(2016) 08 KAR CK 0057

KARNATAKA HIGH COURT (KALABURAGI BENCH)

Case No: Criminal Appeal No. 3536 of 2011

Shakeer Ahmadsab		APPELLANT
	Vs	
State		RESPONDENT

Date of Decision: Aug. 22, 2016

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 221(2)
- Penal Code, 1860 (IPC) - Section 376, Section 376, Section 452, Section 511

Citation: (2016) 4 AirKarR 619

Hon'ble Judges: Budihal R.B., J.

Bench: Single Bench

Advocate: Ishwaraj S. Chowdapur, Advocate, for the Appellant; P. S. Patil, HCGP, for the Respondent

Final Decision: Partly Allowed

Judgement

Budihal, R.B., J. - The Judgment and Order of conviction dated : 14.2.2011 passed by the Prl. Sessions Judge, Raichur, in S.C.No.54/ 2009 is called in question in this appeal by the accused/appellant.

2. By the said Judgment and Order of conviction, the learned Session''s Judge has convicted the accused for the offence punishable u/S section 452 & 376 of IPC and imposed 7 years of rigorous imprisonment and to pay fine of Rs.25,000/- and if he fails to pay the fine amount, he has to further undergo rigorous imprisonment for a period of six months for the offence punishable u/S.376 of IPC and he has also been imposed 2 years of "rigorous imprisonment and to pay fine of Rs.1,000/-and if he fails to pay the fine amount, he has to further undergo rigorous imprisonment for a period of one month for the offence punishable u/Sec.452, IPC.

3. The appellant/accused being aggrieved by the judgment and order of conviction for the said offences and also challenging the legality and correctness of the judgment and order of conviction of the trial court, preferred the present appeal on

the grounds as mentioned in the appeal memorandum.

4. Brief facts of the prosecution case as per the complaint averments Ex.P-1 are that the victim girl who is the daughter of one Khajavali, aged about 16-years lodged the complaint dated 26.2.2009 before the Sindhanoor police station alleging that she is residing along with her parents at Salagunda village, studying 10th standard in Government Girls High School at Sindhanoor. Every day she used to go to Sindhanoor through bus and coming back. On Wednesday, i.e. previous date of the complaint, on 25.2.2009 night at 10-00 p.m., she went to the courtyard of the another house which is nearby to the house of the complainant to answer 2nd call of nature. After completing the same, when she was about to return back, the appellant/accused under the pretext that he came there to answer first call of the nature came there and asked the complainant when she is going to the school for that complainant told that tomorrow i.e. the next day she is going to the school. When the accused person was talking with the complainant, all of a sudden embraced her and held her tightly by closing her mouth and lifted her to one portion of the said hittala (courtyard) and made her to lay on the ground and he also fell on her, removed her salwar paijama and also inner garment so also removed his lungi and his inner garment and committed sexual intercourse on her. Though she protested asking him to leave and she made cry even then she was not able to get relieved from the appellant/accused. The appellant/accused held her tightly and he has committed forcible intercourse with her. When she made hue and cry, which was heard by her uncle''s son Alam Basha s/o Shaik Moulasab and Khajasab s/o Shaikh Moulasab and so also her own brother Maheboob s/o Khajavali, they all came there, she narrated what has happened before them. As it was night, there was no arrangement for the buses she was not able to come to the police station and also as the matter was involving the dignity and honour of their family, there is a delay in lodging the complaint. Now she came to the police station along with her brother and gave the complaint by narrating the same. Legal action may be taken against the accused person who committed forcibly sexual intercourse on her. On the basis of the said complaint, case came to be registered in Sindhanoor Police Station Crime No.44/2009 for the offence punishable u/Sec.376, IPC and FIR was issued as per Ex.P-3.

5. After completing the investigation, Investigation Officer has filed the charge-sheet against the accused for the offence punishable u/Sec.376 of IPC.

6. After hearing both sides, learned Session''s Judge framed the charges against the appellant/accused for the offence punishable u/Sec.452, IPC and also u/Sec.376 of IPC. When it was read over to the appellant/ accused, appellant/accused denied the charges and claimed to be tried.

7. In order to prove its case, the prosecution in all examined 10-witnesses and produced 12-documents and also 5-material objects.

