(2009) 05 GAU CK 0028

Gauhati High Court

Case No: Criminal Appeal No. 72 of 2002

Bhaiti Lal		APPELLANT
	Vs	
State of Assam		RESPONDENT

Date of Decision: May 19, 2009

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 164, 313
- Penal Code, 1860 (IPC) - Section 354, 376, 511

Citation: (2010) 1 GLR 844 : (2009) 4 GLT 604

Hon'ble Judges: H.N. Sharma, J

Bench: Single Bench

Advocate: S.R. Bhattacharjee, for the Appellant; K. Munir, Addl. P.P., for the Respondent

Final Decision: Allowed

Judgement

1. The challenge in this criminal appeal is the judgment and order dated 28.1.2002 passed in Sessions Case No. 75(K)/98 by the learned ad hoc additional Sessions Judge, No. 2, Kamrup, Guwahati, convicting the accused appellant u/s 376/511 IPC and sentencing him to undergo R.I. for 5(five) years and to pay fine of Rs. 1,000 in default further R.I. for 3 months.

2. I have heard Mr. S.R. Bhattacharjee, Learned Senior Counsel for the appellant, and Mr. K. Munir, learned Addl. Public Prosecutor for the State.

3. The prosecution case, as unfolded, inter alia, is that on 28.10.1993 in the evening at about 6.30 P.M., the accused allured the minor-daughter of the informant aged about 10 years and tried to rape her. The accused allured the minor offering her to provide some chocolates and took her to a nearby school wherein, he undressed himself and also undressed the victim girl and tried to rape her. The victim girl, PW3 having raised hue and cry, the accused fled away. The information about the occurrence was lodged by PW1, the mother of the victim girl, who was informed by

her daughter about the occurrence. The FIR was lodged on the same day with Satgaon Police Outpost wherein the police taking note in general dairy, being G.D. Entry No. 628 forwarded the same for registration to Noonmati wherein it was registered as Noonmati P.S. Case No. 176/93 u/s 376/511 IPC Ext. 2 is the said FIR.

Upon receipt of the FIR and upon registration of the same the process of investigation was set into motion. During the course of investigation the statement of the victim girl was recorded u/s 164 Cr. PC before the Magistrate which is exhibited as Ext- 1. The I.O., recorded the statement of witnesses and the victim was examined by doctor and after completion of the investigation and having found a prima facie case against the accused submitted charge-sheet against him u/s 376/511 IPC and forwarded him for trial. The case being exclusively triable by the Court of Sessions, the learned Addl. C.J.M., Kamrup, Guwahati, committed the same for trial to the Court of Sessions. The case was registered as Sessions Case No. 75(K) of 98 and was transferred to the court of the learned Additional Sessions Judge for necessary trial wherein charge u/s 376/511 IPC was framed against the accused, to which he pleaded not guilty and claimed to be tried. Thereafter the case was further transferred to the court of the learned ad hoc Additional Sessions Judge for necessary disposal.

4. During the course of trial prosecution examined as many as 5 PWs including the informant and I.O., whereas the accused examined none. After closure of the prosecution witnesses the accused was examined u/s 313 Cr.PC, pointing out to the circumstances that appeared against him during the course of trial but he denied the same.

5. The learned trial judge upon appreciation and consideration of the evidence available on record held the petitioner to be guilty of the offence and sentenced him in the manner as indicated above vide impugned judgment and order dated 28.1.2002. Challenging the impugned judgment and order, the appellant, has approached this Court by filing this criminal appeal.

6. Mr. Bhattacharjee, Learned Senior Counsel appearing for the appellant during the course of his argument led me to the statements of the PWs. Commenting on the statements of the PWs, Learned Counsel submits that the statements of PW3 are full of contradictions and on the basis of such contradictory evidence it is not safe to uphold the conviction and sentence so imposed upon the accused. The Learned Counsel further submits that the facts as proved in the case do not attract an offence under Sections 376/511, IPC and at best, it may be an offence u/s 354 IPC. It is further submitted that the offence having been committed way back, in the year 1993 and the victim girl having done married in the meantime, the petitioner may be released on probation of good conduct by applying the provisions of the offenders Act.

7. Mr. Munir, the learned Addl. Public Prosecutor per contra, refuting the contentions made on behalf of the petitioner, submits that upon careful appreciation of the evidence of the prosecution witnesses disclose the present case to be case falling under Sections 376/511 of the IPC and there are ample materials to show that the accused attempted to commit rape upon the victim who is a minor girl around 10 years of ago and the learned trial judge has rightly convicted him.

8. The rival submissions of the Learned Counsel have received duo consideration of the court. The submissions of the Learned Counsel led the court to peruse and scrutinize the statement of PWs on record and other materials.

