HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

S.B. Criminal Appeal No. 5/1992

Shiv Prakash, S/o Shri Jagan Nath, aged 27 years, resident of Berkiya, Police Station Atroo, District Baran.

----Accused-Appellant

Versus

The State of Rajasthan

----Respondent

For Appellant(s) : Mr. Pranav Pareek
Mr. Aman Lodha

For Respondent(s) : Mr. Manvendra Singh, PP

JUSTICE ANOOP KUMAR DHAND

Reserved on 10/10/2024

Pronounced on 19/10/2024

Reportable

Order

For convenience of exposition, this judgment is divided in the following parts: -

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1. The correctness of the judgment dated 18.12.1991 passed by the Additional Sessions Judge No.2, Baran (hereinafter referred as "the trial Judge") in Sessions Case No.71/1990 is questioned in this appeal.

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2. By passing the impugned judgment dated 18.12.1991, the learned trial Judge has convicted the accused-appellant (hereinafter referred as "appellant") for the offence under Section 376 IPC read with Section 511 IPC and sentenced him to undergo five years rigorous imprisonment (for short "RI") with a fine of Rs.500/- and in default of payment of fine to further undergo six months simple imprisonment (for short "SI").

I. Factual Matrix:

3. The facts leading to the present appeal are as follows:

3.1 The motion of law came into picture when an FIR (Ex.P4) was lodged by the father of the prosecutrix (PW-5) at the Police Station Baran, District Kota alleging therein that on 07.02.1985 around 4.30 PM his daughter "S" aged 05 years came crying and stated that the tenant-Shiv Prakash (hereinafter referred as "the appellant") has committed rape with her. When the complainant came to his house around 7.00 PM in the evening, his wife narrated the entire story to him and thereafter, he took his daughter to the Police Station for lodging FIR.

3.2 Upon this report, Crime No.24/1985 was registered at the Police Station, Baran, District Kota for the offence under Section 376 IPC and after investigation, Police submitted charge-sheet against the appellant for the offences under Sections 376, 511 and 354 IPC.

3.3 Charges were framed against the appellant for the offences under Section 376 IPC by the trial Court. The

accused denied the charges and claimed trial and thereafter, during the course of trial, the prosecution examined as many as seven witnesses in support of its case and exhibited nine documents. Thereafter, explanation of the appellant was recorded under Section 313 Cr.P.C., wherein, he denied his participation in the incident and submitted that because of enmity, he has been falsely implicated, but in defence, no evidence was produced by him.

3.4. After hearing arguments of both the sides, the learned trial Judge vide impugned judgment dated 18.12.1991 convicted and sentenced the appellant, as stated above.

3.5 Feeling aggrieved and dissatisfied by the impugned judgment, the appellant has approached this Court by way of filing of this appeal under Section 374 Cr.P.C.

II. Submissions by counsel for the parties:

4. Learned counsel for the appellant submitted that the entire case of the prosecution is based on the solitary testimony of the prosecutrix-"S" (PW-1) and she is not a trustworthy witness. Counsel submits that there are lot many contradictions in her statements and the story created by her with regard to attempt to rape is not reliable. Counsel submits that the alleged incident occurred in the thickly populated area, but not a single independent witness was produced by the prosecution. Counsel submits that as per the statements of the prosecutrix, forceful rape was committed with her, but such allegation is not corroborated

by her medical examination when her injury report (Ex-P6) was prepared by Dr. P. Jhanwar (PW-6). Counsel submits that as per the injury report (Ex-P6) of the prosecutrix, there was no mark of violence on her body and no physical injury was found and her hymen was found to be intact & healthy and there was no visible discharge. Counsel submits that her vaginal swab was taken for analysis and the same was sent to the Forensic Science Laboratory (for short "FSL") for analysis. Counsel submits that when the chemical analysis process was conducted, semen was found in the vaginal smear of the prosecutrix, whereas actually the smear of the prosecutrix never collected. Counsel submits that there is no report with regard to vaginal swab of the prosecutrix, hence, under these circumstances, the prosecution has failed to prove its case against the appellant beyond reasonable doubt. Counsel submits that when the prosecutrix was cross-examined, she failed to sustain on her own version, hence, under these circumstances, the appellant is liable to be acquitted from the offences charged. In support of his contentions, reliance has been placed on the judgment passed by the Apex Court in the case of **Nirmal Premkumar and Another Vs. State Rep. By Inspector of Police (Criminal Appeal No.1098/2024)** decided on 11.03.2024.