8. After hearing both sides, trial court after evaluation of the entire material placed on record, held that the offence punishable u/Ss.452 and 376 of IPC are proved by the prosecution against the appellant/accused. Accordingly, appellant/accused has been convicted for the said offences and he has been sentenced to punishment of rigorous imprisonment and fine, as I have already referred above.

9. Being aggrieved by the said judgment and order of conviction, the appellant is before this Court.

10. I have heard the arguments of the learned counsel for the appellant/accused and also learned HCGP for the respondent-State.

11. Learned counsel for the appellant, during the course of argument, made the submission that, looking to the entire material placed on record, both oral and documentary, the prosecution utterly failed to prove the charges as against the appellant/accused, but, even then, the trial Court wrongly read the evidence and wrongly proceeded to convict the appellant/ accused. Learned counsel submits that in the complaint lodged by the victim girl, she has not mentioned about the injuries on her chest portion and he submitted that, it is only during the course of'' evidence in cross-examination before the court so also the Doctor who examined her not mentioned about those injuries. Learned counsel made the submission that even looking to the medical evidence, the FSL report is negative. There is no presence of semen and spermatozoa and even there are no blood stains found on the articles sent for FSL examination. Learned counsel submitted that as per the case of the prosecution immediately after the incident the clothes of the victim girl as well as the accused person were seized by the police and sent for FSL examination. Hence, it is his contention that if it is so, if really there is sexual intercourse as alleged by the prosecution, there could have been some materials. As per the FSL report there is no presence of semen and spermatozoa or at least blood stains on the clothes of either victim or the accused person. He submitted in respect of all the items sent for FSL there is negative finding. He also made submission that when the accused person went to the Hittal portion in order to commit rape on the victim girl and when he tried to embarrass her she could have cried loudly which is not done in this case. This itself goes to show that no such incident has taken place. He made further submission that looking to the evidence of victim girl she told that after committing forcible sexual intercourse, the appellant/accused ran away from that place, thereafter she made hue and cry. Then her brother and other relatives came to the spot, whereas the evidence of PW 2 and other witnesses go to show that when they came the accused still slept on the body of the complainant. Then after seeing them he stood up and he ran away from the said place. Hence, the counsel submitted that looking to these materials placed on record it cannot be believed that the accused committed rape on the victim girl in the manner as stated in the complaint, so also deposed in the oral evidence. Hence, the learned counsel submitted that all these important material aspects were not properly considered and appreciated by the

Sessions Court and accused has been wrongly convicted for the said offences. Learned counsel submitted to allow the appeal and to set aside the judgment and order of conviction and appellant/ accused be acquitted for the said charges.

12. Per contra the learned High Court Government Pleader during the course of his arguments made the submission that regarding the injuries sustained by the victim girl, there is material placed on record by the prosecution through the mouth of the doctor who examined the victim girl wherein it is furnished the history and it is mentioned and noticed by the doctor. He also made the submission that even the doctor who examined deposed in her evidence that there is rupture of hymen. The victim girl consistently deposed before the Court on oath about the forcible sexual intercourse committed on her by the appellant/accused. Learned High Court Government Pleader submitted that though there may not be positive finding in the FSL report, but when her story before the Court is true and acceptable, it does not require corroboration from any other materials and even if it is not supported by the FSL report, but her evidence and the doctor''s evidence clearly goes to show that such an offence has been committed on her. Learned Government Pleader also made the submission that if such incident has not at all taken place, then what was the motive or purpose for which the complaint has been lodged against this particular accused and why not against other persons. Hence, the learned High Court Government Pleader made the submission that the Trial Court considered each and every aspect of the matter in a proper perspective and rightly comes to the conclusion holding that the prosecution proved its case beyond all reasonable doubt that the appellant/ accused has committed the alleged offence on the victim girl and rightly convicted the appellant/accused for the said offences. He also made submission that no illegality has been committed, nor any perverse or capricious view taken by the Trial Court in coining to such conclusion. Hence, the learned High Court Government Pleader made submission that there are no grounds for this Court to interfere into the judgment and order of conviction passed by the Trial Court. Hence, he submitted that there is no merit in the appeal and the same be dismissed.

