

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 123 of 2010

Swapan Sen

-Vs-

The State of West Bengal

For the Appellant : Mr. Smartajit Sarkar

For the State : Ms. Faria Hossain
Mr. Anand Keshari

Judgment on : 06.05.2026

AnanyaBandyopadhyay, J.:-

1. This appeal is directed against an order of conviction and judgment dated 17.02.2010 and 18.02.2010 passed by the Learned Judge, Special Court (E.C. Act-cum Additional Sessions Judge), Hooghly in Sessions Trial No.16 of 2005 arising out of Sessions Case No.49 of 2005, thereby convicting the appellant under Sections 366, 342, 376 read with Section 511 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for 7 years and to pay a fine of Rs.5,000/- in default to suffer rigorous imprisonment for 6 months more for the offence under Section 366 of the Indian Penal Code and also suffer rigorous imprisonment for 1 year and to pay a fine of Rs.1,000/- in default to suffer rigorous imprisonment for 2 months more for the offence under Section 342 of the Indian Penal Code and also suffer

rigorous imprisonment for 7 years and to pay a fine of Rs.10,000/- in default to suffer rigorous imprisonment for 1 year more for the offence under Section 376 read with Section 511 of the Indian Penal Code and all the sentences were run concurrently.

2. The prosecution case precisely stated on 03.10.2003, the appellant dishonestly and deceitfully induced the victim girl to accompany him on the false pretext of attending Durga Puja, thereby taking her away without her consent from the lawful guardianship of her grandmother. Thereafter, the appellant wrongfully confined the victim in a rented house where he forcibly committed rape upon her against her will and consent. After returning home, the victim disclosed the entire incident to her grandmother, upon which the present complaint was promptly lodged, setting the criminal law into motion.
3. On the basis of a written complaint lodged by the complainant, Chinsurah Police Station Case No.117 of 2003 dated 05.10.2003 under Section 376 of the Indian Penal Code was initiated for investigation.
4. Upon conclusion of the investigation, the Investigating Agency submitted a charge-sheet being no.251 of 2003 dated 24.12.2003 against the appellant under Section 376 of the Indian Penal Code against the appellant to which he pleaded not guilty and claimed to be tried.
5. In order to prove its case the prosecution examined as many as 18 witnesses and exhibited certain documents while the defence adduced none.
6. The Learned Advocate representing the appellant submitted as follows:-
 - i. *"The incident took place on 03.10.2003 and the complaint giving rise to the instant case was lodged on 05.10.2003 no plausible explanation*

was forthcoming for the undue delay in lodging the complaint. It was not the case of PW-1 that thinking about the prestige of the victim girl she had not promptly lodged the complaint. It was the specific case that on the date itself she had informed the incident to the member of the Gram Panchayat. On the following morning she had narrated the incident to the members of the local club. It was on the next morning as per PW-1, she had taken the victim girl to Dr. Nandini Kar Mazumdar for treatment and as per her advice she lodged the complaint. It was not known as to why inspite of so many people coming to know about the aforesaid incident nobody lodged any complaint to the police on prior date.

- ii. So far as the story of treatment being provided to the victim girl by one Dr. Nandini Kar Mazumdar was concerned, look at the evidence of that doctor who had been examined as PW-6, who however was declared hostile. As per her evidence, she did not find any abnormality in the appearance of the victim girl who had been examined as PW-7.*
- iii. It was the specific case of the prosecution that the appellant was known to the victim girl. She used to call her as "Pishe Moshai". She went out with the appellant purportedly to visit idols in the neighboring area. The appellant however, took her to his residence and committed sexual assault on her. Neither at the stage of investigation nor after completion of investigation the Investigating Officer sought to invokes the provisions of Section 342 or for that matter Section 366 of the Indian Penal Code. It was the Learned Judge who had framed charges against the appellant of the aforesaid Sections and had also recorded an order of conviction*

and sentence against the appellant. The reasoning ascribed by the Learned Judge was de hors of common sense.