5. Per contra, learned Public Prosecutor opposed the prayer made by the counsel for the appellant and submitted that an attempt to commit rape was made by the appellant upon the prosecutrix, who was a minor girl of 05 years of

age. Counsel submits that the allegations of attempt to rape have been corroborated with the FSL report (Ex-P10) as human semen was detected from the inner-wear of the prosecutrix as well as of the appellant. Counsel submits that human semen was found in the vaginal smear of the prosecutrix, hence, under these circumstances, the prosecution has proved its case beyond reasonable doubt against the appellant and thus, he has been rightly convicted and sentenced by the learned trial Judge vide impugned judgment dated 18.12.1991. Counsel submits that under these circumstances, interference of this Court is not warranted.

III. Analysis of evidence:

6. Heard and considered the submissions made at Bar and perused the material available on the record.

7. To bring home the guilt of the appellant, the prosecution has examined as many as seven witnesses. The prosecutrix PW-1 “S” was 05 years of age when the incident took place. She has stated that the appellant was residing in her home as a tenant. On 07.02.1985 around 4.30 PM, the appellant called her in his room and forcefully made her to lay on the bed and removed her inner wear and touched his genitals on her genitals and pressed his genitals, because of which the underwear got wet due to water (semen). She narrated the entire incident to her mother who then told it to her father.

7.1 This witness was cross-examined by the appellant but she has narrated the incident as it is whatever happened

with her on the day of the incident. Though, slight improvement was there in her Court statements which were missing in her police statement (Ex-D1) and the reason was obvious, as the incident occurred on 07.02.1985 while the Court statements were recorded after more than five years i.e. on 07.06.1990.

8. PW-2 Babulal is the Head Constable who deposited the sealed packets of the seized articles of the case in the Malkhana.

9. PW-3 "K" is mother of the prosecutrix and she has stated that five years back in the second month, she was cooking food and around 4:30 PM her daughter came weeping and told her that the appellant pushed his genitals into her genitals and she saw the wet underwear of her daughter and when the husband came around 7.00 PM, she narrated the whole incident to him.

10. PW-4 Ram Prasad is a witness in whose presence the clothes of the prosecutrix were seized vide Ex-P1 and the underwear of the appellant was also seized by the Police vide Ex-P2 and the site plan (Ex-P3) of the place of occurrence was prepared. In cross-examination this witness has stated that the clothes were seized on the next day of the incident.

11. PW-5 "S" is father of the prosecutrix who has given similar statement as given in the FIR, that when he came back to home after his duty, his wife narrated the entire incident to him, as narrated to her by his daughter. He was disturbed by this incident and thereafter he reported

the matter to the police by lodging FIR (Ex-P5) at the Police Station, Baran.

11.1 This witness as well as the prosecutrix and her mother were thoroughly examined by the appellant but not a single question was put to them about the reason of false implication of the appellant in this case.

12. PW-6 Dr. P. Jhanwar is the Medical Officer who examined the prosecutrix and he has stated that he did not find insertion of any object into the genitals of the prosecutrix but he took two slides for the purpose of analysis. On the same day he examined the appellant where he found him capable to commit sexual intercourse.

12.1 He prepared the medical report Ex-P6 of the prosecutrix and Ex-P7 of the appellant, but no cross-examination has been done by the appellant about the medical examination of the prosecutrix.

13. The last witness PW-7 Ravi Karan is the Investigating Officer who conducted investigation and collected the evidence and submitted charge-sheet against the appellant. He registered the FIR (Ex-P4) and recorded the statements of the witnesses and arrested the appellant vide arrest memo (Ex-P8) and he prepared the disclosure statement (Ex-P9) made by the appellant before him about the place of occurrence where the incident occurred. In cross-examination, this witness has stated that a washed underwear of the accused was seized, during the course of investigation.

14. After closure of the prosecution evidence the statements of the appellant were recorded under Section 313 Cr.P.C., wherein, he denied his participation in the incident and stated that he has been falsely implicated due to enmity, but in defence no evidence was produced.

15. The trial Court found the appellant guilty of the offence of attempting rape on the prosecutrix on the basis of evidence of prosecution witnesses as well as the corroboration of the allegation with the chemical analysis report (Ex-P10) submitted by the FSL**,** wherein human semen was detected on the undergarments of the prosecutrix and the appellant, and also in the vaginal smear of the prosecutrix.

