(2010) 05 JH CK 0006

Jharkhand High Court

Case No: None

Pintu Paliwar		APPELLANT
	Vs	
The State of Jharkhand		RESPONDENT

Date of Decision: May 21, 2010

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 164
- Penal Code, 1860 (IPC) - Section 375, 376, 511

Hon'ble Judges: Amareshwar Sahay, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Amareshwar Sahay, J.

This appeal has been filed by the sole appellant against the judgment of conviction and order of sentence dated 15/12/2006 and 18/12/2006 respectively passed by the Additional Sessions Judge, FTC-IV, Deoghar in S.T. No. 202 of 2005/ 83 of 2006, whereby he has been convicted for the offence u/s 376 IPC for committing rape upon the prosecutrix Priti Kumari Keshri and, thereby, has been sentenced to undergo R.I. for a period of 10 years and to pay a fine of Rs. 5000/- and in default of payment of fine to further undergo 3 months imprisonment.

2. The prosecution case in short is that on 31/12/2004 the prosecutrix Priti Kumari Keshri was alone in her house. On that day at about 4.30 P.M. she went out to fetch water and then came back to her house. Thereafter, in order to go the shop of her father, while she was going to lock the doors, the appellant Pintu Paliwar came there and forcibly took away keys from her hand, opened the door, gagged her mouth and forcibly took her inside the room. Thereafter, the appellant forcibly laid her on the ground and after undressing her, committed rape on her. After commission of rape he threatened her not to disclose the matter to any one otherwise to be prepared to face the consequences. On the basis of the written

report, FIR was registered u/s 376 of the India Penal Code. The police after completion of investigation submitted charge sheet against the appellant u/s 376 IPC. Thereafter, cognizance was taken and the case was committed to the Court of Sessions.

3. In order to establish the charges altogether 6 witnesses were examined on behalf of the prosecution, out of whom, PW-1 is Srinath Keshri, PW-2 is Manoj Keshri, PW-3 is Santoshi Devi, PW-4 is the informant Priti Kumari Keshri, i.e. the victim herself, PW-5 is Dr. Minu Mukerjee, is one of member of the Medical Board, who medically examined the victim girl on 31/12/2004, i.e. on the same day of the occurrence. She proved the report of the Medical Board and PW-6 is the Investigating Officer of the case.

4. During the investigation the prosecutrix PW-4 was also examined u/s 164 Cr.P.C. Which has been marked as Ext.-3 on behalf of the prosecution.

5. The learned trial court on consideration of the evidence and materials on record found the appellant guilty for committing the offence u/s 376 and thereby sentenced him accordingly.

6. Mr. Tripathy, learned senior Counsel appearing for the appellant submitted that in view of the evidence of the prosecution witnesses, the entire occurrence cannot be denied or disputed and as such he is not challenging the whole occurrence. But, at the same time he submitted that if the evidence of the prosecution witnesses particularly of the victim girl made at different stages is scrutinized minutely then it would disclose that at best it can be said that the appellant attempted to commit rape on the victim but he did not succeed or he did not commit. He further submitted that the prosecution failed to establish the ingredients or the offence of rape and, therefore, the conviction and sentence passed by the trial court against the appellant for the offence u/s 376 IPC is not sustainable in the eyes of law.

According to the learned senior counsel, at best the appellant can be held guilty for the offence u/s 376/511 IPC. Further, according to him the law provides maximum punishment for attempting to commit an offence u/s 511 IPC is only half of the punishment provided under the main offence.

7. In order to substantiate his argument, learned senior Counsel has taken me to the evidence of the prosecution witnesses, as well as the statement of the victim, the contents of the FIR and the statement of the victim recorded u/s 164 Cr.P.C. and also the evidence of the prosecutrix in Court during the trial.

8. From the contents of the fardbeyan lodged by Priti Kumari Keshri, i.e. the prosecutrix, it appears that she has stated therein that she used to live with her father in the house of Sushi Paliwar Panda on rent. On 31/12/2004, at about 4.30 p.m., she was alone in her house. While she was locking the door of her house in order to go to the shop of her father, Pintu, her neighbour, (the appellant) came

there and grabbed the keys from her hand and opened the lock from one hand and gagged her mouth from the other hand. Thereafter, took her inside the room and then laid her on the ground and after removing the clothes committed rape on her and, thereafter, threatened her not to disclose this fact to anyone.

