A TARAKESHWAR SAHU

*v.*

STATE OF BIHAR (NOW JHARKHAND)

SEPTEMBER 29, 2006

B [S.B. SINHA AND DALVEER BHANDARI, JJ.]

*Penal Code, 1860—Sections 354, 366, 375 and 376—Criminal Procedure Code, 1973—Section 222—Accused forcibly took a minor with intention to commit rape on her and was caught before he could commit the* C *act—Trial Court convicted the accused under section 376 r/w 511 IPC and sentenced him to seven years rigorous imprisonment—High Court confirmed the conviction and sentence awarded by the trial court—Correctness of—Held, on evidence on record, the accused did not do any penetration into private part of the victim—Hence, conviction of the accused under section* D *376 r/w 511 IPC is set aside—Invoking section 222 Cr.P.C., the accused is convicted under sections 366 and 354 IPC and sentenced to 5 years and 2 years rigorous imprisonment respectively.*

**Appellant forcibly took prosecutrix, who is a minor, for committing rape on her. When the prosecutrix raised an alarm, PW 1, PW 2, PW 3, PW 6** E **and other co-villagers came immediately and caught the appellant before he attempted to ravish her. PW1 and other villagers went to police station and lodged a First Information Report. The appellant was charged for the offence punishable under sections 376/511 IPC. The trial court convicted the appellant under sections 376/511 IPC and sentenced to seven years imprisonment. The** F **High Court, in appeal, confirmed the conviction and sentence awarded by the trial court. Hence the appeal before this Court.**

**Partly allowing the appeal, the Court**

**HELD: 1.1. The appellant had forcibly taken her with the intention of** G **committing sexual intercourse with her. The important ingredient of the offence under Section 375 punishable under Section 376 IPC is penetration which is altogether missing in the instant case. No offence under Section 376 IPC can be made out unless there was penetration to some extent. In absence of penetration to any extent, it would not bring the offence of the appellant within the four corners of Section 375 IPC. There has not been any**

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attempt of penetration to the slightest degree. The conviction under Section 376/511 IPC is wholly illegal and unsustainable. [19-B-C; 23-B] A

*State of U.P.* v. *Babul Nath,* [1994] 6 SCC 29 and *Aman Kumar and Anr.* v. *State of Haryana,* [2004] 4 SCC 379, referred to.

*State of Kerala* v. *Kundumkara Govindam,* [1969] CrLJ 818 and *Nirmal Kumar* v. *State,* (2002) CrLJ 3352 (P&H) referred to. B

*R* v. *Hill,* [1781] 1 East PC 439]; *R.* v. *M. Rue* (1838) 8 C & P 641; *R* v. *Allen,* (1839) 9 C & P 31; *R* v. *Hughes* (1841) 2 Mood 190; *R* v. *Lines,* (1844) 1 C & K 393; *R* v. *Marsden* (1891) 2 QB 149 and *Rex* v. *James Lloyd,* (1836) 7 C and P 317:173 ER 14, referred to. C

*Halsbury's Statutes of England and Wales,* 4th Edition, Vol. 12] and *Encyclopaedia of Crime and Justice* [Vol. 4 page 1356], referred to.

1.3. The appellant has forcibly taken the prosecutrix with the intention of committing illicit intercourse. The offence committed by the appellant would fall within the four corners of section 366 IPC. The essential ingredients of the offence punishable under Section 366 IPC are clearly present in this case. The act of the accused proves that during the kidnapping of the prosecutrix or forcibly taking her, the accused had intention or knew it likely that the prosecutrix would be forced to have illicit intercourse. Hence, it is not a mere case of kidnapping for indecent assault but the purpose for which kidnapping was done by the accused has been proved. [13-C; 26-F-G; 28-C] D E

*Lakhjit Singh & Anr.* v. *State of Punjab,* [1994] Supp. 1 SCC 173; *Shamnsaheb M. Multtani* v. *State of Karnataka,* [2001] 2 SCC 577 and *Rajendra* v. *State of Maharashtra,* [1997] SCC (Cri) 840, referred to. F

*Niranjan Singh* v. *State (Delhi)* (1986) 2 Crimes 335 and *Vishnu* v. *State of Maharashtra,* (1997) (CrLJ) 1724 (Bom), referred to.

*Khalilur Ramman* v. *Emperor,* AIR (1933) Rangoon 98, referred to.

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1.4. On the basis of evidence and documents on record, the appellant is also guilty under Section 354 IPC because all the ingredients of Section 354 IPC are present. [28-F]

*Raju Pandurang Mahale* v. *State of Maharashtra,* [2004] 4 SCC 371; *Rupan Deol Bajaj* v. *Kanwar Pal Singh Gill,* AIR (1996) SC 309 and *State of* H

A *Punjab* v. *Major Singh,* **AIR (1967) SC 63, referred to.**

*Major Singh Lachhman Singh* v. *State,* **AIR (1963) Pun 443;** *State of Kerala* v. *Hamsa,* **(1988) 3 Crimes 161;** *Kanhu Charan Patra* v. *State,* **(1996) CrLJ 1151 (Orissa);** *Jai Chand* v. *State,* **(1996) CrLJ 2039 (Delhi);** *Raja* v. *State of Rajasthan,* **(1998) CrLJ 1609 Rajasthan;** *State of Karnataka* v. B *Khaleel,* **(2004) CrLJ NOC 10;** *Nuna* v. *Emperor,* **15 IC 309: 13 CrLJ 469 and** *Bishewhwar Murmu* v. *State* **(2004) CrLJ 326 (Jharkhand);** *Keshab Padhan* v. *State of Orissa,* **(1976) Cuttack LR Cr 236;** *Ram Mehar* v. *State of Haryana,* **(1998) CrLJ 1999 (Punjab & Haryana);** *Rameshwar* v. *State of Haryana,* **(1984) CrLJ 786 (Punjab & Haryana) and** *Shokut* v. *State of* C *Rajasthan,* **(2002) CrLJ 364 (Rajasthan), referred to.**

