
(2021) 11 CAL CK 0060

Calcutta High Court (Appellete Side)

Case No: C.R.A. No. 678 Of 2018, IA No. CRAN 2 Of 2021

Bibhas Dey

APPELLANT

Vs

State Of West Bengal

RESPONDENT

Date of Decision: Nov. 24, 2021

Acts Referred:

- Indian Penal Code, 1860 - Section 354A, 354A(1)(I), 376, 511
- Code Of Criminal Procedure, 1973 - Section 313, 428

Hon'ble Judges: Bibek Chaudhuri, J

Bench: Single Bench

Advocate: Fazlur Rahman, Prasant Kumar Banerjee, Ranabir Roy Choudhury, Anasuya Sinha, Pinak Kr. Mitra

Judgement

The instant appeal is directed against the judgment and order of conviction and sentence dated 25th July, 2018 and 27th July, 2018 passed by the

learned Additional Sessions Judge, Chandernagore in Sessions Trial No.44 of 2014, corresponding to Sessions Case No.07 of 2014 which arose out of

Bhadreswar P.S. Case No.256 of 2013 dated 7th July, 2013 under Section 376/511 of the Indian Penal Code sentencing the appellant to suffer

rigorous imprisonment for 5 years and to pay fine of Rs.2000/-, in default, to suffer further imprisonment of one month.

A very short question is involved in the instant appeal, viz., the specific act of the accused/appellant, even if admitted, tantamounts to commission of

offence under Section 376/511 of the Indian Penal Code.

In order to substantiate the charge under Section 376/511 of the Indian Penal Code, Prosecution examined 9 witnesses. Defence case as disclosed

from the cross-examination of the witnesses on behalf of the Prosecution as well as examination of the accused under Section 313 of the Code of

Criminal Procedure and evidence of the three witnesses on behalf of the defence is that of false implication of the accused due to animosity between

the parties due to landed property dispute.

It is needless to say that in an offence of sexual assault or attempt to commit sexual assault, it is the evidence of the victim girl that matters most.

Accomplice theory cannot be applied in case of the evidence of the victim girl. She is the injured witness and it is expected that she will not make

false allegation against an innocent person at the cost of her feminine dignity, honour and chastity.

The case in hand discloses an incident which took place on 7th July, 2013, when the de facto complainant (P.W.1) did not find her mentally retarded

daughter, she conducted search and went to the house of her neighbour, the appellant herein. She found the door of the room of the appellant closed

from inside. She peeped through the window and found that the accused was lying over the body of the victim girl, tried to commit rape upon her. The

same narration was made in the written complaint filed by the mother of the victim girl in the local police station. Another important aspect that

requires a special mention is that the victim girl was medically examined on the same day at about 1:50 p.m. by P.W.2, Dr. Santosh Kumar Hazari.

During examination, he did not find any external injury over the body of the victim girl.

There was no injury seen over vulva of her private parts and

the hymen was intact.

It is found from the evidence of the victim girl (P.W.4) that on the date and time of occurrence, the accused/appellant pressed her breast and thigh

after lying her down. It is already recorded that the victim girl is mentally retarded. However, her evidence was recorded by the Trial Judge on his

satisfaction that she was able to give answer to normal questions rationally.

The said witness was cross-examined and she withstood the test of cross-examination successfully. Therefore, this Court has no reason to disbelieve

the evidence of P.W.4.

Now the most important question that requires to be answered in the instant appeal is as to whether the specific act done by the appellant comes

within the purview of attempt to commit rape.

In *Aman Kumar & Anr. Vs. State of Haryana* reported in 2004 SCC (Cri) 1497, the Hon'ble Supreme Court had the occasion to consider the

scope of an attempt to commit an offence. The relevant portion of the said report is reproduced below:-

“The plea relating to applicability of Section 376 read with Section 511 of the Indian Penal Code needs careful consideration. In every crime, there

is first intention to commit, secondly, preparation to commit it, thirdly, attempt to commit it. If the third stage, i.e., attempt is successful then the crime

is complete. If the attempt fails, the crime is not complete, but law punishes the person attempting the act. The Section 511 is a general provision

dealing with attempts to commit offence not made punishable by other specific sections. It makes punishable all attempts to commit offences

punishable with imprisonment and not only those punishable with death. An attempt is made punishable because every attempt, although it falls short

of success, must create alarm which by itself is an injury, the moral guilt of the offender is the same as he had succeeded. Moral guilt must be united

to cause injury in order to justify punishment. As the injury is not as grave as if the act had been committed, only half the punishment is awaited.”

Thus, in order to prove a charge under Section 376/511 of the Indian Penal Code, prosecution was under obligation to establish all the ingredients of

offence under Section 376 of the IPC, short of penetration. If a victim girl is molested, the accused commits an offence under Section 354A of the

Indian Penal Code.

Considering the entire evidence on record, this Court finds that the accused made physical contact and advances involving unwelcome and explicit

sexual overtures within the meaning of Section 354A (1)(I) IPC and accordingly, he is liable to be punished with rigorous imprisonment which may

extend to 3 years or with fine or with both.

Therefore, this Court finds that the prosecution failed to establish the charge under Section 376 by Section 511 of the Indian Penal Code. However,

from the evidence on record, it is established beyond any shadow of doubt that the accused committed offence of sexual harassment within the

meaning of Section 354A of the Indian Penal Code.

It is needless to say that in view of the provision of Section 222(1), this Court can hold the accused guilty for committing a minor offence, though he

was not charged with it. Applying the provision of Section 222(1), the appellant is convicted for committing offence under Section 354A of the Indian

Penal Code.

Accordingly, the appellant is sentenced to rigorous imprisonment for 3 years.

The Trial Court's judgment and order of conviction and sentence is modified accordingly.

The period of punishment shall be set off under Section 428 of the Code of Criminal Procedure against the actual period of imprisonment and if the

appellant serves out rigorous imprisonment of 3 years, he shall be released at once.

A copy of this judgment be immediately sent to the learned Court below along with the lower court record for information and compliance.

The appellant is at liberty to act on the server copy of this order.