- iv. It was the specific case of the prosecution that the appellant had ravished the victim girl as a result of which she was profusely bleeding and for that reason only service of PW-1 was requisitioned by PW-9, the father of the victim girl. During the course of the trial however, medical evidence totally demolished the prosecution case of forceful co-habitation of the appellant with the victim girl. In such a situation, the Learned Judge came up with a third story which was neither the story of the prosecution nor the story of the defence that the appellant had made an attempt to ravish the victim girl but owing to various factors, failed in his attempt. The reasoning ascribed by the Learned Judge with due respect to the Learned Judge, was not tenable either in law or in facts. The impugned order of conviction and sentence had been recorded against the appellant was liable to be struck down on that score alone.*
- v. The overall assessment of the evidence by the Learned Judge was unworthy of any credit and acceptance by a man of reasonable prudence. Each part of the prosecution case was tainted with meagerness of evidence or absence of satisfactory evidence. But the Learned Judge in a very slipshod and casual manner discussed the evidence, wherein he left the material facts aside from his consideration and thus acted with serious illegality.*
- vi. The order of conviction as recorded against the appellant was based on evidence illegally admitted and/or non-consideration of material pieces*

of evidence brought out through cross examination. The Learned Judge acted in defiance of the sense of justice and the provisions of law by filling up the gap in the prosecution case and by introducing imaginary facts and conjectural circumstances.

vii. The order of conviction and sentence as recorded against the appellant was unsustainable in law inasmuch as it had not been proved beyond reasonable doubt on clinching and categorical evidence that the incident had occurred on the date, at the time and at the place under the circumstances as alleged by the prosecution.

viii. The judgment and order of conviction and sentence recorded against the appellant as also the sentence imposed on him are bad in law, liable to be set aside on grounds of patent violation of the mandatory procedure of law and denial of fair trial to the appellant.”

7. The Learned Advocate representing the State submitted as follows:-

i. “The prosecution had examined eighteen (18) witnesses, including the victim (PW-7), the grandmother and de facto complainant (PW-1), the father of the victim (PW-9), independent witnesses, medical experts, and the Investigating Officer. The evidence adduced by the prosecution is complete and mutually corroborative. The testimony of the victim (PW-7) was natural, cogent, consistent, and of sterling quality. Her deposition remains unshaken during cross-examination and inspires full confidence. The testimony of the victim was duly corroborated by PW-1 and PW-9 through prompt disclosure, supported by independent witnesses, medical evidence, and the investigation conducted in a fair

and lawful manner. The prosecution has thus proved its case beyond reasonable doubt.

- ii. It was a settled principle of law that conviction can be based solely on the testimony of the victim if it was found reliable and trustworthy. In the present case, the victim's statement stands corroborated by the surrounding circumstances and prompts disclosure.*
- iii. The defence contention regarding delay in lodged the F.I.R., had been sufficiently explained by the surrounding facts and circumstances of the case, and such delay was natural and understandable in offences of that nature. Further, any minor discrepancies or contradictions, if at all present, were trivial in nature and did not went to the root of the prosecution case. The core of the prosecution story remains intact and consistent.*
- iv. The medical evidence, though not decisive in cases of sexual offences against children, supports the prosecution case and was consistent with the allegations made. The absence of conclusive medical findings did not negate the occurrence when the testimony of the victim was otherwise reliable and trustworthy, and the medical evidence, read along with the oral evidence, did not detract from the prosecution case.*
- v. The non-examination of certain witnesses or the hostility of some witnesses did not weaken the prosecution case when the evidence of the victim and other material witnesses remains reliable and trustworthy. It was well settled that the prosecution case to be assessed on the basis of the quality of evidence and not on the number of*

witnesses examined, and the credible evidence on record was sufficient to sustain the case.

vi. The Learned Trial Court has carefully considered the oral and documentary evidence on record and, upon such consideration, has rightly held the appellant guilty. The findings arrived at by the Learned Trial Court are supported by the evidence on record and do not suffer from any perversity or illegality.

vii. The offence was grave and heinous in nature, involving a minor child. Considering the nature of the offence and the circumstances in which it was committed, no sufficient ground for leniency was made out. The sentence imposed was commensurate with the gravity of the offence and was just, proper, and proportionate, and did not call for interference.

viii. The appeal was devoid of merit and fails to disclose any sustainable or tenable ground in law or on facts. The judgment and order of the Learned Trial Court was supported by the materials on record. Therefore, the appeal was liable to be dismissed”.