*Outlines of Criminal Law by Kenny* **(19th Edn.), referred to.**

**2.3. In view of the foregoing facts and circumstances of the case, the crime committed by the accused was at initial stage of preparation. The offence** D **committed does not come within the purview of offence punishable under Sections 376/511 IPC. The appellant was charged under Sections 376/511 IPC but on Invoking the provisions of Section 222 Cr.P.C., the accused charged with major offence can always be convicted for the minor offence, if necessary ingredients of minor offence are present. On evaluation of the entire evidence and documents on record, the appellant is clearly guilty of the offences under** E **Sections 366 and 354 IPC. The ends of justice would be subserved by convicting the appellant under Sections 366/354 IPC. The appellant is sentenced to undergo imprisonment for five years under Section 366 IPC. The appellant is also convicted under Section 354 IPC and sentenced to two years rigorous imprisonment. [28-D-E; 34-A-B]**

F CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1036 of 2005.

From the Judgment and Order dated 6.8.2004 of the High Court of Jharkhand at Ranchi in Crl. A. No. 277/1999.

G Chandrakant, A.C. for the Appellant.

Gopal Prasad and Sarbajit Dutta for the Respondent.

The Judgment of the Court was delivered by

H **DALVEER BHANDARI, J.** This appeal is directed against the judgment

of the Jharkhand High Court at Ranchi, Jharkhand passed in Criminal Appeal No. 277 of 1999, dismissing the appeal filed by the Appellant and upholding the judgment of the Additional Judicial Commissioner, Ranchi, whereby the Appellant was found guilty for the offence punishable under Sections 376/511 of Indian Penal Code and was sentenced to undergo rigorous imprisonment for seven years.

Facts which are necessary to dispose of this appeal, in nutshell, are as follows.

On 18th February, 1998, at about 1.30 a.m., Tara Muni Kumari, aged about 12 years, came out of her house to answer the call of nature. The appellant at that time had forcibly taken her to his Gumti for committing illicit sexual intercourse with her. The said Gumti of the appellant was only few feet away from the house of the prosecutrix. It is alleged that the prosecutrix raised an alarm, and immediately thereafter several persons including PW1 Ram Charan Baitha, the informant and the father of the prosecutrix, Sahdeo Sahu PW2, Deonandan Sahu PW3 the Sarpanch of the village, Jewalal Sahu PW6 came from the adjoining houses and caught the appellant before he could even make any attempt to ravish her. Due to immediate arrival of PW1 and other co-villagers on hearing hue and cry raised by the prosecutrix, the appellant could not succeed in ravishing her. Immediately after this episode, PW1 Ram Charan Baitha, father of the prosecutrix along with other villagers, who appeared as witnesses in this case, had gone to the police station and lodged a first information report at 2.30 a.m. The FIR was lodged within one hour of the incident. All the persons who had gone to the police station and later appeared as witnesses were residing in the close vicinity and were natural witnesses to the incident. The appellant was charged for the offence punishable under Sections 376/511 IPC, to which he did not plead guilty and claimed himself to be innocent. According to him, he was falsely implicated in the instant case at the instance of Gyan Kumar Sahu PW5 and the informant Ram Charan Baitha PW1.

The prosecution had examined ten witnesses to substantiate its case. The prosecutrix Tara Muni Kumari was examined as PW7. Sahdeo Sahu PW2, a retired school teacher, who resided in the same vicinity. Deonandan Sahu, another neighbour was examined as PW3. Bahadur Baitha, the brother of the prosecutrix was examined as PW4. Gyan Kumar Sahu, a student of Modern College was examined as PW5. Jewalal Sahu was examined as PW6. Manju Devi, mother of the prosecutrix was examined as PW8. Ram Prasad Baitha,

A grandfather of the prosecutrix was examined as PW9 and Ishwar Dayal Singh, Assistant Sub-Inspector was examined as PW10.

The statements of PW1 to PW5 are consistent, in which all of them had stated that they resided in close proximity to the house of the accused and victim Tara Muni Kumari. On 18.2.1998, at 1.30 a.m., on hearing an alarm of B the prosecutrix, they got up and ran to the Gumti of the appellant and found that the prosecutrix Tara Muni Kumari was crying in front of the appellant Tarkeshwar Sahu. Number of villagers had also assembled there. In the presence of all of them, she had narrated that the appellant had forcibly lifted her and took her to his Gumti with the clear intention to outrage her modesty C but the appellant had failed in his attempt because on raising an alarm by the prosecutrix the father of the prosecutrix and other villagers had assembled there. Statements of PW1 to PW5 were recorded during 24.6.1998 to 15.7.1998. Their statements by and large narrate the consistent version. These witnesses firmly withstood the cross-examination. Other set of witnesses who were examined later on from 12.8.1998 to 10.3.1999 had not supported the version D of the prosecution and consequently they were declared hostile. It is quite evident that the witnesses which were examined from 12.8.1998 to 10.3.1999 were won over by the appellant. There is clear and cogent evidence of PW1 to PW5 on record supporting the entire prosecution story. The prosecutrix, PW7 was declared hostile but in her cross-examination she had clearly E mentioned as under:

> "Tarkeshwar Sahu tried to commit rape on my person, but did not succeed due to protest made by me; he used to tease other girls also."