13. Having heard the arguments of learned counsel for the appellant/accused and also the learned High Court Government Pleader, I have perused the grounds urged in the appeal memorandum, oral evidence of the parties before the Trial Court, so also the documents produced. Perused the judgment and order of conviction passed by the Trial Court and considered the submissions made by the learned counsels on both the sides at the bar. Let me consider the relevant portion in the evidence of the prosecution witnesses in order to ascertain whether the findings recorded by the Trial Court convicting the accused person for the said offence are in accordance with materials placed on record or it requires interference by this Court in this appeal.

14. The victim girl has been examined as PW 1 in this case in her examination-in-chief she narrated all the averments that she has mentioned in the complaint. She has also mentioned that as there were no facility of the vehicles during the night it was not possible to go to the police station during that night itself and on the next day in the evening at about 8.00 p.m. she went to the Sindanoor Rural police station and lodged the complaint as per Ex.P-1. There afterwards she was taken to the Government hospital and she was examined. On 27.2.2009 morning at 8.00 a.m. the police came to their place she herself shown the spot to the police and at that time police have seized her black colour chudidar and paijama, light colour inner garment and top and the witness identified them as MOs 1 to 3. She has also deposed that MOs 4 and 5 are the clothes which the accused worn at the time of the incident, i.e., blue colour inner garment and one banian. She deposed that from her village to Sindhanoor there is a tar road. Buses are plying and the bus which came during the night will be leaving in the morning. Buses were also plying from their village to Somlapur and the buses playing from Sindhanoor to Ambamath, Mukkund and Singapur. She further deposed that from her backyard portion (Hittal) there is way towards the house of one Muddayya there is a wall. On the eastern side there is a dilapidated house of one Siraj and on the southern side to the said house of Siraj a vacant place. There is east-west wall of the height of 6 feet and to the south of the said place the backyard portion of the complainant starts. She deposed that on the road people are moving day and night. Incident took place in the middle of the backyard portion (Hittal). If a person made cry from the said place, it will be heard by the persons residing in the nearby houses, but she voluntarily deposed when her mouth was gagged,- how it is possible. She further deposed that during the incident, the accused gagged her mouth from his right hand. She deposed that she assaulted the accused with hands and she has also kicked him. In that process there are injuries on her chest portion. She also deposed that there are struggle marks at the Hittal. The accused committed rape on her and it went on for half an hour. Accused committed sexual intercourse on her only one time and earlier to that he has not at all committed the sexual intercourse on her. There is a bleeding injury to her and there was bleeding injury into her private part. After the incident was over the accused removed his hand from her mouth and he went and there afterwards she made hue and cry and her brothers came. When they came she has not at all worn the clothes. She denied the suggestion that incident has not taken place as narrated by her. She told about the incident before her parents and brothers during night itself. Because of the family prestige and honour, in the morning also she had not been to the police station. She denied the suggestion that when she called to the police station, the accused was also called along with his father and insisted the accused to marry her and as accused refused to marry, as such false complaint has been filed against him. In the cross-examination she further deposed that on 27.2.2009 she has not been to the police station. As accused was having shop, her father and her uncle were making purchase in the said shop, but denied the suggestion that her father and her uncle

each were due to pay Rs.25,000/- to the accused. She also denied further suggestion that when the accused insisted them to pay due amount, because of that reason her father got filed false complaint through her against the accused person. She shown her ignorance that one Kurubara Irappa has contested for the election, but she admitted that her Senior uncle Shaik Moulasab contested for the Gram Panchayat election. She shown ignorance that accused and his father supported Kurubara Irappa, but she deposed that her senior uncle elected in the said election. She does not know what is her date of birth in the school records. She denied the suggestion that she was now aged 19 years and when she gave complaint she was 18 years old. She denied the suggestion that she has not stated before the police about the electric pole and also light at the place of occurrence.