8. The circumspection of evidence of the prosecution witnesses revealed as follows:-

- i. PW-9, the father emerges as the linchpin of the prosecution's ocular edifice, his deposition pulsating with the raw immediacy of paternal discovery. On the vibrant *Dashami* of idol immersion, he recounted returning home to a tableau of familial disquiet: his five-year-old daughter, fresh from the appellant's custody, huddled in visible

agitation, her tiny frame trembling as she poured forth a spontaneous outcry. With childlike candour, she narrated being taken to the appellant's rented house, stripped bare, and subjected to the appellant's lascivious violations – acts that left her private parts aflame with a burning sensation, a visceral complaint echoing the trauma's indelible imprint. Prompted by instinct, he parted her garments for inspection, beholding the stark crimson redness and tumid swelling engulfing the genital precincts, alongside a jagged bite mark etched upon her left chest like a predator's signature – marks alien to a child's ingenuity. He stood sentinel during the police seizure of her soiled apparel (later marked in proceedings), his unblemished cross-examination rendering this testimony an impregnable bastion, mutually fortified by PW-1 and medical corroborants (Exhibits 1, 4, 7/1).

- ii. PW-1, the grandmother paints the entrustment's fateful prelude, a momentary lapse amid festive revelry. She deposed that appellant Swapan Sen, cloaked in neighbourly familiarity, materialised at their threshold on Dashami, coaxing her vigilance with the beguiling promise of escorting the minor victim to behold the resplendent Durga idol. Thus entrusted, the child vanished into his sole dominion during the offence's shadowy interlude – a fact unchallenged, bridging seamlessly to the distressed homecoming chronicled by PW-9 and irrefutably tying the appellant's opportunity to the corpus delicti.

- iii. PW-1 the grandmother's testimony unfurls the complaint's genesis with exactitude, suffused by maternal anguish. On returning home the granddaughter accompanied by Raja Sen, son of the appellant at about 07:00 p.m., described the physical ravages – genital erythema, thoracic bite (echoing PW-9)—and imbibed the child's reiterated disclosure of the appellant's depravity. At a modest tea stall, she dictated the complaint (Exbt.-1) to PW-14 with verbatim fidelity, its contents a mirror to the unprompted outcry. This evidence, though initiatory, accrues weight through consonance with Exbt.-7/1 (victim's 164 statement) and the birth proof (Exbt.-4), repelling any whisper of afterthought.
- iv. PW-15 was the Gynaecologist at Chinsurah Sadar Hospital on 06.10.2003, this specialist's clinical gaze appraised the victim – a diminutive figure of 3½ feet and 20.02 kg, emblematic of infantile fragility. The hymen stood intact, unruptured, yet he pronounced with forensic nuance: "exclusion of rape could not be commented upon" on this datum alone, as assault's legal ambit transcends mere laceration. Cross-examination elicited a masterly explication – violence's clinical signatures vary; their evasion does not eclipse attempt under Section 376/511 of the Indian Penal Code. This pivotally tempers defence exuberance, harmonising with PW-9's observations. PW-15 further stated that *“attempt to sexual inter-course is also a rape but I did not find such type of symptom of the victim”*. This report was marked as Exbt.-5.

- v. PW-16 was the Medical Officer. His terse yet telling appraisal of the appellant disclosed uncompromised virility: “capable of performing intercourse”, with “sufficient stiffness” evinced—a physiological imprimatur that dismantles incapacity pleas, dovetailing with the entrustment (PW-1) and injuries (PW-9).
- vi. PW-11 the Sanitary Inspector tendered the Hooghly-Chinsurah Municipality's birth ledger (Exbt.-4), he etched the victim's nativity on 27.02.1998 into indelible ink—affirming her tender five years at the offence, a demographic predicate invoking provision of POCSO Act like severity under Indian Penal Code, unassailable amid the testimonial matrix.
- vii. PW-18 deposed as the Investigating Officer. With diary-like rigour, he chronicled the probe's alacrity: FIR ingress and egress on the selfsame day; peregrination to the locus in quo, yielding sketch map (Exbt.-8); seizures of the stained bed sheet (marked as Exbt.-2), appellant's motorcycle (marked as Exbt.-9), and laundered victim apparel (marked as Exbt.-3). Wearing apparel of the appellant marked as Exbt.-10. He further prayed for medical examination of the child victim. His cross-examination laid bare the forensic hiatus—apparel unsent to FSL post-wash – yet this investigative alacrity, unmarred by *mala fides*, sustains the oral fortress against forensic penury. He further deposed “*witness - Kalpana Paul when examined stated to him that the member of the club told him that his tenant Swapan Sen took Mauparna to his house and committed rape her and he told me that he*

knew Mauparna or that he told me on the very date of incident he found Swaparn took Mauparna his house on his moter cycle or that that she told me that Mauparna came several times at his house prior to the incident or that he told me that his wife, two sons and Swaparn to his in-laws' house to attend Durga puja festival.

