations of rape made by the victim. There was no injury on the private part of the appellant which rules out the allegation of commission of rape. C.A. reports do not support prosecution case. According to her, the trial Court has failed to appreciate the evidence in the proper perspective and the conviction is based on unreliable evidence. Therefore, the impugned judgment and order of conviction is liable to be quashed and set aside and appellant is entitled for acquittal.

v. In the alternate and without prejudice to the defence of the appellant she submits that, at the most, the offence of attempt

to commit rape can be said to be proved against the appellant, but certainly not the offence of rape. It is further submitted that the offence is committed in the year 2016 when the punishment prescribed for the offence under Section 376 (2)(f) of the IPC was minimum 10 years of imprisonment which may extend to life imprisonment and fine. After the amendment of 2018 the punishment provided under sub-section 2 of Section 376 of the IPC for rape is minimum sentence of 10 years, which may extend to imprisonment for life which shall mean imprisonment for the remainder of that person's natural life and shall also be with fine.

vi. In support of her submissions she relied on-

- (a) Guddu alias Santosh vs State of Madhya Pradesh, reported in (2007) 14 SCC 654
- (b) Aman Kumar and another vs State of Haryana, reported in (2004) 4 SCC 379
- (c) Koppula Venkat Rao vs State of A.P., reported in (2004) 3 SCC 602
- (d) Ganga Prasad Mahto vs State of Bihar and another, reported in (2020) 15 SCC 398

vii. *Per contra*, learned Assistant Public Prosecutor supported the impugned judgment and order of conviction. She would submit that the victim has narrated the incident of rape in her

evidence and delay of 2 days in lodging FIR is not fatal to the prosecution. The chit written by victim is proved by the prosecution. Considering the evidence of victim, prosecution has proved its case beyond reasonable doubt. Trial Court has recorded sound reasons while convicting the appellant. Hence, no case is made out by the appellant to interfere in the conviction recorded by the trial Court.

viii. In support of her submissions, she placed reliance on -

- (a) Madan Lal vs State of J & K, reported in (1997) 7 SCC 677
- (b) Chaitu Lal vs State of Uttarakhand, reported in AIR 2020 SC 219
- (c) State of Madhya Pradesh vs Mahendra alias Golu, reported in 2021 Cri.L.J. 4915

xix. Victim (PW-8) has deposed that incident took place on 30-06-2016. As usual they had food and watched T.V. She and Vishal slept on the cot. Her father was sleeping on the floor on mat. While she was asleep her father called her on the floor, at that time Vishal was sleeping on the floor. She did not go. Then her father went to the bathroom, he came back and slept with her.

He removed her clothes and also his clothes. She was wearing slacks, underwear and frock. He applied oil on her organ of urination and also on his organ of urination. Then he was trying to put his organ of urination in her organ of urination. She had severe pain in her private part. She was trying to raise shouts but her father gagged her mouth with his hand. He was trying hard to insert his organ in her private part. Therefore, she kicked him on which he slapped her on her cheek. Then he got up and went to the floor and slept there. She could not sleep for the whole night due to severe pain. On next day, she did not go to the school. She had not told the incident to anybody. She took one page from her note book and wrote a letter to her madam, narrating the incident. On 02-07-2016 she went to the school at 7.00 am and met Lohakare madam. She asked her as to why she had not come to the school on previous day. She did not say anything. After school was over, she gave letter to Lohakare madam. From there she went to home. Then Police came to her house and asked her about her father. Her father was brought by Police to Gram Panchayat. She was also taken to Gram Panchayat. Police then had a talk with her and from there they all went to Police Station.

Police made enquiry with her and recorded it in writing. Then she was taken to Government hospital at Wardha, where she was admitted for 2/3 days.

x. Dr. Manisha Nasare (PW-7) examined victim on 02-07-2016. On local examination she found no external injury over her body or on private part. Her hymen was found ruptured at 10 O’Clock, 6 O’Clock and 2 O’ Clock position. She issued medical certificate (Exhibit-46) with an opinion that possibility of sexual intercourse or assault cannot be ruled out, but she kept final opinion reserved till receipt of FSL report of the samples. In cross examination she has admitted that during medical examination she did not find active bleeding. The edges of hymen tear were smooth, which indicates old injury, she could not say that it was 1 or 2 months old. She has also admitted that such injuries are possible due to cycling.

xi. Dr. Nitinkumar Nimodia (PW-9) examined the appellant on 04-07-2016 and issued medical certificate (Exhibit-66). He found no injury/scar/stain on the body of the

accused. On local examination of peritoneum and genitals no injuries were noted.

xii. C.A. reports of the clothes of the victim and appellant are negative. No semen was detected on the pubic hair or vaginal swab of the victim. It is thus clear that the C.A. reports are of no help to the prosecution case to prove the charge of rape.

xiii. On careful scrutiny of evidence of the victim it is clear that she has categorically stated that appellant was trying to put his organ of urination in her organ of urination. He was trying hard to insert his organ in her private part, therefore she kicked him. From her evidence no penetration or insertion on the part of appellant is made out. To complete the offence of rape in terms of Section 375 of the IPC penetration to any extent into the private part, mouth, urethra or anus of a woman or insertion to any extent, any object or a part of body not being penis into the private part or urethra etc. of a woman is necessary. The same is not proved by prosecution in the present case.

