

**IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA**

**Criminal Appeal No. 347 of 2006**

**Reserved on : 24<sup>th</sup> July, 2007**

**Date of decision : 31.7.2007**

---

**Saurabh Kumar** **...Appellant.**

**Versus**

**State of H.P.** **...Respondent.**

---

***Coram***

**The Hon'ble Mr. Justice Surjit Singh, Judge.**

**Whether approved for reporting?<sup>1</sup>**

**For the Appellant : Mr. Anup Chitkara, Advocate.**

**For the respondent : Mr. Som Dutt Vasudeva, Additional Advocate General.**

---

**Surjit Singh, Judge**

Appellant is aggrieved by the judgment of the trial Court, whereby he has been convicted of offences punishable under Section 376 read with Section 511, Section 377 read with Section 511 and Section 506 of the Indian Penal Code and sentenced as follows:

<b><u>Offence</u></b>	<b><u>Sentence &amp; fine</u></b>
376/511, IPC	Three years rigorous imprisonment & a fine of Rs.5000/-; in default of payment of fine rigorous imprisonment for a further period of six months;
377/511, IPC	Three years rigorous imprisonment & a fine of Rs.5,000; in default of payment of fine rigorous imprisonment for a further period of six months;

---

**Whether reporters of the local papers may be allowed to see the judgment?**

506, IPC                      Simple imprisonment for six months & a fine of Rs.1000/-; in default of payment of fine simple imprisonment for a further period of three months.

2.                      Appellant was sent up for trial for the aforesaid offences on the following allegations. On 13.1.2006, the prosecutrix, who at that time was aged about 19 years, was all alone at her parents' place. Around 12.30 p.m. the appellant went there and enquired from the prosecutrix as to where other members of her family had gone. On being told that the mother and the younger sister of the prosecutrix had gone to Hamirpur and the elder brother had gone to a nearby village for hair dressing, the appellant lifted the prosecutrix, who was sitting in a chair, and carried her to her parents' cow-shed situated close-by and there he first attempted to commit rape on her but when the prosecutrix resisted his attempt, he forcibly turned her side and mounted on her back and attempted to commit sodomy. The prosecutrix continued to struggle as a result of which the appellant could not succeed even in the attempt to penetrate his male organ in the anal canal of the prosecutrix. The appellant then told the prosecutrix that he was interested in marrying her and left the scene threatening her that in case the incident was narrated to anybody, the consequences would be serious. The prosecutrix had been crying and weeping, when one of her neighbours, namely Veena Devi (PW-7), noticed her. She enquired from the prosecutrix as to what had happened. She was told by the prosecutrix that the appellant had attempted to dishonour her. Soon Sandeep Kumar (PW-2), brother of the prosecutrix, reached. He also saw the prosecutrix crying. He was told by the prosecutrix that the appellant had attempted to rape and sodomize her. He then started for the Police Station, in the company of the prosecutrix. On the way their

mother PW-3 Gyatri Devi met them. Sandeep Kumar then returned to the village to lock the house and Gyatri Devi accompanied the prosecutrix to the Police Station. After locking the house Sandeep Kumar (PW-3) also reached the Police Station. The prosecutrix lodged the report with the police.

3. Prosecutrix was got medically examined. PW-4 Dr. Madhu Kaushal, Medical Officer, Regional Hospital, Hamirpur, who conducted the medico legal examination, made the following observations

- “1. There was swelling with mild tenderness over her left elbow joint posterior lateral side. Movements were normal.
2. There was a hairline longitudinal abrasion about .75 c.m. over the left dorsum of hand near wrist joint which was pinkish-red in colour and clotted blood was present.
3. There was abrasion about 1 cm x ½ cm present over the coccygeal region mid line which was red in colour and clotted blood was present over it. It was tender to touch.
4. There was oval shaped abrasion 1 c.m. x .75 c.m. over the fourchette red in colour and tender to touch.
5. There was tenderness and redness over the perivaginitis. Hymen was intact, but tender to touch.
6. There was redness over perianal region with tenderness.
7. Anal sphincter was normal in shape and tone. P/R-NAD.”

**4.** Appellant was arrested the same day. He too was got medically examined and the doctor (PW-5 Dr. B.R. Thakur) noticed the following injuries on his person:

“Multiple abrasions 5-6 Nos. on right dorsum of right hand, wrist, forearm and 10-11 Nos. of abrasion mark on left palm dorsum, wrist forearm region. No stain of any form was present on cloth or body part at the time of examination. External genitala was well developed. Pubic hair were well developed. No stain or any form of injury was present in external genital or medial side of thigh. No loose pubic hair was noticed at the time of examination.”