16. The whole case of the prosecution is based on the solitary evidence of the child witness PW-1 “S” with whom the incident has taken place. This Court has carefully examined her statements wherein she has categorically stated that the appellant called her in his room and laid her on the bed and undressed her and himself and touched his genitals on her genitals and pressed it due to which she felt pain and her underwear got wet. This witness was cross-examined by the appellant and slight improvement and contradictions were found, from her earlier statements which were recorded before the Police (Ex.D1). Slight contradiction and improvements in her version were obvious because when the incident occurred on 07.02.1985 this child witness was of the age of 05 years and when her statements were recorded on 07.06.1990, her age was 11 years. Even

though, the statements were recorded after 05 years and 04 months from the date of incident, the evidence of this witness has not shaken.

16.1 It is settled proposition of law that while analyzing the law with regard to assessment of the statement made by a child witness, the Court has to take into account the fact that a child witness is vulnerable and susceptible under imposing atmosphere which a courtroom presents.

16.2 The statements of the victim girl in the present case has to be understood, analyzed and appreciated in the backdrop of the other circumstances which are to be corroborated by the scientific evidence of FSL. Thus, merely because the victim has not stated anything about the actual assault does not lead to a conclusion that it has not taken place. Her statement, having regard to her tender age and vulnerabilities, has to be appreciated in the light of FSL report.

17. As per the evidence available on the record, the accused laid her on a bed and undressed her and himself, and then tried to press his genitals to enter into her genitals and got discharged. The human semen was found on the inner wear of both the victim and the appellant and so also in the vaginal smear of the prosecutrix. Her version regarding the occurrence has not shaken even though she has been subjected to lengthy cross-examination by the defence. In fact, the defence could not make out a case that why such allegations have been levelled against the

appellant by a child of the age of 05 years. The appellant has failed to make out a case as to why he has been falsely booked in the present case.

IV. Law on the issue:

18. Now the question remains for adjudication of this Court is whether the offence under Section 376/511 IPC is made out or not?

19. For an offence of attempting to commit rape, the prosecution must establish that it has gone beyond the stage of preparation. The difference between mere preparation and actual attempt to commit an offence consists chiefly in the greater degree of determination, as has been held by the Hon'ble Apex Court in the case of **Madan Lal Vs. State of Jammu & Kashmir** reported in **AIR 1998 SC 386**. In para 12, the Hon'ble Apex Court observed as under:-

> "The difference between preparation and an attempt to commit an offence consists chiefly in 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 state of preparation."

20. What constitutes an "attempt" is a mixed question of law and fact depending largely on the circumstances of the particular case. "Attempt" defines a precise and exact definition. Broadly speaking, all crimes which consist of the commission of affirmative acts are preceded by some covert or overt conduct which may be

divided into three stages. The first stage exists when the culprit first entertains the idea or intention to commit an offence. In the second stage, he makes preparations to commit it. The third stage is reached when the culprit takes deliberate overt steps to commit the offence. Such overt act or step in order to be "criminal" need not be the penultimate act towards the commission of offence. It is sufficient if such act or acts were deliberately done and manifest a clear intention to commit the offence aimed, being reasonably proximate to the consummation of the offence.

20.1 In order to constitute "an attempt", first, there must be an intention to commit a particular offence; second, some act must have been done which would necessarily have to be done towards the commission of the offence and third, such act must be "proximate" to the intended result. The measure of proximity is not in relation to time and action but in relation to intention to commit a crime. In other words, the act must reveal, with reasonable certainty, in conjunction with other facts and circumstances and not necessarily in isolation, an intention, as distinguished from a mere desire or object, to commit the particular offence, though the act by itself may be merely suggestive or indicative of such intention, but that it must be, that is, it must be indicative or suggestive of the intention.

21. In the case of **Rex Vs. Lloyed** reported in **(1836) 7 C&P 318**, Lord Patterson, J. on the point:

whether the act of the accused amounted to an attempt to commit rape in summing upheld as under:

> "In order to find the accused guilty of an assault with intent to commit a rape, you 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. We believe that in this country indecent assaults are often magnified into attempts at rape, and even more often into rape itself; and we think a conviction of an attempt at rape ought not to be arrived at, unless the Court be satisfied that the conduct of the accused indicated a determination to gratify his passions at all events, and in spite of all resistance. In the present case, having regard to the medical evidence, and to the varying statements made at different times by the complainant, we find it impossible to place entire reliance upon her statement; and, as to the extent of the violence to which she was subjected, there is no evidence except her own statement. The Sessions Court has not believed her allegation that penetration took place and has consequently refused to convict the accused of rape. We feel a similar hesitation in coming to the conclusion, on the complainant's unsupported statement that the accused's conduct amounted to an attempt to commit rape. He seems to have desisted before he was interrupted; and no evidence has been given to show that the complainant's person showed marks of violence (while the Civil Surgeon's evidence is to the contrary effect), nor that the clothes, either of the complainant or the accused showed any stains which would indicate to what point the accused's criminality had proceeded."
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> In that case conviction was made under Section 354 I.P.C.