I examined Dr. Nandini Ker Mazumder, lady gynecologist, who stated to me that her maid servant Puspa came to her along with her granddaughter Mauparna aged 5 years for medical examination. This witness told that Rinku on the previous day in the afternoon went to the father of Raja, viz. Swaparn whom she called Pisemasai and he took her to show "thakur" and he took her to his house and put his penis into her vagina and this witness also told to me that Rinku felt burning sensation in her vagina and this witness also stated to me that Rinku came to her and Rinku did not feel any pain or burning sensation and she did not examine her. This witness also told me that advised Puspa Sarker to go to P.S. and Govt. Hospital and at that time Rinku was aged 5/6 years.

I also examined Ashoke Kumar das who told me that he was the Secretary of Naldanga Sports & Cultural Association or that Puspa told him that Swaparn took her granddaughter to his house and committed rape on her in absence of his wife and two sons or that this witness told me that on the it he himself and other club members went to the house Anup Gonguly, Member of their Anchel Pancheyet, and narrated all the incident to him.

I examined Purnima Das who also told me that on 03-10-2003 at 8-30 he heard a cry from the house of Ratan Sarkar and went to see and found Raton, his mother and his daughter were crying or that she also told me that on 03-10-2003 the daughter of Ratan went to the house of Swapan along with her mother Puspa in order to take Prosad and on that day at about 3-30 p.m., accused Swapan took the daughter of Ratan to see “thakur” but Swapan took the daughter inside his rented house and raped her or that she knows Swapan”.

viii. PW-17 was the Judicial Magistrate. Under Section 164 of the Code of Criminal Procedure aegis, he transcribed the victim's tremulous statement (Exbt.-7/1), vouchsafing procedural sanctity per superior fiat. Cross examination probed the omission of “testing questions” on mentation or tutoring a judicial reticence noted, but its echo in PW-9/PW-1 disclosures preserves intrinsic credibility.

ix. PW-14 testified as the Scribe. At the humble tea stall, he inscribed Exbt.-1 from PW-1’s lips, a mechanical scribe unaltered by artifice its phrasing a pristine vessel for the primal complaint, shielding against fabrication calumnies.

9. In the case of **STATE OF MADHYA PRADESH V. MAHENDRA @ GOLU**¹ the Hon’ble Supreme Court made the following observations :-

“14. *However, if the attributes are unambiguously beyond the stage of preparation, then the misdemeanours shall qualify to be termed as an “attempt” to commit the principal offence and such “attempt” in itself is a punishable offence in view of Section 511IPC. The “preparation” or*

¹ (2022) 12 SCC 442

“attempt” to commit the offence will be predominantly determined on evaluation of the act and conduct of an accused; and as to whether or not the incident tantamounts to transgressing the thin space between “preparation” and “attempt”. If no overt act is attributed to the accused to commit the offence and only elementary exercise was undertaken and if such preparatory acts cause a strong inference of the likelihood of commission of the actual offence, the accused will be guilty of preparation to commit the crime, which may or may not be punishable, depending upon the intent and import of the penal laws.

15. *Section 511IPC is a general provision dealing with attempts to commit offences which are not made punishable by other specific sections of the Code and it provides, inter alia, that,*

“511. Punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment.—*Whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both.”*

(emphasis supplied)

16. *It is extremely relevant at this stage to brush up the elementary components of the offence of “rape” under Section 375IPC, as was in force at the time when the occurrence took place in the instant case. The definition of “rape”, before the 2013 Amendment, used to provide that:*

“375. Rape.—A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.— * * *

Fourthly.— * * *

Fifthly.— * * *

Sixthly.—With or without her consent, when she is under sixteen years of age.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.—Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.”

(emphasis supplied)

....

18. Even prior thereto, this Court in *Madan Lal v. State of J&K* [*Madan Lal v. State of J&K*, (1997) 7 SCC 677 : 1997 SCC (Cri) 1151] opined that the degree of the act of an accused is notably decisive to differentiate between “preparation” and “attempt” to commit rape. It was held thus : (SCC p. 689, para 12)

“12. The difference between preparation and an attempt to commit an offence consists chiefly in the greater degree of determination and what is necessary to prove for an offence of an attempt to commit rape has been committed is that the accused has gone beyond the stage of preparation. If an accused strips a girl naked and then

making her lie flat on the ground undresses himself and then forcibly rubs his erected penis on the private parts of the girl but fails to penetrate the same into the vagina and on such rubbing ejaculates himself then it is difficult for us to hold that it was a case of merely assault under Section 354IPC and not an attempt to commit rape under Section 376 read with Section 511IPC. In the facts and circumstances of the present case the offence of an attempt to commit rape by the accused has been clearly established and the High Court rightly convicted him under Section 376 read with Section 511 IPC.”