The said victim Priti Kumari recorded her statement u/s 164 Cr.P.C. On 13/01/2005, wherein she stated that while she was locking the room, Pintu Paliwar arrived there and gagged her mouth. After opening the lock he took her inside the room and, thereafter, laid her on the bed. When he was removing his pant, at that time she scratched him with her nails. He remained laid on her for 10 to 15 minutes and, thereafter, she could rescue herself from his clutches and then fled away to the shop of her father, where she narrated the story to her father and another.

9. The said victim girl was medically examined by a Medical Board of three Doctors. Her injury report has been exhibited as Ext.-4. The victim girl was found to be aged below 14 years. No blood or seminal stains were found over her cloth. Breasts were undeveloped and no injuries were found there. The injuries which were found on her body were:

(I) Abrasion ½'' x ½'' parental right side of middle part of nose probably caused by sharp pointed thing.

(ii) Bruise 1 ½'' x 1 ½'' on lower lip caused by hard and blunt substance.

No injuries on her private part found. Hymen was found intact, no blood and seminal stains were found. No foreign hair was found on her private part. The swab taken from her vagina was sent for pathological examination and as per the report no living and dead spermatozoa were seen.

According to the opinion of the Medical Board, in view of the presence of abrasion and bruise found over her face, the same were suggestive of some sort of struggle. The medical board did not suggest as to whether any rape had been committed on her. The report of the medical board, wherein the doctors found absence of foreign hair, absence of blood or seminal stains on her private part definitely go to suggest that since as per the statement of victim girl that she scratched the appellant with her nails and, therefore, it may be that because of the protest made by the victim girl the appellant could not succeed in commission of rape on the victim girl. The statement of the victim girl as well as the report of the medical board and the evidence of the Doctor makes out a case for attempt to commit rape.

10. Though, the victim girl in her evidence in court has stated in specific term that the appellant penetrated his private part inside her private part but it appears to me that the victim girl has tried to exaggerate and develop the story. At one hand she omits to make any such statement either in the FIR or in her statement u/s 164 Cr.P.C. and on the other hand when Medical Board''s report did not show any sign of rape then the prosecution developed the story. The report of the medical board as

well as the evidence of the Doctor does not suggest that in fact there was any penetration of genitals of the appellant in the private part of the victim girl. If there would have been any penetration in her private part then the Doctor must have found some sort of injury there but as already noticed above no injury of any kind was found. Even, no foreign hairs, blood or seminal stains were found on her private part rather her hymen was found to be intact which suggest that in fact the appellant did not penetrate or he could not succeed in penetrating his private part in the private part of the victim girl.

11. In order to constitute an offence of rape penetration is must. Explanation (1) to Section 375 IPC says that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. In order to constitute penetration it must be proved that some part of the virile member of the accused was within the labia of pudendum of the women, no matter how little. The only thing to be ascertained is whether the private part of the accused entered into the person of the women. It is not necessary to decide how far they entered. Complete penetration is not necessary.

12. On similar facts as in the present case, the Supreme Court in the case of Koppula Venkat Rao Vs. State of Andhra Pradesh, ", held as follows:

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.

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.

In every crime, there is firstly, intention to commit, secondly, preparation to commit it, and thirdly, attempt to commit it. Thus, a culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offefce; if it fails

due to reasons beyond his control, he is said to have attempted to commit the offence.

Thus, 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.

13. From the facts and evidence of the present case as noticed herein above, it appears that the appellant intended to commit rape on the victim girl and with such an intention he made an attempt but he could not succeed in penetrating his genital in the private part of the victim girl. In view of the decision of the Supreme Court in the case of Koppula Venkat Rao (supra) the offence committed by the appellant in the present case would come within the purview of Section 376 read with Section 511 IPC.

14. In view of the findings and reasons stated herein above, the conviction and sentence passed by the trial court against the appellant for the offence u/s 376 IPC is hereby set aside and the appellant is held guilty for committing the offence of attempt to commit rape on the victim girl punishable u/s 376/511 IPC.

15. So far as the sentence is concerned, it appears that the appellant has already remained in custody for four years and, as such, I feel that he has sufficiently been punished for the offence for which he has been held guilty and, as such, he is hereby sentenced for a period already undergone by him in custody. The appeal is accordingly, dismissed by altering the conviction and reduction in sentence as stated herein above. The appellant, who is in custody, is directed to be released forthwith if not wanted in any other case.