A GUDDU @ SANTOSH

v.

STATE OF MADHYA PRADESH

APRIL 27, 2006

B [S.B. SINHA AND P.P. NAOLEKAR, JJ.]

Penal Code, 1866:

s.376/511—Minor girl—Subjected to sexual assault—Doctor found C *swelling over private part of victim—Hymn intact but had become red—No definite report by doctor of intercourse in immediate past—High Court convicting accused u/s 376/511—Held, it is not a case where merely preparation had been undergone by accused—He made an attempt to criminally assault the prosecutrix—From medical evidence inference could also have been drawn* D *by High Court that there had been penetration—High Court failed to notice that even slight penetration was sufficient to constitute offence of rape—However, since High Court convicted accused u/s 376/511, sentence of 10 years reduced to 5 years.*

Kappula Venkat Rao **v.** *State of A.P.,* **[2004] 3 SCC 602 and** *Aman* E *Kumar and Anr.* **v.** *State of Haryana,* **[2004] 4 SCC 379, referred to.**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1491 of 2005.

From the Judgment/Order dated 23.6.2005 of the High Court of Judicature at Madhya Pradesh, Jabalpur Bench at Gwalior in Crl. A.No. 408 F of 1997.

S.K. Dubey, L.S. Chauhan, Chandra Mohan Snisetty and Dr. Kailash Chand for the Appellant.

Vibha Datta Makhija for the Respondent.

G The Order of the Court was delivered by

ORDER

The appellánt herein was charged with commission of an offence under Section 376 of the IPC for committing rape on a minor girl Sushama. Her

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parents are labourers. They had been occupying a portion of the premises belonging to the father of the appellant herein, as tenant. On 2.1. 1995, they had gone out of their house in search of work. Sushama was all alone in the house. The appellant taking advantage of the absence of the parents of the prosecutrix, came there, took her to Tapariya, put off her Chaddi and he also pulled down his trousers and sat upon her. When her grandfather came, he fled away. When the parents of Sushama came back, they were informed about the said incident by her. The mother of the prosecutrix had seen redness in her private part as also blood coming out therefrom.

First Information Report was lodged on the next day i.e. on 3.1.1995. The prosecutrix was sent for medical examination and one Dr. Smt. Sunita Jain examined her. The said doctor was examined before the learned Trial Judge as PW-2. In her evidence she stated:

> "I medically examined Sushama D/o Mukesh on 3.1.1995 at 12.15 noon and found no any external injury over her body. Swelling was there over her private part and that became red. Hymen of her private part was intact. Hymen of her private part became red. I cannot give definite opinion that in earlier past whether there had been any intercourse happened with that lady."

The only question which was put to PW-2 in cross-examination was a suggestion which was in the following terms:

> "By biting of ant, swelling and redness may come at 3-4 places of the private parts."

Apart from the mother and grandfather, the prosecutrix examined herself. She being below 12 years of age, the learned Sessions Judge satisfied himself that she was capable of testifying as a witness. In her evidence, the prosecutrix stated:

> "On that Tapariya was closed, which Guddu opened. Guddu sat over me by removing my underwear. After the incident my father reached there, I narrated about the incident to my father. I was medically examined."

On the aforementioned statement she was not cross-examined.

The mother of the prosecutrix also examined herself as PW-7. In her examination-in-chief, she stated:

A "Sushama is my daughter. I know the accused earlier before one year. I and my husband went out for labour work. On that day we did not get labour work. Therefore, we came back home at 10 a.m. Sushama told that Guddu opened the lock of Tapariya, put off my underwear and sat over me. Blood was stained in the underwear of Sushama. I told all about facts to my husband."

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Yet again she had not been cross-examined on the said point.

PW-3 is the grandfather of the prosecutrix. His evidence before the learned Trial Judge was as under:

C "I know Sushma, Mukesh and Guddu. Sushama is my granddaughter. Mukesh is my son. About one year before at 10-11 A.M. When I was returning home after working on Kothi No.28. At home Sushama told me that Gudu came. He opened the look of Tapariya, took me inside. Later on he put off his pant and put off my underwear and sat over me. When I came, on that point of time Guddu came out from D Tapariya, when I caught hand of Guddu then he shown me knife."

He was also not cross-examined.

The learned Trial Judge, however, recorded a judgment of acquittal E opining:

"But, here that principle is not applicable because as per prosecution account explicitly committed rape over Sushama, and adduced the evidence that accused committed rape over the prosecutrix. Dr. Smt. Jain in her evidence did not tell this that blood was oozing from the F private part of Sushama. If accused would have committed rape on the prosecutrix then the hymen of private parts of Sushama would have ruptured. But as per Dr. Smt. Jain hymen of private part of Sushama was intact. There are so many reasons of redness over private part. Hence, on the basis of the redness only no presumption of cohabitation can be reached."

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The learned Trial Judge failed to consider the effect of non-cross-examination of the prosecution witness in regard to the subject matter of offence. A Division Bench of the High Court upon considering the evidence on record opined as under:

H "Thus, it is established that respondent removed the underwear of

prosecutrix and sat upon her. This will not be a case under Section 354 IPC. It is well settled that in sexual offence need of corroboration of prosecutrix evidence is not necessary. If Court is satisfied and is convinced that the restimony of young victim of sexual offence is reliable. It does not require any corroboration. Trial Court has committed a grave error in holding that the statement of prosecutrix is not corroborated by other witnesses."

Having regard to the medical evidence, however, the appellant was foung guilty of commission of offence under Section 376(2) (f) read with Section 511 of the IPC. He was sentenced to 10 years rigorous imprisonment. The appellants is thus before us.