....

20. *In light of the statutory provisions as construed by this Court from time to time in the cited decisions, let us examine whether the respondent attempted to commit rape of the prosecutrices or there was only preparation on his behalf?*

21. *We may at the outset explain that what constitutes an “attempt” is a mixed question of law and facts. “Attempt” is the direct movement towards the commission after the preparations are over. It is essential to prove that the attempt was with an intent to commit the offence. An attempt is possible even when the accused is unsuccessful in committing the principal offence. Similarly, if the attempt to commit a crime is accomplished, then the crime stands committed for all intents and purposes.*

22. *There is overwhelming evidence on record to prove the respondent's deliberate overt steps to take the minor girls inside his house; closing the door(s); undressing the victims and rubbing his genitals on those of the prosecutrices. As the victims started crying, the respondent could not succeed in his penultimate act and there was a sheer providential escape from actual penetration. Had the respondent succeeded in penetration, even partially, his act would have fallen within*

the contours of “rape” as it stood conservatively defined under Section 375 IPC at that time.

....

25. In our considered opinion, the act of the respondent of luring the minor girls, taking them inside the room, closing the doors and taking the victims to a room with the motive of carnal knowledge, was the end of “preparation” to commit the offence. His following action of stripping the prosecutrices and himself, and rubbing his genitals against those of the victims was indeed an endeavour to commit sexual intercourse. These acts of the respondent were deliberately done with manifest intention to commit the offence aimed and were reasonably proximate to the consummation of the offence. Since the acts of the respondent exceeded the stage beyond preparation and preceded the actual penetration, the trial court rightly held him guilty of attempting to commit rape as punishable within the ambit and scope of Section 511 read with Section 375IPC as it stood in force at the time of occurrence.”

10. The Hon’ble High Court at Calcutta, in the case of **RABI SAHA vs. STATE OF WEST BENGAL**², has made the following observations: -

“**16.** Section 511 states as follows:

“511. Punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment - Whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of the offence, or with both”.

17. In *State of Madhya Pradesh v. Mahendra @ Golu*¹ the Hon'ble Supreme Court inter alia, observed as follows:

“It is a settled preposition of Criminal Jurisprudence that in every crime, there is first, Mens Rea (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 still punishes the person for attempting the said act. ‘Attempt’ is punishable because even an unsuccessful commission of offence is preceded by mens rea, moral guilt, and its depraving impact on the societal values is no less than the actual commission.

18. There is a visible distinction between ‘preparation’ and ‘attempt’ to commit an offence produced in a case. The stage of ‘preparation’ consists of deliberation devising or arranging the means or measures which would be necessary for the commission of the offence Whereas an ‘attempt’ to commit the offence, starts immediately after the completion of preparation. ‘Attempt’ is the execution of mens rea after preparation. ‘Attempt’ starts where ‘preparation’ comes to an end, though it falls short of actual commission of the crime.

13. However, if the attributes are unambiguously beyond the stage of preparation then the misdemeanours shall qualify to be termed as an ‘attempt’ to commit the principal offence and such attempt in itself is a punishable offence in view of Section 511 IPC. The preparation or attempt to commit the offence will be predominantly determined on evaluation of the act and conduct of an accused, and as to whether or not the incident tantamount to transgressing the space between preparation and attempt. If no overt act is attributed to the accused to commit the offence and only elementary exercise was undertaken and if such preparatory acts cause a strong guilt of preparation to commit the crime, which may or may not be punishable, depending upon the intent and import of the penal laws”.

11. The Hon'ble High Court at Punjab & Haryana, in the case of **SURESH VS.**

STATE OF HARYANA³, has made the following observations: -

³ 2007 SCC OnLine P&H 358

“...