15. PW 2 one Mehaboobsab is the brother of the victim girl who deposed that on 25.2.2009 Wednesday at 10.00 p.m. his sister went to answer the second call of nature to Hittal. For long time she did not come back, so he went there to see his sister. At that time he heard the sound that his sister was telling relieve, relieve her and not to do the act and she was crying. When he went there running, the accused was on the body of his sister and he was committing rape. When he went near-by them and still at the distance of 2-3 mar, Aalam Pasha S/o Shaik Moulasab and Khajasab S/o Shaik Moulasab came to the said place. In the meanwhile accused ran away from the said place. Though they have chased to caught hold him, he escaped. When they enquired his sister, she told about the incident committed by the accused person. She was brought to the house. The victim girl told about the incident before her mother also. They felt very bad about the incident. During that night they did not have dinner and they thought about the same and as the complainant was yet to be married, they were thinking what has to be done in the matter. He also further deposed if legal action is not taken against the accused, then he will move stating that nothing has been done to him. Hence on 20.6.2009 at 8.00 p.m. she was taken to Sindhanoor police station and she lodged the complaint. He has also identified the accused who was present before the Court who committed the incident on that day.

During the course of cross-examination he deposed that in the Hittal portion there is no stony surface. The land is also not so tight, it is muddy. He denied the suggestion that as his father was bringing the grocery from the shop of the accused, he was due Rs.25,000/- to accused. He also denied further suggestion that his senior uncle was also due to the tune of Rs.25,000/- to the accused. He deposed that in their village there is Primary Health Center. During that night they have not taken their sister to the said Primary Health Center. He denied the suggestion that they all went to the police station, but police have not registered the case during that night. He denied the suggestion that in front of his house there is no electric pole, so also denied further suggestion that in the Hittal portion there would not be light. Always there will be darkness. He further deposed that accused and his sister were on the eastern side of Hittal portion there were no clothes on the body of both. The

accused ran away from the hind portion of the said house. He deposed that in the said place there were no marks of struggle on the ground. He denied the suggestion that in his statement before the police he has not stated that when they went to the said place, the accused was on the body of his sister and he was committing forcible sexual intercourse on her.

16. PW 3 Rajaksab turned hostile and even during the course of cross-examination he has not supported the case of the prosecution. Therefore, his evidence is not useful either to the prosecution or to the defence.

17. PW 4 One Khajasab deposed in his evidence that he knows the accused present before the Court. On 25.2.2009 at 10.00 p.m. he was going to the shop in order to bring beedi, he heard the crying noise from the Hittal. PW 2 was running towards the said place, so also he went to the said place. At that time his sister was lying below and on her the accused slept. After seeing them the accused ran away. Though they chased, they were not able to caught hold him. He saw the same in the electric light.

In the cross-examination he deposed that Hittal portion is a tight area. When he was going to the shop, he has not seen the accused on the way. When he was coming back after purchasing the beedi, at that time he heard crying noise of PW 1. When he was going to bring beedi, he does not know where were P.W.2 Mahaboob Sab and C.W.5 Alam Bhasha. He has deposed that after one house next to the house of his uncle, there is Hanuman Temple and Masque. People will always be there in the said temple and Masjid. When he went to the said place, there were no clothes on the body of his sister, so also the accused, after they went there, they worn the clothes. In the meanwhile, accused ran away from the said place. When they went inside, his sister and accused were present on the northern side hittal portion. He has not observed whether the clothes of his sister were blood stained or not. He denied the suggestion that as they were due Rs.25,000/- to the accused in connection with purchase of provisions, they are giving false evidence against the accused. On 27.02.2009, Police came to the village and recorded his statement. He denied the suggestion that in his statement he has not stated that he went to the shop for bringing beedi. He has also denied the suggestion that he has not stated in his statement before the Police that he saw the accused slept on the body of his sister and after seeing them, the accused ran away and they chased, even then they were not able to caught hold him. He denied the suggestion that he has not stated in his statement before the Police that he has seen it in the electric light.

18. P.W.5-Shekh Hussasin, who is panch witness to spot mahazar (Ex.P-3), has turned hostile and not supported the case of the prosecution. Even when he was cross-examined by the PP, nothing has been elicited from his month to believe that spot mahazar was conducted in his presence.