22. The distinction between an attempt to commit rape and to commit indecent assault is sometimes very measure. For the former, there should be some action on the part of the accused which would show that he is just going to have sexual connection with the prosecutrix. For an offence of an attempt to commit rape the prosecution must establish that it has gone beyond the stage of preparation. The difference between mere preparation and actual attempt to commit an offence consists chiefly in the greater degree of determination.

23. This Court in the case of **Sittu Vs. State of Rajasthan** reported in **AIR (Raj.) 1967 (3) 149**, while dealing with the case whether case for offence under Section 376/511 I.P.C. was found or not, held that where girl was forcibly made naked, the accused tried to force male organ into her private parts despite strong resistance from her, would amount to attempt to commit rape and not merely indecent assault.

24. Perusal of both the provisions of Sections 376 and 511 IPC shows that, an offence of attempt to rape would be proved, if at all the case falls within the definition of Section 375 IPC.

25. It is a settled proposition 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.

26. There is a visible distinction between 'preparation' and "attempt" to commit an offence and it all depends on the statutory edict coupled with the nature of evidence 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.

27. 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 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.

28. Section 511 IPC 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 for other imprisonment**--
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> 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".

29. It is extremely relevant at this stage to brush up the elementary components of the offence of "rape" under Section 375 IPC, as was in force at the time when the occurrence took place in the instant case.

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 five following descriptions:-

First.-Against her will.

Secondly.— Without her consent.

Thirdly -With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.

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 beileves herself to be lawfully married.

Fifthly. —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.

30. The Hon’ble Apex Court in **Madan Lal vs. State of J&K** reported in **1997 (7) SCC 677** 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:

> “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 354 IPC and not an attempt to commit rape under Section 376 read with Section 511 IPC. 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."

31. The difference between "attempt" and "preparation" in a rape case was again elicited by the Hon'ble Supreme Court in **Koppula Venkat Rao vs. State of A.P.** reported in **2004 (3) SCC 602** laying down that:

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

11. In order to find an accused guilty of an attempt with intent to commit rape,

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

32. There is overwhelming evidence on the record to prove the appellant's deliberate overt-steps to call the minor-victim in his room and lay her on the bed and undress her and himself and push his genitals into her genitals and discharged semen. As the child cried due to pain, the appellant could not succeed in his penultimate act and there was a sheer providential escape from actual penetration. Had the appellant succeeded in penetration, even partially, his act would have fallen within the definition of "rape" as defined under Section 375 IPC.

33. The evidence available on the record indicates that the appellant has fiddled with the private parts of the victim by pressing his genitals into her genitals and discharged semen when she cried due to pain. There is a cogent evidence available on the record as per FSL report Ex-P10 that semen was found on certain parts of the body and clothes of the victim and the appellant. Thus, the evidence on the record clearly shows that the appellant has

done all that was required in accomplishing his evil desire of committing rape upon the victim, when she cried due to pain and he was discharged. Therefore, it is a clear cut case of attempt to rape.

V. Conclusion:

34. For what has been discussed hereinabove, this Court does not find any ground to interfere with the well reasoned and well crafted judgment of the trial Court and thus, for the reasons stated above, this Court does not find any merit in the instant appeal. The impugned judgment of conviction and sentence passed by the trial Court is upheld and the appeal is dismissed accordingly.

34.1 The bail and surety bonds of the appellant stand cancelled. The appellant is directed to surrender before the trial Court within two weeks and serve the remainder of his sentence, as awarded by the trial Court. In case, the appellant fails to surrender within the above stipulated time, the trial Court is directed to send the warrant of arrest to the concerned police authorities to arrest the accused appellant and prepare the compliance report and send the same to this Court.

34.2 Record be sent back to the trial Court for necessary compliance.

(ANOOP KUMAR DHAND),J

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