16. *The word “attempt” in Section 511 has been used in a very large sense. A person commits the offence of attempt to commit a particular offence when (i) he intends to commit that particular offence, (ii) he having made preparation and with the intention to commit the offence does an act towards its commission.*

17. *In order to find out 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 and only desire 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 assault are often magnified into attempts at rape. In order to come to a conclusion that the conduct of the accused was indicative of the determination to gratify his passion at all events and in spite of all resistance, materials must exist. As already discussed above, 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. When the evidence of the prosecutrix is considered in the proper perspective, it is clear that the commission of actual rape has not established. However, the evidence is sufficient to prove that attempt to commit rape was made.*

18. *In Madan Lal v. State of Jammu and Kashmir, 1997 (4) RCR (Crl.) 89 (SC) : 1998 Crl. L.J. 667 (Supreme Court) it was held as under:—*

“The difference between preparation and an attempt to commit an offence consist chiefly in the greater degree of determination and what is necessary to prove an offence for an offence of an attempt to commit rape has been committed is that the accused has gone beyond the stage of preparation. If an accused strips a girl naked and then making her flat on the ground undressed himself and then forcibly rubbed his erected penis on the private part of the girl but fails to penetrate the same into vagina and on such rubbing ejaculates himself, then it cannot be said that it was a case of merely assault under Section 354, IPC and not an attempt to commit under Section 376 read with 511, I.P.C.

19. *In the case of Abhaynand Mishra v. State of Bihar, AIR 1961 SC 1698, the Hon'ble Supreme Court has held as under:—*

“There is a thin line between the preparation for and an attempt to commit an offence. Undoubtedly, 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, therefore, 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 one 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 Supreme Court has further held about the construction of Section 511, IPC as under:—

“A person commits the offence of ‘attempt to commit a particular offence’ when (i) he intends to commit that particular offence; and (ii) he, having made preparation and with the intention to commit the offence, does an act towards its commission; such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence.”

12. In the case of **DEEPAK KUMAR SAHU vs. STATE OF CHHATTISGARH**⁴ the Hon’ble Supreme Court made the following observations :-

“5.4.1 *An attentive look at the evidence of the prosecutrix (PW-2) would reveal that her testimony in narrating the incident and to describe what happened with her, is natural. Even when read independently, excepting the oral testimonies of others highlighted above, it inspires confidence and veracity for its clarity and consistency. The contention that non-availability of emphatic medical evidence about occurrence of physical intercourse and absence of external injury marks make it imperative to doubt and disregard the evidence of the prosecutrix, could hardly be countenanced.*

5.5 *In cases of offences committed under Section 376, IPC, when the story of the victim girl as told in the evidence is found credit-worthy, the apparent insufficiency of medical evidence pitted against acceptable testimony of the victim, the latter would prevail. In **State of Punjab vs. Gurmit Singh [(1996) 2 SCC 384]** it was observed:*

⁴ 2025 INSC 929

In the absence of injury on the private part of the prosecutrix, it cannot be concluded that the incident had not taken place or the sexual intercourse was committed with the consent of the prosecutrix. The prosecutrix being a small child of about nine years of age, there could be no question of her giving consent to sexual intercourse. The absence of injuries on the private part of the prosecutrix can be of no consequence in the facts and circumstances of the present case.

(Para 16)

5.5.1 *In State of Himachal Pradesh vs. Manga Singh, [(2019) 16 SCC 759], which was also a case in relation to the offence committed under Section 376, IPC where the prosecutrix was minor girl aged 9 years, she was staying in her aunt's house pursuing her studies. When the offence of rape was committed against her, she narrated the story to her teacher. The High Court gave the benefit of doubt to the accused on the ground, inter alia, that the medical evidence of the doctor was not conclusive to hold that the prosecutrix was subjected to sexual intercourse.*

5.5.2 *This Court observed that if the evidence of the victim does not suffer from any basic infirmities and the factor of probability does not render it unworthy evidence, the conviction could base solely on the evidence of the prosecutrix. It was further observed that as a general rule there is no reason to insist on the corroboration except in certain cases, it was stated.*

5.5.3 *The medical evidence may not be available in which circumstance, solitary testimony of the prosecutrix could be sufficient to base the conviction.*

“The conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence. The conviction can be based solely on the solitary evidence of the prosecutrix and no corroboration be required unless there are compelling reasons which necessitate the courts to insist for corroboration of her statement. Corroboration of the testimony of the prosecutrix is not a requirement

of law; but a guidance of prudence under the given facts and circumstances. Minor contractions or small discrepancies should not be a ground for throwing the evidence of the prosecutrix.”