In further cross-examination, PW7 stated that "I cannot tell who the person F was."

On the basis of the above statement, PW7 was declared hostile. PW8 and PW9 also did not support the prosecution story and they were also declared hostile. Ishwar Dayal Singh, Assistant Sub-Inspector was examined as PW10. He gave elaborate description of the Gumti. He submitted that he G had recorded the statements of the witnesses. According to the statements of the witnesses, they saw Tara Muni and Tarkeshwar coming out of the Gumti. The prosecutrix clearly stated that the appellant forcibly took her and kept her inside the Gumti. The prosecutrix further stated that the appellant took her in his lap inside the Gumti and told her to lie down with the intention to commit rape on her. The trial court arrived at a finding that the prosecution H had fully established the charge under sections 376/511 IPC against the

appellant Tarkeshwar Sahu beyond all reasonable doubt. Consequently, the appellant was found guilty under sections 376/511 IPC and he was convicted and sentenced to seven years rigorous imprisonment.

Being aggrieved by the judgment of the trial court, the appellant had preferred an appeal before the Jharkhand High Court at Ranchi. The learned Single Judge carefully scrutinized the entire evidence on record. The High Court observed that there is a twelve feet wide road which intervenes between the house of the appellant and that of the informant PW1, the father of the prosecutrix. The Gumti in question was in the east of the house of the appellant and was on the front of the road. The Investigating Officer, in para 9 of his evidence, had deposed that the distance of the Gumti from the place where prosecutrix had gone to answer the call of nature was about 50 yards. The High Court also observed that there was evidence on record to show that the houses of PWs 2, 3, 4 and 5 were located close to the said Gumti. It was established from the evidence on record that the appellant used to sleep in the said Gumti for the last three months prior to the alleged incident whereas, his parents used to sleep in the house. The High Court had critically examined the entire prosecution version. Relevant portion of the judgment reads as under:

> "PW7 Tara Muni Kumari, the daughter of the informant has deposed that in the night of the occurrence she had come out from her house for nature's call and one unknown person caught her and attempted to confine her in the said Gumti and she raised alarms and the neighbours came there and they caught the said man. However, she was declared hostile by the prosecution. She has stated in her cross-examination that it was a dark night and nothing was visible and she did not identify that man and she also did not know his name till date.
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> Manju Devi, PW8 mother of Tara Muni Kumari has deposed that Tara Muni Kumari had come out of her house for nature's call and one unknown person carried her inside the Gumti stuffing her mouth and on her alarms she came to the Gumti and saw her daughter and the said man (Tarkeshwar Sahu) coming out of the said Gumti. She has also deposed that she does not identify that man. She has also been declared hostile by the prosecution. In her cross-examination, she has disclosed that the person who has carried her daughter inside the said Gumti is not the resident of the locality and she does not identify him.
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> Ram Prasad Baitha, PW9 the paternal grand father of Tara Muni

A Kumari who has also been declared hostile by the prosecution has deposed that Tara Muni Kumari had told her that one unknown person has carried her to the said Gumti. It, therefore, appears from the evidence of PWs 7,8 and 9 that they have not named the appellant as a participant in the occurrence carrying Tara Muni Kumari from the place where she had gone for nature's call to the said Gumti. However, B PW7 has deposed very categorically that the persons who had assembled there had apprehended the said man and PW3 Deonandan Sahu has deposed that the said apprehended person was none but the appellant who has been brought to the police station. It is equally relevant to mention here that PW7 and PW8 however corroborates the C prosecution case that Tara Muni Kumari has been carried to the said Gumti and confined there and she has raised alarms. PW1 Ram Charan Baitha, the informant has deposed that on the alarms raised by her daughter Tara Muni Kumari, he ran to the said Gumti belonging to the appellant and found Tara Muni Kumari crying there in front of the said Gumti and the villagers came there. However, he has also stated in the D next breath that Tara Muni Kumari was raising alarms inside the Gumti and the appellant opened the Gumti and Tara Muni Kumari and the appellant came out of the said Gumti. He has further deposed that on query Tara Muni Kumari told him that when she had come for the nature's call the appellant forcibly carried her and brought her inside E the Gumti where he attempted to ravish her but because she raised alarms the appellant could not succeed in ravishing her.

PW2 Sahdeo Sahu, PW3 Deonandan Sahu and PW4 Bahadur Baitha in their evidence on oath has corroborated the testimony of the informant in material particulars. PW5 had also come to the place of F occurrence on alarms and when he reached to the place of occurrence he found Tara Muni Kumari outside the Gumti and he was told about the incident. It, therefore, stands established by the evidence on the record that Tara Muni Kumari was carried to the said Gumti and confined there and on alarms when the informant and others assembled there she came out of the said Gumti along with the appellant who was G apprehended by them and brought to the police station and inside the said Gumti the appellant had made attempt to ravish her but due to the intervening circumstance he could not succeed in his attempt in respect thereof. Even PW2 in para 9 of his cross examination has stated that the parents of the appellant had also accompanied the H informant and others to the said police station along with the appellant

who was apprehended by the informant and others. It is a circumstance of unimpeachable character which supports the prosecution case regarding the participation of the appellant in the occurrence in question and in this view of the matter the absence of identification of the appellant by PW7 and PW8 does not cut much ice. Furthermore, PW10, the I.O. has categorically deposed that PW7 has stated before him that the appellant has lifted her in his lap and confined her in the Gumti and attempted to ravish her and PW8 in her statement has also stated that PW7 Tara Muni had told her that the appellant has carried her to the said Gumti. It, therefore, appears that PW7 and PW8 have deliberately suppressed in their evidence regarding the identification of the appellant as a participant in this case. Thus, the non-identification by PW7 and PW8 of the appellant as a participant in the occurrence in question in view of the overwhelming evidence of the other witnesses of the prosecution who are natural, competent and independent witness of the occurrence does not at all cast a cloud of suspicion to the credibility of the warf and woof of the prosecution case."