Mr. S.K. Dubey, learned senior counsel appearing on behal of the appellant submitted that the High Court committed an error in reversing the judgment of acquittal. Learned counsel would contend that the very fact that the hymen of the prosecutrix was intact, it could not have been a case where an inference of commission of rape could be arrived at. In support of the said contention the learned counsel strongly relied on *Kappula Venkat Rao* v. *State of A.P.*, [2004] 3 SCC 602 and *Aman Kumar and Anr.* v. *State of Haryana*, [2004] 4 SCC 379. Ms. Vibha Datta Makhija, learned counsel for the respondent State, on the other hand, supported the judgment of the High Court.

We have noticed hereinbefore the statements made by the prosecutrix as also the corroborative statements of her mother and grandfather. She was medically examined on the next day. The doctor found a swelling over her private part and it had become reddish. Although her hymen was intact but also had become red. Only because no definite opinion could be given by the doctor as to whether in the immediate past of the intercourse, the High Court convicted the appellant for commission of the offence under Section 376/511 of the IPC.

It is not a case where merely a preparation had been undergone by the appellant as contended by the learned counsel. Evidently, the appellant made an attempt to criminally assault the prosecutrix. In fact, from the nature of the medical evidence an inference could also have been drawn by the High Court that there had been penetration. The High Court failed to notice that even slight penetration was sufficient to constitute an offence of rape. *The redness of the hymen would not have been possible but for penetration to some extent.* In *Kappula Venkat Rao* (supra), this Court categorically made a

A distinction between the preparation for commission of an offence and attempt to commit the same, in the following terms:

> "Attempt to commit an offence can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step
B towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. The word 'attempt' is not itself defined, and must, therefore, be taken in its ordinary meaning. This is exactly what the provisions of Section 511 require. An attempt to commit a
C crime is to be distinguished from an intention to commit it; and from preparation made for its commission. Mere intention to commit an offence, not followed by any act, cannot constitute an offence. The will is not to be taken for the deed unless there be some external act which shows that progress has been made in the direction of it, or towards maturing and effecting it. Intention is the direction of conduct
D towards the object chosen upon considering the motives which suggest the choice. Preparation consists in devising or arranging the means or measure necessary for the commission of the offence. It differs widely from attempt which is the direct movement towards the commission after preparations are made. Preparation to commit an offence is
E punishable only when the preparation is to commit offence under Section 122 (waging war against the Government of India) and Section 399 (preparation to commit dacoity). *The dividing line between a mere preparation and an attempt is sometimes thin and has to be decided on the facts of each case.*"

F (Emphasis supplied)

In the instant case, the appellant cannot be said to have intended to commit an indecent assault on the prosecutrix. The fact of the matter clearly demonstrates that his conduct was indicative of his determination to gratify his passion. He would not have been able to do so for one reason or the other,
G but the same in this established fact situation actual commission or at least attempt to commit the offence cannot be said to have been made out.

In the said decision itself this Court having regard to the fact situation obtaining therein that an offence under Section 376/511 was proved, held:

H "The *sine qua non* of the offence of rape is penetration, and not

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

When the evidence of the prosecutrix is considered in the proper perspective, it is clear that the commission of actual rape has not been established. However, the evidence is sufficient to prove that attempt to commit rape was made. That being the position, conviction is altered from Section 376 IPC to Section 376/511 IPC."

Yet again in *Aman Kumar and Anr.* v. *State of Haryana,* (supra) it was categorically stated:

"Penetration is the *sine qua non* for an offence of rape. In order to constitue penertration, 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 hos little."

It was further noticed by this Court:

"The *actus reus* is complete with penetration. It is well settled that the prosecutrix cannot be considered as accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence of rape. In examination of genital organs, state of hymen offers the most reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any significance to the findings. The shape and the texture of the hymen is variable. This variation, sometimes permits penetration without injury. This is possible because of the peculiar shape of the orifice or increased elasticity. On the other hand, sometimes, the hymen may be more firm, less elastic and gets stretched and lacerated earlier. Thus a relatively less forceful penetration may not give rise to injuries ordinarly possible with a forceful attempt. The anatomical feature with regard to hymen which merits consideration is its anatomical situation. Next to hymen in positive importance, but more than that in frequency, are the injuries on labia majora. These, *viz.* labia majora, are the first to be encountered

A by the male organ. They are subjected to blunt forceful blows, depending on the vigour and force used by the accused and counteracted by the victim. Further, examination of the female for marks of injuries elsewhere on the body forms a very important piece of evidence. To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of
B semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under Section 376 IPC."

C As regards the applicability of Section 511 of the IPC, it was stated:

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

In that case, having regard to the prosecution case and in particular, the statment of the father of the prosecutrix to the effect that she had merely been teased by the appellant therein, he was convicted under Section 354 IPC.

The findings in a criminal case would depend upon the facts and
F circumstances of each case. However, the ratio laid down in both the judgments relied upon by learned senior counsel Mr. S.K. Dubey, go against the contention raised by him. There is therefore, no merit in this appeal. The High Court, however, in our opinion, comitted an error in sentencing the appellant to rigorous imprisonment for a term of 10 years. The appellant has been convicted
G only under Section 376/511 of the IPC and thus the proper sentence that should have been awarded to him was imprisonment for 5 years.

We, therefore, in modification of the impugned order, reduce the sentence to rigorous imprisonment for 5 years. The appeal is allowed to the aforesaid extent.

H RP. Appeal partly allowed.