**5.** Prosecution examined, during the course of the trial, a number of witnesses, including the prosecutrix, who appeared as PW-1, brother of the prosecutrix Sandeep Kumar (PW-2), mother of the prosecutrix Gyatri Devi (PW-3), Dr. Madhu Kaushal (PW-4), who conducted medico legal examination of the prosecutrix, Dr. B.R. Thakur (PW-5), who conducted medico legal examination of the appellant and a couple of other witnesses in whose presence the appellant allegedly produced a *Darat* and towel (which he was carrying with him at the time of occurrence) and his pant, to the Investigating Officer.

**6.** Trial Court on appraisal of the evidence concluded that the charge against the appellant stood established and consequently it convicted and sentenced him, as aforesaid.

**7.** Learned counsel representing the appellant argued that the evidence on record clearly shows that the appellant and the prosecutrix had attraction for each other and they wanted to develop the attraction into friendship and, therefore, on the fateful day, when the mother and other members of the family of the prosecutrix were not at

home and opportunity was available, the prosecutrix invited the appellant and they went to the cattle-shed, which is a lonely place, to talk to each other, but when the brother of the prosecutrix reached, all of a sudden, and noticed them sitting together, he gave them beating and forced the prosecutrix to lodge the report of attempted rape and attempted sodomy against the appellant. In the alternative, he urged that this was just a case of assault to outrage the modesty of the prosecutrix and not the attempted rape or sodomy.

**8.** To support his argument, the learned counsel made a number of submissions. First, it was urged that even though the prosecutrix and her brother had stated that they were not on talking terms with the appellant or his family members, yet their own evidence suggested that in fact they used to talk to each other. He drew the attention of the Court to that part of the testimony of the prosecutrix in which she said that the appellant came to her house and enquired as to where her mother had gone. He also referred to the testimony of PW-2 Sandeep Kumar, who stated that when he was returning from barber's shop around 1 p.m., appellant met him on the way and told that the prosecutrix had fallen and was crying. Also he made reference to the statement of PW-3 Gyatri Devi, who stated that when she was going to Hamirpur, the appellant enquired as to where she was going and what for and she told him that she was going to Hamirpur to buy some medicines. He also referred to the statement of PW-6 Onkar Chand, who stated that prior to the occurrence the members of the family of the appellant and the members of the family of the prosecutrix were on visiting terms with each other.

**9.** In fact what the prosecutrix (PW-1), her brother Sandeep Kumar (PW-2) and her mother Gyatri Devi (PW-3) have stated is that

they are not on visiting terms with the family of the appellant, but they do talk when they come across each other. In any case, from mere fact that the members of the two families talk to each other or even if they were on visiting terms with each other an inference cannot be drawn that the prosecutrix had any attraction for the appellant and she invited him to her house, when her mother and other members of the family were not there. No doubt, a suggestion was thrown to the prosecutrix that she had called the appellant by gestures, but she denied the same. No evidence has come on record that the prosecutrix had called the appellant. Even the appellant in his statement, under Section 313 of the Code of Criminal Procedure, did not say so.

**10.** It was further submitted that the prosecutrix's telling the appellant that her mother had gone to Hamirpur, as per her own testimony as PW-1, itself suggested that she had invited the appellant. The contention merits outright rejection, because the prosecutrix has stated that it was on enquiry by the appellant that she told him that her mother had gone to Hamirpur. The prosecutrix has stated that she was reading a book, which was part of her syllabus for twelfth class, when the appellant came there. There should be no reason to disbelieve her testimony, particularly (as already noticed above) when it is not the plea of the appellant that he went to the house of the prosecutrix on being called by her. In his statement under Section 313 of the Code of Criminal Procedure he even denies having gone to house of the prosecutrix.

**11.** Next, it was submitted that the prosecutrix had ample opportunity to raise alarm, but she did not do so and this fact suggests

that the appellant was there at her place or the cattle-shed with her consent.

**12.** It is true that the prosecutrix has not stated that she raised any alarm when the appellant first tried to penetrate her vagina and then anal canal, but at the same time she has stated that she had put up resistance as a result of which the appellant could not succeed in committing the intended acts. Her testimony that she had put up resistance is corroborated by the testimony of PW-4 Dr. Madhu Kaushal, who noticed three injuries on her person as also the testimony of PW-5 Dr. B.R. Thakur, who noticed some abrasions on the person of the appellant and testified that the same could have been sustained in the course of resistance put up by a girl sought to be raped/sodomized.

**13.** Different persons react differently to the same or similar situation. Some would raise alarm, some would get so shocked or scared that they would find it difficult not only to raise alarm but even to put up resistance. Some would put up resistance with confidence and may or may not raise alarm while resisting the attempted criminal act.

**14.** Learned counsel then pointed some contradictions in the testimony of the prosecutrix, which according to him, made her testimony unworthy of credence. It was pointed out that at one point she stated that the appellant first gagged her mouth with a towel and then took her to the cow-shed but at another stage she stated that first the appellant lifted her physically and then gagged her mouth with one hand when she tried to raise alarm. The contradiction is too minor to be taken note of particularly when the testimony of the prosecutrix is corroborated by medico legal evidence in the form of testimony of PW-4 Dr. Madhu Kaushal and medico legal certificate Ex. PW-4/A issued by her.