However the act committed by the appellant clearly spells out an attempt on his part to commit rape on the victim. Appellant had made preparation by removing victims clothes and his clothes and then applying oil on his and her private organs and then tried to insert his private organ into her private part which clearly spells out an attempt on the part of appellant to commit rape on the victim.

xiv. It is useful to refer the observations of the Hon'ble Apex Court in **Aman Kumar** (supra), wherein it is held-

"11. In order to find an accused guilty of an attempt with intent to commit a rape, Court has to be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part. Indecent assaults are often magnified into attempts at rape. In order to come to a conclusion that the conduct of the accused was indicative of a determination to gratify his passion at all events, and in spite of all resistance, materials must exist. Surrounding circumstances many times throw beacon light on that aspect.

12. Though the prosecutrix's version in Court was of rape, when it is compared with the one given during investigation, certain irreconcilable discrepancies are noticed. The evidence regarding actual commission of rape is at variance from what was recorded by police during

evidence. The evidence of PW-11, the father who according to prosecution made departure from what he allegedly stated during investigation is to the effect that his wife PW-9 told her that the prosecutrix was teased by the accused persons. Merely because he was termed as a hostile witness his entire evidence does not get effected. Significantly, the evidence of prosecutrix and the doctor does not specifically refer to penetration which is sine qua non for the offence of rape."

xv. In **Koppula Vyankat Rao** (supra), the above ratio is reiterated as follows-

"8. The plea relating to applicability of Section 376 read with Section 511 of IPC needs careful consideration. In every crime, there is first, intention to commit, secondly preparation to commit it, 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.

9. *A culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence, if it fails due to reasons beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. The word "attempt" is not itself defined, and must, therefore, be taken in its ordinary meaning. This is exactly what the provisions of Section 511 require. An attempt to commit a crime is to be distinguished from an intention to commit it, and from preparation made for its commission. Mere intention to commit an offence, not followed by any act, cannot constitute an offence. The will is not to be taken for the deed unless there be some external act which shows that progress has been made in the direction of it, or towards maturing and effecting it. Intention is the direction of conduct towards the object chosen upon considering the motives which suggest the choice. Preparation consists in devising or arranging the means or measures necessary for the commission of the offence. It differs widely from attempt which is the direct movement towards the commission after preparations are made. Preparation to commit an offence is punishable only when the preparation is to commit offences under Section 122 (waging war against the Government of India) and Section 399 (preparation to commit dacoity). The*

dividing line between a mere preparation and an attempt is sometimes thin and has to be decided on the facts of each case. There is a greater degree of determination in attempt as compared with preparation.

10. *An attempt to commit an offence is an act, or a series of acts, which leads inevitably to the commission of the offence, unless something, which the doer of the act neither foresaw nor intended, happens to prevent this. An attempt may be described to be an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt consists in it the intent to commit a crime, falling short of, its actual commission or consummation/completion. It may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted. The illustrations given in Section 511 clearly show the legislative intention to make a difference between the cases of a mere preparation and an attempt.*

11. *In order to find an accused guilty of an attempt with intent to commit a rape. Court has to be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part. Indecent assaults are often magnified into attempts at rape. In order to come to a conclusion that the conduct of the accused was indicative of a determination to*

gratify his passion at all events, and in spite of all resistance, materials must exist. Surrounding circumstances many times throw beacon light on that aspect.

12. The sine qua non of the offence of rape is penetration, and not ejaculation. Ejaculation without penetration constitutes an attempt to commit rape and not actual rape. Definition of "rape" as contained in Section 375 IPC refers to "sexual intercourse" and the Explanation appended to the Section provides that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Intercourse means sexual connection. In the instant case that connection has not been established. Courts below were not correct in their view."

xvi. Applying the ratio of **Aman Kumar** (supra) and **Koppula Vyankat Rao** (supra) to the facts of the present case and considering the victim's evidence along with medical and forensic evidence in the proper perspective it is clear that prosecution has failed to establish commission of rape on the victim. However, there is sufficient evidence on record to prove that appellant attempted to commit rape on the victim.

xvii. Though the chit (Exhibit-55) written by the victim states that appellant committed rape on her, however, the evidence of victim clearly indicates that there was an attempt on the part of the appellant to commit rape on the victim.

xviii. In **Madanlal** (supra), Hon'ble Supreme Court was considering an appeal against acquittal. In the facts of that case the Hon'ble Supreme Court held that evidence of prosecutrix read in its entirety was rightly accepted by the High Court and there was sufficient corroboration to her evidence, hence the conviction recorded under Section 376 read with Section 511 of the IPC was upheld.

xix. In **State of Madhya Pradesh** (supra) Hon'ble Supreme Court discussed about the difference between attempt and preparation in rape.

xx. For the aforesaid reasons, following order is passed :-

Order

(a) Appeal is partly allowed.

- (b) Conviction of the appellant is altered from Section 376(2)(f) of the IPC to Section 376 (2)(f)/511 of the IPC and the appellant is sentenced to suffer rigorous imprisonment for 10 years.
- (c) Sentence of fine imposed by the trial Court is maintained.
- (d) Appellant is entitled for set off under Section 428 of the Code of Criminal Procedure.

Added as per Court's
Order dated 06-02-2025
Passed in APPA No.128/
2025

xxi. Learned Advocate for the appellant is appointed through Legal Aid. Her fees be paid as per schedule within four weeks from the date of uploading of the judgment.

(M.W. Chandwani, J.)

(Nitin B. Suryawanshi, J.)