19. P.W.6-Dr. Rajkumar has deposed in his evidence that on 27.02.2009 at about 7.30 p.m. he examined the accused Shakir, who was brought by P.C.No.03 with a requisition sent by C''PI of Sindhanur Circle. He identified the accused person before the Court. He has further deposed that on clinical examination he found that his vital parameter were normal. There were no external injuries found on the body of the accused or even on external genital organs. There were no evidence to suggest that the accused was not capable of performing sexual intercourse. His pubic hair were collected, post masturbation semen was collected. The under garments of the accused were collected, they were M.Os.4 and 5 and same were subjected for being examined in Regional Forensic Laboratory at Gulbarga. The blood grouping of the accused was done and the same was confirmed as "O" positive.

He has further deposed that on seeing FSL report vide Ex.P-5, he has given the final report dated 18.06.2009, which is vide Ex.P-6. His opinion is as per points 1 to 5 as deposed in his deposition, which are as follows:

1) There is no evidence to suggest that the accused person was not capable of performing sexual intercourse

2) No evidence to suggest that the accused person had undergone recent sexual intercourse.

3) No external injuries were found over the external genital organs or over the body.

4) As per FSL report no seminal stains were found on the pubic hair and under garments.

5) Blood group of the accused person was "O" positive.

He has further deposed that he has brought the MLC register in which the above stated recitals were noted, on the basis of it he has issued the documents Exs.P-4 and P-6.

In the cross-examination, he has deposed that FSL report regarding sexual act is negative.

20. P.W.7 Hussain Bhasha, who is also the panch witness to spot mahazar (Ex.P-3) has not supported the case of the prosecution. He turned hostile and even when cross-examined by the PP, he denied the suggestion that spot mahazar was conducted in his presence.

21. P.W.8-Chandrashekar, the Police Officer, has deposed in his evidence that on 12.06.2007 to 30.05.2010 he was the Police Sub-Inspector in the Sindhnoor Rural Police Station. On 26.02.2009 at 8.00 p.m., Mallika (P.W.l) came to the Police Station and gave the oral complaint, which was reduced into writing as per Ex.P-1. On the basis of the same, he registered the case in Crime No.44/ 2009 for the offence punishable under Section 376 of IPC and issued FIR, which is marked as Ex.P-7 and then handed over the further investigation to Sri. Sridhar Malagar, Circle Inspector,

Sindhnoor Circle Police Station.

In the cross-examination, he has deposed that from their station, the Salagunda village is at the distance of 26 k.m. and the buses are plying in the said place. He denied the suggestion that at about 8.00 p.m. on 25.02.2009, P.W.1, her father and brothers came to the Police Station and asked about performing the marriage of P.W. 1 with the accused. He denied the suggestion that the first information was prepared at 10.00 p.m. on 26.02.2008.

22. P.W.9-Dr. Annapurna has deposed in her evidence that, on 26.02.2009, she examined P.W.1, aged 16 years brought to her with history of sexual assault on the previous night i.e., on 25.02.2009. On examination, she found scratch marks on chest below clavicle i.e., on anterior part of the chest wall. On clinical examination, she found rapture of hymen. So there was evidence of sexual intercourse. She collected pubic hairs, two vaginal smears to send to RSFL, Gulbarga to detect the presence of semen and spermatozoa. She has entered all these details in MLC register (Ex.P-8).

In the cross-examination, she has deposed that it is a fact that in Ex.P-8 she has not made a note with regard to the rupture of hymen. But, she voluntarily deposed that in the MLC register brought by her on that day, such recitals were already made. Even by going through the recitals made in Ex.P-9, she cannot say as to whether rupture of hymen was old or new. She has deposed that because of rupture of hymen she stated that victim girl had sexual intercourse. Age of scratch was not noticed by her at the time of examination of the victim girl. She has also deposed that according to her there was no evidence of recent sexual intercourse. She has received the FSL report, which according to her was negative report. Rupture of hymen could be for so many reasons other than sexual intercourse. On receipt of FSL report, she has given final opinion that there was no recent sexual intercourse.

23. P.W. 10, the Investigating Officer, who completed the investigation and filed the charge-sheet, has deposed that on 01.07.2009 he collected the final report as per Ex.P-11. The date of birth of the complainant was 01.06.1994, he collected her date of birth on 15.10.2010 from the Head Master, Government Primary School, Salgund, which is marked as Ex.P-12.