The High Court also observed that the prosecution witnesses had no animus to depose falsely against the appellant. According to the impugned judgment, there was no semblance of enmity between the appellant on one hand and PWs 1 to 4, 7, 8 and 9 on the other. According to the High Court, all the witnesses were the most natural and independent witnesses of the incident and there was nothing on record to show that they had any animus, grudge or vendetta against the appellant to depose falsely against the appellant. In this view of the matter, the High Court did not see any justification in discarding their testimony. The High Court independently came to the finding that false implication of the appellant was totally ruled out in the facts and circumstances of this case. According to the High Court, the trial court was perfectly justified in awarding the sentence of seven years rigorous imprisonment to the appellant and consequently the appeal filed by the appellant was dismissed by the High Court.

Looking to the gravity of the offence, we ourselves have examined the entire evidence and documents on record. Even on close scrutiny and marshalling of evidence, we could not persuade ourselves to take a different view than taken by the courts below as far as the conviction of the appellant is concerned. In our considered view, the prosecution version is both, truthful and credible. We are clearly of the view that the appellant had forcibly taken

A the prosecutrix to the Gumti to outrage her modesty but before he could do anything, on raising an alarm by the prosecutrix, the father of the prosecutrix and other villagers had assembled there and she was rescued.

Now, the moot question which squarely falls for our consideration pertains to the correct and appropriate sections of the Indian Penal Code
B under which the appellant is required to be convicted according to the offence he had committed. The trial court and the High Court had convicted the appellant under Sections 376/511 IPC. In order to arrive at the correct conclusion, we deem it appropriate to examine the basic ingredients of section 375 IPC punishable under Section 376 IPC to demonstrate whether the
C conviction of the appellant under Sections 376/511 IPC is sustainable.

> "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.
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> D
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> Secondly. Without her consent.
>
> *Thirdly.* With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.
>
> E *Fourthly.* With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
>
> *Fifthly.* With her consent, when, at the time of giving such
> F consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
>
> G *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.
>
> H Exception. Sexual intercourse by a man with his own wife, the wife

not being under fifteen years of age, is not rape." A

Under Section 375 IPC, six categories indicated above are the basic ingredients of the offence. In the facts and circumstances of this case, the prosecutrix was about 12 years of age, therefore, her consent was irrelevant. The appellant had forcibly taken her to his Gumti with the intention of committing sexual intercourse with her. The important ingredient of the offence B under Section 375 punishable under Section 376 IPC is penetration which is altogether missing in the instant case. No offence under Section 376 IPC can be made out unless there was penetration to some extent. In absence of penetration to any extent would not bring the offence of the appellant within the four corners of Section 375 of the Indian Penal Code. Therefore, the basic C ingredients for proving a charge of rape are the accomplishment of the act with force. The other important ingredient is penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim completely, partially or slightly would be enough for the purpose of Sections 375 and 376 IPC. This Court had an occasion to deal with the basic ingredients D of this offence in the case of *State of U.P.* v. *Babul Nath*[1]. In this case, this Court dealt with the basic ingredients of the offence under Section 375 in the following words:-"

> 8. It may here be noticed that Section 375 of the IPC defines rape and the Explanation to Section 375 reads as follows: E
>
> "Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape."
>
> From the Explanation reproduced above it is distinctly clear that ingredients which are essential for proving a charge of rape are the F accomplishment of the act with force and resistance. To constitute the offence of rape neither Section 375 of IPC nor the Explanation attached thereto require that there should necessarily be complete penetration of the penis into the private part of the victim/prosecutrix. In other words to constitute the offence of rape it is not at all necessary that G there should be complete penetration of the male organ with emission of semen and rupture of hymen. Even partial or slightest penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration

1. [1994] 6 SCC 29. H

A into the private part of the victim would be quite enough for the purpose of Sections 375 and 376 of IPC. That being so it is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains. But in the present case before us as noticed above there is more than enough evidence positively showing that there was sexual activity on the B victim and she was subjected to sexual assault without which she would not have sustained injuries of the nature found on her private part by the doctor who examined her."

The ingredients of the offence have also been examined by the Kerala C High Court in the case of *State of Kerala* v. *Kundumkara Govindam*[2]. In this case, the Court observed as under:

"The crux of the offence u/s 376 IPC is rape and it postulates a sexual intercourse. The word "intercourse" means sexual connection. It may be defined as mutual frequent action by members of independent D organization. By a metaphor the word "intercourse" like the word "commerce" is applied to the relation of sexes. In intercourse there is temporary visitation of one organization by a member of the other organization for certain clearly defined and limited objects. The primary object of the visiting organization is to obtain euphoria by means of a detent of the nerves consequent on the sexual crisis. There is no E intercourse unless the visiting member is enveloped at least partially by the visited organization, for intercourse connotes reciprocity. In intercourse between thighs the visiting male organ is enveloped at least partially by the organism visited, the thighs; the thighs are kept together and tight."

F The word "penetrate", according to Concise Oxford Dictionary means "find access into or through, pass through".

In order to constitute rape, what section 375 IPC requires is medical evidence of penetration, and this may occur and the hymen remain intact. In G view of the explanation to section 375, mere penetration of penis in vagina is an offence of rape. Slightest penetration is sufficient for conviction under Section 376 IPC.