9. In the instant case prosecution examined a many as 5 witnesses out of which PW1 is the mother of the victim who lodged the FIR. The victim girl was examined as PW3 and PW4 is the Magistrate who recorded the statement of the victim u/s 164 Cr.PC on 1.1.1993 whereas PW5 is the I.O.

PW2 is the father of the victim girl and his evidence is not very much material for the prosecution.

Now let us scrutinize the statements of the prosecution witnesses to arrive at the conclusion as to whether the learned trial judge was justified in law and facts in convicting and sentencing the accused.

PW1, the mother of the victim is not eye witness to the occurrence. The facts reported to her by her daughter (PW3), the victim, have been disclosed by her in her evidence that the accused had allured her to provide her with chocolate and took her to a nearby solitary house and untied her pant and tried to commit rape on her. Upon hearing the said statement PW1 intimated the police or Satgaon police outpost wherein she lodged the FIR vide Ext- 1. In cross she denied the suggestion that the accused has been falsely implicated as they had quarrel with the accusers.

PW2 is the father of the victim girl and his evidence are not so material for the prosecution.

The statement of PW3, the victim girl is very vital for the prosecution in this case. In her statement she stated that she knows the accused, on the day of occurrence at about 6.30 P.M. while he was in her courtyard, the accused allured her telling her that he would purchase for her something from the market, and in this way she took her to a nearby school in the evening wherein he by applying force untied her pant and tried to rape her. When she raised hue and cry the accused fled away. She further stated that on being informed about the incident to police, got her examined by Doctor. Her statement was also recorded before the Magistrate:

In cross she stated that she is presently married and does not know the name of the accused but she knows the name of the father of the accused. She reiterated her statement as regards the commission of offence by the accused as made in her examination-in-chief and the said fact could not be demolished by the defence,

although he was cross-examined at length.

PW4, Smt. S. Hazarika, the Judicial Magistrate who proved the statement of the victim girl recorded by her u/s 164, Cr.PC as Ext-1 and Ext-1(1) is her signature. This witness was not cross-examined by the defence.

PW5 the I.O., has narrated that on 29.10.1993 he was in-charge of Hatgaon police outpost and on that day PW2 intimated her by lodging an FIR that 10 year old girl was attempted to rape by the accused and he forwarded the FIR for registering a case to Noonmati Police Station. He having been entrusted with the responsibility of investigation, investigated the case. Exhibit-2 is the said FIR wherein Ext-2(1) is his signature and Ext-2(2) is the signature of the O.C., Noonmati Police Station. After completion of the investigation he submitted charge-sheet against the accused u/s 376/511 IPC. The defendant did not cross-examine the I.O. at any point except giving the suggestion that on he relevant date he was not the in-charge of the Satgaon Police Out post.

10. On the background of the aforesaid evidence adduced by the prosecution witnesses we are to examine as to whether the prosecution has been able to prove the case against the accused. The statement of the victim girl was recorded u/s 164 Cr.PC vide Ext-1 on 7.11.2001. In her statement she has categorically stated the facts as she has deposed before the court. Crux of her deposition is that the accused after taking her to a nearby school untied his own dress and also untied the pant of the victim and tried to commit rape on her by force and when the victim raised hue and cry the accused fled away. The statements of the PWs, more particularly, PW3 and PW1 coupled with the statement recorded u/s 164 Cr.PC are in the same tune. The materials on record clearly disclose that on the date of occurrence in the evening at about 6.30 P.M. the accused allured the victim girl by asking her to provide some chocolate and took her to the nearby school. At that time it was evening and certainly there was darkness inside the school. The accused with the idea what was in his mind took her to the nearby school and undressed the victim and also undressed himself and when he tried to rape her, she raise hullah and the accused fled away.

11. From the materials available on record there is nothing to disbelieve the aforesaid facts as alleged against the accused which is duly proved by the PWs. The statement of the victim girl is clear and firm and she had reiterated the same all throughout right from the disclosure before her mother, PW1 and her statement recorded u/s 164 Cr.PC. There is no infirmity in the prosecution case as regards the proof of the facts as alleged by the prosecution against, the accused.

12. Mr. Bhattarcharjee relying on the decision of the Apex Court Aman Kumar and Another Vs. State of Haryana, submits that in the instant case the intention to commit an offence u/s 376 IPC by the accused could not be proved nor there was any such intention to commit the offence, it is contended that for holding 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 fulfil his passions upon her person, but also intended to do the act at all cost, and notwithstanding any resistance on her part. In the instant case such evidence are lacking, in the said case the Apex Court at paras 8, 9, and 10 held as follows.