(Para 11)

5.5.4 *It may be true that in the present case the evidence of the medical officer (PW-17) spoke about absence of external injury marks on the genitals of the victim. However, the proposition that the corroboration from the medical evidence is not sine qua non when the cogent evidence of the victim is available, was reiterated in a recent judgement of this Court in **Lok Mal alias Loku vs. State of Uttar Pradesh, [(2025) 4 SCC 470]**, observed:*

“Merely because in the medical evidence, there are no major injury marks, this merely cannot be a reason to discard the otherwise reliable evidence of the prosecutrix. It is not necessary that in each and every case where rape is alleged there has to be an injury to the private parts of the victim and it depends on the facts and circumstances of a particular case. We reiterate that absence of injuries on the private parts of the victim is not always fatal to the case of the prosecution.”

(Para 4)

5.5.5 *Akin to the facts of the present case, it was stated in **Lok Mal (supra)**, according to the version of the prosecutrix, that the accused overpowered her and pushed her to bed in spite of her resistance and gagged her mouth using a piece of cloth. Thus, considering this very aspect, it is possible that there were no major injury marks. The appellant made an attempt to raise the defence of false implication, however, he was unable to support his defence by any cogent evidence.*

5.5.6 *The credible and reliable evidence of prosecutrix could not be jettisoned for want of corroboration including the corroboration by medical report or evidence. The Court observed in **Manga Singh (supra)** that “in absence of injury on the private part of the prosecutrix, it cannot be*

concluded that the incident had not taken place or the sexual intercourse was committed with the consent of the prosecutrix". It was stated that it is well settled that in the cases of rape it is not always necessary that external injury is to be found on the body of the victim.

....

5.6.2 *In **Gurmit Singh (supra)** it was observed to reiterate that in all cases, the corroboration to the statements made by the victim in her evidence could not be insisted upon as a rule of thumb:*

In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook.

(Para 8)

5.6.3 *It was asserted that only compelling reasons would justify rejection of testimony of a rape victim, and not otherwise:*

"...the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury....."

(Para 8)

5.6.4 *From a recent decision in **Raju alias Umakant vs. State of Madhya Pradesh, (2025 SCC OnLine SC 997)**, following observations could be noticed:*

".....a woman or a girl subjected to sexual assault is not an accomplice but a victim of another person's lust and it will be improper and undesirable to test her evidence with suspicion. All that the law mandates is that the Court should be alive to and

conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of charge levelled by her and if after keeping that aspect in mind if the Court is thereafter satisfied that the evidence is trustworthy, there is nothing that can stop the Court from acting on the sole testimony of the prosecutrix. [See State of Rajasthan v. N.K. the Accused, (2000) 5 SCC 30, Rameshwar v. State of Rajasthan, 1951 SCC 1213, State of Maharashtra v. Chandraprakash Kewal Chand Jain, (1990) 1 SCC 550, State of Punjab v. Gurmit Singh, (1996) 2 SCC 384]”

(Para 18)

5.6.5 *As early as in State of Maharashtra vs. Chandraprakash Kewalchand Jain, [(1990) 1 SCC 550], this court observed that the prosecutrix of a sex offence cannot be put on a par with the accomplice, it was further observed that she is a victim of crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. It was further observed that evidence of a rape victim must receive the same weight as is attached to an injured in cases of physical violence. It was stated that there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 of the Evidence Act which may require it to look for corroboration.”*

13. The testimony of the victim had been the bedrock of the prosecution’s case rests upon the testimony of the victim, a child of tender years. Her deposition, marked by a harrowing simplicity, narrates a profound breach of patriarchal and societal trust. She deposed that on the day of the festival—a time when the collective consciousness is steeped in devotion—the appellant, a man known to her as *Pisamosai*, exploited her innocence.
14. Under the deceptive lure of witnessing the Durga idol, she was transported to a secluded, rented chamber. Her testimony describes the mechanical

coldness of the assault: the bolting of doors, the forceful undressing, and the physical trauma she endured. Most chilling is her account of the post-incident behavior of the appellant, who attempted to pacify her with “cartoons” on the television—a calculated effort to mask a heinous act with a veneer of normalcy. Despite the rigors of cross-examination regarding her cognitive understanding of “genitals,” her core narrative regarding the pain and the identity of her assailant remained unshaken.