Position of law in England is the same. To constitute the offence of

H 2. (1969) Crl.J 818.

rape, there must be a penetration[3]. Even the slightest, penetration will be sufficient. Where a penetration was proved, but not of such a depth as to injure the hymen, still it was held to be sufficient to constitute the crime of rape. This principle has been laid down in *R* v. *M'Rue*[4] and *R* v. *Allen*[5]. In the case of *R.* v. *Hughes*[6] and *R.* v. *Lines*[7], the Court has taken the view that 'proof of the rupture of the hymen is unnecessary'. In the case of *R.* v. *Marsden*[8], the Court has laid down that 'it is now unnecessary to prove actual emission of seed; sexual intercourse is deemed complete upon proof of penetration only.

In the case of *Nirmal Kumar* v. *State*[9], the Court held as under:-

> "Even slightest degree of penetration of the vulva by the penis with or without emission of semen is sufficient to constitute the offence of rape. The accused in this case had committed rape upon a minor girl aged 4 years and he could not explain the reasons regarding congestion of labia majora, labia minora and redness of inner side of labia minor and vaginal mucosa of victim. Stains of semen were also found on the underwear worn by the accused. The conviction of accused held proper."

The distinction between rape and criminal assault has been aptly described in the English case *Rex.* v. *James Lloyd*[10]. In this case, while summing up the charge to the jury, Justice Patterson observed:

> "In order to find the prisoner guilty of an assault with intent to commit a rape, you must be satisfied that the prisoner, when he laid hold of the prosecutrix, not only desired to gratify his passions upon

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3. *R.* v. *Hill* (1781) 1 East PC 3439.
4. (1838) 8 C & P 641.
5. (1839) 9 C & P 31.
6. (1841) 2 Mood 190.
7. (1844) 1 C & K 393.
8. (1891) 2 QB 149.
9. (2002) CrLJ 3352 (P&H)
10. (1836) 7 C and P 317 : 173 ER 14.

A her person but that he intended to do so at all events, and notwithstanding any resistance on her part."

A similar case was decided by Mirza and Broomfield JJ. of the Bombay High Court in *Ahmed Asalt Mirkhan*[11]. In that case the complainant, a milkmaid, aged 12 or 13 years, who was hawking milk, entered the accused house to B deliver milk. The accused got up from the bed on which he was lying and chained the door from inside. He then removed his clothes and the girl's petticoat, picked her up, laid her on the bed, and sat on her chest. He put his hand over 'her mouth to prevent her crying and placed his private part against hers. There was no penetration. The girl struggled and cried and so C the accused desisted and she got up, unchained the door and went out. It was held that the accused was not guilty of attempt to commit rape but of indecent assault. The point of distinction between an offence 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 is just going to have sexual connection with her.

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In *Halsbury's Statutes of England and Wales,* 4th Edition, Vol. 12, it is sated that even the slightest degree of penetration is sufficient to prove sexual intercourse.

In *Encyclopaedia of Crime and Justice* (Vol. 4 page 1356), it is stated E "...even slight penetration is sufficient and emission is unnecessary".

In the case of *Aman Kumar & Anr.* v. *State of Haryana*[12], this Court stated as under:

"Penetration is the *sine qua non* for an offence of rape. In order F to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little."

In view of the catena of judgments of Indian and English Courts, it is abundantly clear that slight degree of penetration of the penis in vagina is G sufficient to hold accused guilty for the offence under Section 375 IPC

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11. Criminal Appeal No. 161 of 1930, decided on 12.8.1930 reported in Law of Crimes by Ratanlal Dhirajlal's, Page 922.

H 12. [2004] 4 SCC 379.

punishable under Section 376 IPC. A

In the backdrop of settled legal position, when we examine the instant case, the conclusion becomes irresistible that the conviction of the appellant under Sections 376/511 IPC is wholly unsustainable. What to talk about the penetration, there has not been any attempt of penetration to the slightest degree. The appellant had neither undressed himself nor even asked the B prosecutrix to undress so there was no question of penetration. In the absence of any attempt to penetrate, the conviction under Section 376/511 IPC is wholly illegal and unsustainable.

In the instant case, the accused has been charged with Sections 376/ C 511 IPC only. In absence of charge under any other section, the question now arises - whether the accused should be acquitted; or whether he should be convicted for committing any other offence pertaining to forcibly outraging the modesty of a girl. In a situation like this, we would like to invoke Section 222 of the Code of Criminal Procedure, which provides that in a case where the accused is charged with a major offence and the said charge is not D proved, the accused may be convicted of the minor offence, though he was not charged with it. Section 222 Cr.P.C. reads as under:-

> "222. *When offence proved included in offence charged.*—(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor E offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.
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> (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of F the minor offence, although he is not charged with it.
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> (3) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.
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> G
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> (4) Nothing in this section shall be deemed to authorise a conviction of any minor offence where the conditions requisite for the initiation of proceedings in respect of that minor offence have not been satisfied."

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A In this section, two illustrations have been given which would amply describe that when an accused is charged with major offence and the ingredients of the major offence are missing and ingredients of minor offence are made out then he may be convicted for the minor offence even though he was not charged with it. Both the illustrations given in the said section read as under:

B

> "(a) A is charged under section 407 of the Indian Penal Code (45 of 1860) with criminal breach of trust in respect of property entrusted to him as a carrier. It appears that he did commit criminal breach of trust under section 406 of that Code in respect of the property, but that it
> C was not entrusted to him as a carrier. He may be convicted of criminal breach of trust under the said section 406.
>
> (b) A is charged under section 325 of the Indian Penal Code (45 of 1860), with causing grievous hurt. He proves that he acted on grave and sudden provocation. He may be convicted under section 335 of
> D that Code."