**15.** Learned counsel then argued that the injuries found on the person of the prosecutrix, as also on the person of the appellant, had not been explained by the prosecution and that as a matter of fact these injuries were sustained by the prosecutrix and the appellant when they were beaten up by PW-2 Sandeep Kumar, who happened to reach home, much before the time he was expected to return and saw the prosecutrix and the appellant together in the cattle-shed.

**16.** The injuries, which were noticed on the person of the prosecutrix, are in the nature of three abrasions, which she appears to have sustained while resisting the attempted rape and sodomy at the hands of the appellant. The prosecutrix has stated that she was laid on the ground by the appellant and attempted to be raped but she put up resistance and then the appellant succeeding in turning her upside down and tried to sodomize her and this attempt was also resisted by her. PW-4 Dr. Madhu Kaushal categorically stated that the injuries No.1 and 2 could have been sustained when the prosecutrix struggled to free herself and injury No.3 could have been sustained when pinned down on the floor.

**17.** As regards the injuries on the person of the appellant, Dr. B.R. Thakur (PW-5) has specifically stated that these injuries could have been sustained at the hands of a woman putting up resistance against attempted rape or sodomy. Not only this, the witness very categorically stated that the injuries found on the person of the appellant were not the result of any beating.

**18.** In any case, the appellant has nowhere stated in his statement under Section 313 of the Code of Criminal Procedure that he was beaten up by PW-2 Sandeep Kumar and the injuries found on his person were the result of such beating.



**19.** Yet another submission that was made on behalf of the appellant was that the absence of any stains of cow-dung or other waste of cattle on the clothes of the prosecutrix indicated that her story was incorrect. This contention is also without merit. The entire floor of a cattle-shed is not supposed to be soiled with cow-dung or waste of cattle. Some portions particularly those which are reserved for stacking fodder always remain clear & dry and may be that the prosecutrix was forcibly laid at such portion and that is why no stains of cow-dung or waste were there on her clothes. Otherwise also, the contention cannot be given too much weightage for the reason that the testimony of the prosecutrix is corroborated by the medico legal evidence.

**20.** Next it was urged that no semen had been found on the clothes and the vaginal slides, anal swab, vaginal swab and the pubic hair or the prosecutrix by the forensic science expert, per his report Ex. PW-13/D. The case of the prosecution is that initially the appellant attempted to commit rape and then attempted to commit sodomy but the prosecutrix foiled his attempts by putting up resistance and struggling to rescue herself. She has nowhere stated that the appellant succeeded in ejaculating either on her vagina or the anus. If it is so, the question of presence of stains of semen on the clothes or the vaginal/anal swab or the pubic hair of the prosecutrix does not arise.

**21.** It was also submitted that during the course of trial towel Ex. P-2 was identified by the prosecutrix to be the same which the appellant was carrying and with which he gagged her mouth and this showed that she knew the appellant intimately. The submission has been noticed only to be rejected. Normally, every victim of an offence is in a position to identify the weapon of offence or other objects used by the perpetrator in the commission of the crime.

**22.** In view of the above stated position, the main argument of the learned counsel for the appellant is rejected.

**23.** Coming to the alternative submission, the testimony of the prosecutrix and the testimony of PW-4 Dr. Madhu Kaushal clearly show that the appellant attempted to penetrate the vagina as also the anal canal to gratify his lust. Redness, tenderness etc. were noticed both on the vagina and the opening of the anal canal, which clearly show that this is a case of attempted rape and attempted sodomy and not merely a case of an assault to outrage the modesty of a woman.

**24.** The Hon'ble Supreme Court in ***Aman Kumar and another versus State of Haryana (AIR 2004 SC 1497)***, while drawing a distinction between the offence of attempted rape and the assault with an intent to outrage the modesty of a woman, has held as follows:

“14. .... In order to find the accused guilty of an assault with intent to commit a rape, Court must 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. The point of distinction between an offence of attempt to commit rape and to commit indecent assault is that there should be some action on the part of the accused which would show that he was just going to have sexual connection with her.”

**25.** In the present case, as noticed hereinabove, the appellant removed the *Salwar* of the prosecutrix and also undressed himself in the lower part of his body and first tried to force his male organ into the vagina of the prosecutrix but when she put up resistance, he forcibly turned her upside down, because in that posture the prosecutrix could not have been able to put up as much resistance as she had been

...11...

putting up while lying supine and tried to penetrate her anal canal with his male organ. It is, thus, clear that he desired to gratify his passions upon the person of the prosecutrix and intended to do so at all events notwithstanding the resistance by the prosecutrix.

**26.** In view of the above discussion, the alternative plea of the learned counsel for the appellant is also rejected.

**27.** The net result of the above discussion is that there is no merit in the appeal. The same is, therefore, dismissed.

**July 31, 2007 (BC)**

**( Surjit Singh )  
Judge**