15. PW-1, the grandmother, serves as the vital link between the incident and the machinery of justice. Her deposition illuminates the timeline of the disappearance and the subsequent disclosure. She corroborated that the victim was taken away on the appellant’s motorcycle without maternal or grandmotherly consent. Her testimony is crucial in establishing the res gestae—the immediate reaction to the trauma. Upon the child’s return via the appellant’s son, Raja Sen, the grandmother noticed the child’s distress and “burning sensation”. Her promptness in seeking medical counsel from Dr. Nandini Kar Majumder the very next morning underscores the credibility of the family’s response.

16. The deposition of PW-9 provides the necessary physical corroboration. Though physically incapacitated at the time due to a leg fracture, his testimony captures the immediate sensory evidence of the crime. He deposed to seeing the “swelling, redness, and the distinct bite mark” on the left chest of his daughter—a physical signature of the appellant’s violence. His testimony further establishes the appellant’s conduct; specifically, the appellant’s flight from the locality when the community sought an

explanation, which, under Section 8 of the Evidence Act, serves as a relevant fact pointing toward a guilty mind.

17. The procedural integrity of the investigation is supported by the depositions of the independent witnesses:
18. PW-4 (Panchayat Member His presence during the search of the appellant's rented room at Kalpana Pal's residence lends official weight to the recovery of the bed sheet (Exbt.-2/1). His testimony confirms that the police followed the mandates of the Code of Criminal Procedure in the presence of a local authority.
19. PW-3's testimony, while partially hearsay regarding the boys' discussion in the colony, confirms the appellant's status as a tenant and the immediate social outcry that followed the revelation of the crime.
20. PW-2, 6, 8, & 10 were the several witnesses were declared hostile. However, in the settled jurisprudence of this Court, the testimony of a hostile witness is not to be discarded in its entirety. The court must sift the grain from the chaff. The hostility of these witnesses, often a byproduct of local influence or a desire to avoid institutional friction, does not dilute the crystalline and corroborated testimony of the victim and the independent witnesses.
21. The defence's attempt to highlight the victim's lack of anatomical knowledge or the minor delays in lodging the complaint fails to withstand judicial scrutiny. In cases of such nature involving a five-year-old child, the law does not demand the precision of a surgeon, but the consistency of a survivor. The minor discrepancies in the layout of the room (the number of windows) are but "peripheral shadows" that do not obscure the "central light" of the

prosecution's case: that a child was lured, violated, and silenced by a person in a position of trust.

22. The condemnable act of the appellant is to be defined as a profound breach of trust. The incident occurs during a community celebration and the appellant not being a stranger but a relative of the neighbour (the sister's husband). Moreover an aged person estimated to be elder to the father of the victim created a sense of predatory opportunism, taking advantage of a crowded festival and the child's innocence to lure her under the guise of harmless activity.
23. A person of the age of the appellant is expected to protect the child, bestow care and love like his own child, attempts to ravish her. An act which itself destroys the physical and moral conscience of the child pernicious to rob her innocence and rights to all pervasive development. A chilling sequence of forced abduction, a violent assault and a bizarre attempt by the appellant to 'pacify' or distract her and showing her 'cartoons' on T.V. Her subjective account highlights her confusion and physical pain, noting her lack of understanding of the physicality and the brazen act at such a tender age of playfulness and childishness. Men in society of paternal age and instinct are expected to nurture a child in an ambience of safety and security but it is cruel and criminal to devastate the child through violation of her body and soul.
24. The process devised by the appellant itself is indicative of the ulterior motive to commit the offence of rape in the backdrop of contemporaneous circumstances and his criminal intent. The appellant in the disguise of being

entrusted to visit places of the Durga idols being installed, deliberately diverted the child to his rented premise itself established the probity of '*mens rea*'.

25. The evidence of the child is unsullied and credible without an iota of fabrication, instigation or false implication in absence of grudge or being tutored in any manner. The 'hymen' might be intact, but the heinous nature of the attempt to succeed in commission of rape itself criminalises such attempt through corroborative oral and medical evidence.
26. However, the elements to constitute the offences under Sections 366 and 342 of the Indian Penal Code could not be established. The child was escorted home by the son of the appellant invalidating the possibility to commit the offence under Section 366 of the Indian Penal Code as well as Section 342 of the Indian Penal Code.
27. The conviction under Section 376/511 is confirmed. The conviction under Sections 366 and 342 of the Indian Penal Code is set aside. In view of the above discussions, the instant criminal appeal being CRA 123 of 2010 is dismissed.
28. There is no order as to costs.
29. Trial Court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
30. Photostat certified copy of this judgment, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)