In the case *Lakhjit Singh & Anr.* v. *State of Punjab*[13], this Court had an occasion to examine the similar question of law. In this case, the accused was charged and tried under Section 302 of the Indian Penal Code but ingredients of Section 302 were missing but ingredients of Section 306 were
E present, therefore, the Court deemed it proper to convert the conviction of the appellant from Section 302 to Section 306 IPC. In this case, it was urged that the accused cannot be tried under Section 306 IPC because the accused were not put to notice to meet a charge under Section 306 IPC and, therefore, they are prejudiced by not framing a charge under Section 306 IPC; therefore, presumption under Section 113-A of Indian Evidence Act cannot be drawn
F and consequently a conviction under Section 306 IPC cannot be awarded. According to this Court, in the facts and circumstances, section 306 was attracted and the appellants' conviction under Section 302 IPC was set aside and instead they were convicted under section 306 IPC.

G A three-Judge Bench of this Court in the case of *Shamnsaheb M. Multtani* v. *State of Karnataka*[14] had an occasion to deal with Section 222 of the Code of Criminal Procedure. The Court came to the conclusion that

13. [1994] Supp 1 SCC 173.

H 14. [2001] 2 SCC 577.

when an accused is charged with a major offence and if the ingredients of major offence are not proved, the accused can be convicted for minor offence, if ingredients of minor offence are available. The relevant discussion is in paragraphs 16, 17 and 18 of the judgment, which read as under:-

> "16. What is meant by "a minor offence" for the purpose of Section 222 of the Code? Although the said expression is not defined in the Code it can be discerned from the context that the test of minor offence is not merely that the prescribed punishment is less than the major offence. The two illustrations provided in the section would bring the above point home well. Only if the two offences are cognate offences, wherein the main ingredients are common, the one punishable among them with a lesser sentence can be regarded as a minor offence *vis-a-vis* the other offence.
>
> 17. The composition of the offence under Section 304-B IPC is vastly different from the formation of the offence of murder under Section 302 IPC and hence the former cannot be regarded as minor offence *vis-a-vis* the latter. However, the position would be different when the charge also contains the offence under Section 498-A IPC (husband or relative of husband of a woman subjecting her to cruelty). As the world "cruelty" is explained as including, *inter alia*,
>
> "harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand".
>
> 18. So when a person is charged with an offence under Section 302 and 498-A IPC on the allegation that he caused the death of a bride after subjecting her to harassment with a demand for dowry, within a period of 7 years of marriage, a situation may arise, as in this case, that the offence of murder is not established as against the accused. Nonetheless, all other ingredients necessary for the offence under Section 304-B IPC would stand established. Can the accused be convicted in such a case for the offence under Section 304-B IPC without the said offence forming part of the charge?"

On careful analysis of the prosecution evidence and documents on record, the appellant cannot be held guilty for committing an offence punishable under Sections 376/511 IPC. According to the version of the prosecution, the appellant had forcibly taken the prosecutrix to his Gumti for

committing illicit intercourse with her. But before the appellant could ravish the prosecutrix, she raised an alarm and immediately thereafter, her father PW1 Ram Charan Baitha and other co-villagers residing in the vicinity assembled at the spot and immediately thereafter, the appellant and the prosecutrix came out of the Gumti. In this view of the matter, no offence under Sections 376/511 IPC is made out.

In this view of the matter, it has become imperative to examine the legal position whether the offence of the appellant falls within the four corners of other provisions incorporated in the Indian Penal Code relating to outraging the modesty of a woman/girl under Sections 366 and 354.

Section 366 IPC is set out as under:

> *"366. Kidnapping, abducting or inducing woman to compel her marriage, etc.*—Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid".

The essential ingredient of the offence punishable under Section 366 IPC is that when a person has forcibly taken a minor girl with the intention as specified in that section, then the offence is clearly made out. In the instant case, the appellant at about 1.30 a.m. has forcibly taken the prosecutrix/victim to his Gumti with the intention of committing illicit intercourse then the offence committed by the appellant would fall within the four forecorners of section 366 IPC. In our considered view, the essential ingredients of the offence punishable under Section 366 IPC are clearly present in this case. We deem it appropriate to briefly reproduce the ratio of some decided cases.

In *Khalilur Ramman* v. *Emperor*[15], the Full Bench has observed as

15. AIR (1933) Rangoon 98.

under:

> "The intention of the accused is the basis and the gravamen of an offence under S. 366. In considering whether an offence has been committed under this section, the volition, the intention and the conduct of the woman are nihil *ad rem* except in so far as they bear upon the intent with which the accused kidnapped or abducted her. If the accused kidnapped or abducted the woman with the necessary intent, the offence is complete whether or not the accused succeeded in effecting his purpose, and even if in the event the woman in fact consented to the marriage or the illicit intercourse taking place."

This Court in *Rajendra* v. *State of Maharashtra*[16] observed as under:

> "Where the Courts had given cogent and convincing reasons for recording their finding that the accused had kidnapped the victim girl with intent to seduce her to illicit intercourse, conviction of accused under S. 366 was not interfered with."