8. The plea relating to applicability of Section 376 read with Section 511 IPC 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, that is, attempt is successful, then the crime is complete, if the attempt fails that crime is not complete, but law punishes the person attempting the act. Section 511 is a general provision dealing with attempts to commit offences 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, and the moral guilt of the offender is the same as if he had succeeded. Moral guilt must be united to injury in order to justify punishment. As the injury is not as great as if the act had been committed, only half the punishment is awarded.

9. A culprit first intends to commit the offence, then makes preparation for committing it and thereafter to commit the offence, if the attempt succeeds, he has committed the offence; if it fails due to reasons beyond his control, he is said to have attempted to commit the offence. 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 towards the commission of the offence. The moment he commences to do an act with the necessary intention, lie 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 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 towards the object chosen upon considering the motives which suggest the choice. Preparation consists in devising or arranging the means or measures 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 punishable only when the preparation is to commit offences u/s 172 (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. There is a greater degree of determination in attempt as compared with

preparation.

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 failing short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt to consists in its the intent to commit a crime, falling short of, its actual commission. 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.

13. The position of law as regards an attempt to commit an offence of rape has also came to be examined by the Apex Court in the case of Koppula Venkat Rao Vs. State of Andhra Pradesh, as cited by the learned Additional P.P. Mr. Munir. In order to commit an offence the preparation for commission of crime should be prior to the attempt to commit the offence and if the attempt succeeds then the crime is complete. In the instant case, the learned Public Prosecutor submits that prosecution has been to prove that the accused intent to commit the offence was pre-planned and that is why he took the victim to the secret place nearby the school at dusk time at about 6.30 P.M. and undressed himself and also undressed the victim and tried to commit rape on her. Those acts are sufficient enough to disclose that he attempted to commit the offence of rape punishable u/s 376 IPC in the case of Aman Kumar (supra) the Apex Court at paragraphs 8, 9, 10 and 11 held as follows:

8. The plea relating to applicability of Section 376 read with Section 511 IPC 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, that is, attempt is successful, then the crime is complete. If the attempt fails that crime is not complete, but law punishes the person attempting the act. Section 511 is a general provision dealing with attempts to commit offences 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, and the moral guilt of the offender is the same as if he had succeeded. Moral guilt must be united to injury in order to justify punishment. As the injury is not as great as if the act had been committed, only half the punishment is awarded.

9. A culprit first intends to commit the offence, then makes preparation for committing it and thereafter to commit the offence. If the attempt succeeds, he has committed the offence; if it fails due to reasons beyond his control, he is said to have attempted to commit the offence. 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 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 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 towards the object chosen upon considering the motives which suggest the choice. Preparation consists in devising or arranging the means or measures 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 punishable only when the preparation is to commit offences u/s 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. There is a greater degree of determination in attempt as compared with preparation.

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 failing short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt to consists in its the intent to commit a crime, falling short of, its actual commission. 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 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 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.

14. Applying the provisions of law as regards offence of attempted rape covering three stages, namely, intention, preparation and attempt, we find in the instant case that the accused-appellant allured the victim girl who was a minor of about 10 years of age and took her to a solitary place in the evening where there was no one, he undressed himself and also undressed the victim by force and at that stage, the victim raised hue and cry the accused fled away.

15. Turning to the definition of rape u/s 376 IPC in order to commit offence of rape, commission of sexual intercourse with the victim woman is necessary and for the purpose of attracting the provisions of Section 511 IPC attempt to commit an offence as defined u/s 376 IPC is necessary. Attempt to commit a crime is distinguishable from an intention to commit crime and from preparation made for its commission. The accused first intended to commit offence and thereafter he made the preparation for committing the offence.

16. Judged on the aforesaid provisions of law in the instant case we find that there are some gap between the preparation and attempt to commit the offence in the instant case and the prosecution could have filled up that gap to attract the provisions of Section 511 of the IPC.

But nonetheless evidence and the materials available on record have clearly disclose that the accused by applying force on PW3 undressed her thereby vigorously outraged her modesty. There are ample evidence against such act committed by the accused which is punishable u/s 354 IPC. In that view of the matter, the conviction and sentence imposed upon the accused u/s 376/511 IPC stands modified to the offence u/s 354 IPC. The sentence is modified to the extent that the accused is sentenced to undergo R.I. for 2 years with a fine of Rs. 1,000 in default further R.I. for 3 months.

17. Although Mr. Bhattacharjee submitted that the accused may be released on probation of good conduct applying the provisions of the Probation of Offenders Act, the foundation for applying the provisions under the Probation of Offenders Act has not been laid down by the accused. Considering the nature of offence committed by the accused, the aforesaid submissions by Mr. Bhattarcharjee stands rejected.

18. Accordingly the appeal is allowed to the extent indicated above modifying the sentence and conviction.

Since the accused is on bail, he is directed to surrender before the learned CJM, Kamrup to serve out the remaining sentence. The period already undergone shall stand setoff.

19. Send down the LCR forthwith.