The High Court of *Delhi in Niranjan Singh* v. *State (Delhi)*[17] indicated that in what circumstances an offence under Section 366 IPC is made out. In this case, the Court, while dealing with a case under Section 366 IPC, observed as under:

> "Where from the statement of prosecutrix, a girl of six years age it was evident that the accused took her on the pretext of getting her some biscuits to public toilets took off her salwar and also his own pant made her to lie on the floor and bent down on her when he was caught hold by a watchman in the locality, the accused would not be guilty of an attempt to rape however he would be guilty of an offence under S. 366 IPC."

In *Vishnu* v. *State of Maharashtra*[18], the High Court of Bombay observed as under:

> "The accused were alleged to have kidnapped the girl below 16 years of age from the lawful guardianship of her parents and taken her to

16. [1997] SCC Cri 840.

17. (1986) 2 Crimes 335.

18. (1997) CrLJ 1724 Bom.

A another city. The co-accused had simply met the girl and had not instigated her to accompany the accused. Hence, her conviction was set aside. So far accused was concerned, his offence of kidnapping was proved beyond all doubts and he was convicted u/s 363/366 IPC. Accused was however acquitted of the charge of rape u/s 375 IPC as hymen of girl was intact and there were no outward sign of injuries or violence suggesting the sexual intercourse and consequently no rape could be said to have taken place."

In the instant case, the act of the accused proves that during the kidnapping of the prosecutrix or forcibly taking her to the Gumti, the accused had intention or knew it likely that the prosecutrix would be forced to have illicit intercourse. Hence, it is not a mere case of kidnapping for indecent assault but the purpose for which kidnapping was done by the accused has been proved. It is a different matter that the accused failed at the stage of preparation of committing the offence itself.

D In view of the foregoing facts and circumstances of the case, we are of the opinion that the crime committed by the accused was at initial stage of preparation. The offence committed does not come within the purview of offence punishable under Sections 376/511 IPC. The offence committed squarely covers the ingredients of Sections 366 and 354 IPC. The appellant was charged under Sections 376/511 IPC but on invoking the provisions of Section 222 of the Code of Criminal Procedure the accused charged with major offence can always be convicted for the minor offence, if necessary ingredients of minor offence are present.

On the basis of evidence and documents on record, in our considered view, the appellant is also guilty under Section 354 IPC because all the ingredients of Section 354 IPC are present in the instant case.

Section 354 IPC reads as under:

"*354. Assault or criminal force to woman with intent to outrage her modesty.*- Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

H So far as the offence under Section 354 IPC is concerned, intention to

outrage the modesty of the women or knowledge that the act of the accused would result in outraging her modesty is the gravamen of the offence.

The essence of a woman's modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. Modesty is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex.

'Modesty' is given as "womanly propriety of behaviour, scrupulous chastity of thought, speech and conduct (in man or woman); reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions".[19]

The ultimate test for ascertaining whether the modesty of a woman has been outraged, assaulted or insulted is that the action of the offender should be such that it may be perceived as one which is capable of shocking the sense of decency of a woman. A person slapping on the posterior of a woman in full public glare would amount to outraging her modesty for it was not only an affront to the normal sense of feminine decency but also an affront to the dignity of the lady.[20]

The word 'modesty' is not to be interpreted with reference to the particular victim of the act, but as an attribute associated with female human beings as a class. It is a virtue which attaches to a female on account of her sex. [21]

We deem it appropriate to reproduce the cases of various Courts indicating circumstances in which the Court convicted the accused under Section 354 IPC.

In *State of Kerala* v. *Hamsa*[22], it was stated as under:

> "What the legislature had in mind when it used the word modesty in Sections 354 and 509 of the Penal Code was protection of an

19. *Raju Pandurang Mahale* v. *State of Maharashtra*, [2004] 4 SCC 371.

20. *Rupan Deol Bajaj* v. *Kanwar Pal Singh Gill*, reported in AIR (1996) SC 309.

21. *Major Singh Lachhman Singh* v. *State* AIR (1963) Pun 443.

22. (1988) 3 Crimes 161.

A attribute which is peculiar to woman, as a virtue which attaches to a female on account of her sex. Modesty is the attribute of female sex and she possesses it irrespective of her age. The two offences were created not only in the interest of the woman concerned, but in the interest of public morality as well. The question of infringing the modesty of a woman would of course depend upon the customs and habits of the people. Acts which are outrageous to morality would be outrageous to modesty of women. No particular yardstick of universal application can be made for measuring the amplitude of modesty of woman, as it may vary from country to country or society to society."

C A well known author *Kenny* in his book *"Outlines of Criminal Law"*[23] has dealt with the aspect of indecent assault upon a female. The relevant passage reads as under:

"In England by the Sexual Offences Act, 1956, an indecent assault upon a female (of any age) is made a misdemeanour and on a charge D for indecent assault upon a child or young person under the age of sixteen it is no defence that she (or he) consented to the act of indecency."

In the case of *State of Punjab* v. *Major Singh*[24], a three-Judge Bench of this Court considered the question-whether modesty of a female child of E 7½ months can also be outraged. The majority view was in affirmative. Bachawat, J., on behalf of majority, opined as under:

"The offence punishable under section 354 is an assault on or use of criminal force to a woman the intention of outraging her modesty or with the knowledge of the likelihood of doing so. The Code does F not define, "modesty". What then is a woman's modesty?

The essence of a woman's modesty is her sex. The modesty of an adult female is writ large on her body. Young or old intelligent or imbecile, awake or sleeping, the woman possesses a modesty capable of being outraged. Whoever uses criminal force to her with intent to G outrage her modesty commits an offence punishable under Section 354. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not

23. 19th Edn., para 146 p. 203.

H 24. AIR (1967) SC 63.

always decisive, as for example, when the accused with a corrupt mind stealthily touches the flesh of a sleeping woman. She may be an idiot, she may be under the spell of anaesthesia, she may be sleeping, she may be unable to appreciate the significance of the act, nevertheless, the offender is punishable under the section.

A female of tender age stands on a somewhat different footing. Here body is immature, and her sexual powers are dormant. In this case, the victim is a baby seven and half months old. She has not yet developed a sense of shame and has no awareness of sex. Nevertheless from her very birth she possesses the modesty which is the attribute of her sex."

In *Kanhu Charan Patra* v. *State*[25], the Orissa High Court stated as under:

"The accused entered the house and broke open the door which two girls of growing age had closed from inside and molested them but they could do nothing more as the girls made good their escape. On being prosecuted it was held that the act of accused was of grave nature and they had committed the same in a dare devil manner. As such, their conviction u/s 354/34 was held proper."

The High Court of Delhi in the case of *Jai Chand* v. *State*[26] observed as under:

"The accused in another case had forcibly laid the prosecutrix on the bed and broken her pyzama's string but made no attempt to undress himself and when prosecutrix pushed him away, he did make no efforts to grab her again. It was held that it was not attempt to rape but only outraging of the modesty of a woman and conviction u/s 354 was proper."

In *Raja* v. *State of Rajasthan*[27], it was stated as under:

"The accused took the minor to solitary place but could not

25. (1996) CrLJ 1151 Orissa.

26. (1996) CrLJ 2039 Delhi

27. (1998) CrLJ 1608 Rajasthan.

A commit rape. The conviction of accused was altered from Section 376/511 to one u/s 354."

The Court in *State of Karnataka* v. *Khaleel*[28] stated as follows:

"The parents reached the sugarcane field when accused was in
B process of attempting molestation and immediately he ran away from the place. There was no evidence in support of allegation of rape and accused was acquitted of charge u/s 376 but he was held liable for conviction under section 354/511 IPC."

The Court in *Nuna* v. *Emperor*[29] stated as follows:

C

"The accused took off a girl's clothes, threw her on the ground and then sat down beside her. He said nothing to her nor did he do anything more. It is held that the accused committed an offence under Section 354 IPC and was not guilty of an attempt to commit rape."

D The Court in *Bishewhwar Murmu* v. *State*[30] stated as under:

"The evidence showed that accused caught hold hand of informant/victim and when one of the prosecution witnesses came there hearing alarm of victim, offence u/s 376/511 was not made out and conviction was converted into one u/s 354 for outraging modesty of victim."

E

The Court in *Keshab Padhan* v. *State of Orissa*[31] stated as under:

"The test of outrage of modesty is whether a reasonable man will think that the act of the offender was intended to or was known to be likely to outrage the modesty of the woman. In the instant case,
F the girl was 15 years of age and in the midnight while she was coming back with her mother the sudden appearance of the petitioner from a lane and dragging her towards that side sufficiently established the ingredients of Section 354."

The Court in *Ram Mehar* v. *State of Haryana*[32] stated as under:

G

28. (2004) CrLJ NOC 10.
29. 15 IC 309:Crl.J. 469.
30. (2004) CrLJ 326 Jharkhand.
31. (1976) Cuttack LR (Cr) 236.
H 32. (1998) CrLJ (1999) Punjab & Haryana.

"The accused caught hold of the prosecutrix, lifted her and then took her to a bajra field where he felled her down and tried to open her salwar but could not do so as in order to make the accused powerless the prosecutrix had injured him by giving a blow of the sickle. The accused failed to give his blood sample with the result it could be presumed that his innocence was doubtful. Ocular evidence of prosecutrix was also corroborated by other evidence. It was held that conviction of accused u/s 354, 376/511 was proper but taking the lenient view only two years RI and a fine of Rs.1000/- was imposed on him."

In the case of *Rameshwar* v. *State of Haryana*[33], the Court observed as follows:

"Whether a certain act amounts to an attempt to commit a particular offence is a question of fact dependant on the nature of the offence and the steps necessary to take in order to commit it. The difference between mere preparation and actual attempt to commit an offence consists chiefly in the greater degree of determination. For an offence of an attempt to commit rape, the prosecution must establish that it has gone beyond the stage of preparation."

The Court in *Shokut* v. *State of Rajasthan*[34] stated as follows:

"The accused took the prosecutrix nurse for the purpose of attending a patient but on way he tried to molest her and beat her also. The accused was held guilty u/s 354/366 IPC as he by deceitful means had taken the prosecutrix from her house and had then outraged her modesty."

We have carefully analyzed the provisions pertaining to outraging of the modesty of a woman/girl under Sections 376, 366 and 354 of the Indian Penal Code. This exercise was undertaken to clearly spell out ambit and scope of offences under these provisions. On the basis of the evidence and documents on record, we are of the considered opinion that the conviction of the appellant under Section 376/511 IPC is wholly erroneous and unsustainable and consequently, the judgments of the High Court and the trial court are set aside.

33. (1984) CrLJ 786 Punjab & Haryana.

34. (2002) CrLJ 364 Rajasthan

A On evaluation of the entire evidence and documents on record, in our considered view, the appellant is clearly guilty of the offences under Sections 366 and 354 IPC. In the facts and circumstances of this case, the ends of justice would be subserved by convicting the appellant under Sections 366/ 354 IPC. The appellant is sentenced to undergo imprisonment for five years under Section 366 IPC. The appellant is also convicted under Section 354 IPC B and sentenced to two years rigorous imprisonment. We direct both the sentences to run concurrently.

The appeal filed by the appellant is partly allowed and disposed of accordingly.

C

B.S. Appeal Partly allowed.