In the cross-examination, he deposed that he collected Ex.P-12 after submitting the charge-sheet. He has not recorded the statement of the Head Master of the said school. He cannot say on the basis of which document Ex.P-12 was issued. He does not know, who admitted the victim girl to the school, who furnished the information regarding her date of birth and what is the basis for the same. He has not prepared the sketch map in respect of the place at which the incident said to have taken place. One Kadappa, the Asst. Engineer, prepared Ex.P-10. He has admitted as true that he has not recorded the statement of Kadappa, Asst. Engineer, PWD, who prepared the sketch map. He has deposed that P.W.4 has not deposed in his statement that when

he went there the complainant was lying below and accused slept on her and after seeing them accused ran away and he has seen the same in the electric light. He has also admitted as true that P.W.2 has not stated that infront of the house there is an electric pole and there was electric light. He has also admitted as true that he has not stated in his statement that when he went to the spot, he saw accused slept on his sister.

24. Perusing the prosecution witnesses, P.W.1, who is the victim girl, has deposed in her evidence that the accused committed forcible sexual intercourse on her in the hittal (back yard) portion, then he ran away from the said place. After that she made hue and cry and thereafter her brothers came to the said place. So this evidence of the complainant shows that till the completion of the alleged sexual intercourse on her it was herself and the accused, who were only present and no other persons were present and witnessed the same. But the evidence of P.Ws.2 and 4 show that they went to the said place after hearing the words of their sister that she was telling leave (Vernacular matter omitted...Ed.) and not to commit the sexual intercourse (Vernacular i matter omitted...Ed.)and when both of them went to the said place, they saw that accused I slept on the body of their sister ana the accused committed sexual intercourse on her, both were in a node position. There were no clothes on the body of both of them. So this evidence of P.Ws.2 and 4 is quite contrary to the evidence of P.W. 1-complainant regarding the important material facts at the spot.

25. As I have made a detailed reference to the evidence of each of the prosecution witnesses, in the chief as well as in the cross-examination, it has come on record that the clothes of the victim girl as well as the accused were collected by the Police on the next day of the incident during night. It has also come on record through the mouth of the prosecution witness that victim has not washed the clothes, which she wore on the alleged dale of incident. So M.Os.1 to 5, the clothes of the victim girl as well as the accused were sent for examination to FSL. The FSL report is also produced before the Court, which is marked as Ex.P-5. Totally 9 items were sent for examination and report.

26. Looking to the report on seminal stains, it is observed as "the suspected seminal stains were observed for their colour, texture and appearance under ultra violet light and the cuttings/scrapings from the suspected areas were tested for seminal stains using Florence test, Acid-Phosphates test and Microscopic test. Further Hacmatoxyline-Eosin test was conducted for the detection of spermatozoa. The results of the examination are furnished below:

Presence of spermatozoa was not detected in item No.2, which is vaginal smear (two glass slides).

Presence of seminal stains were not found in item Nos.1, 3, 4, 5, 6, 8 and 9."

So the FSL report, it is negative.

27. Now coming to the medical evidence as per the evidence of the doctor, it is no doubt true, the doctor, who has been examined as P.W. 9, has deposed in her evidence that when she examined the victim girl, she has noticed rupture of hymen, but she deposed and admitted that in the medical certificate, which she has issued, she has not mentioned about the rupture of hymen. It is no doubt true, the witness* however, deposed that she has mentioned the same in the MLC register, which she has brought to the Court. It is true, in MLC register there is a mention regarding the rupture of hymen, but when it was there in the register what prevented the doctor to mention the same in the certificate, which she has issued. Apart from that, even if it is assumed that there is rupture of hymen, when P.W.9 was questioned during the course of cross-examination, she has deposed that she is not in a position to say whether the rupture of the hymen was old or new one.

28. Looking to these things and in the absence of any positive material from the FSL, regarding the rupture of hymen also, reasonable doubt arises in the mind of the Court as to why the doctor has not mentioned about the same in the certificate Ex.P-8, which she has issued.

29. At this stage, it is no doubt true, learned HCGP during the course of his arguments has submitted that corroboration from other sources is not at all necessary and prosecutrix has already deposed on oath about such incident committed on her. It is true, if the evidence of the prosecutrix is satisfactory and worth believable in all respects, then, in that case, the Court cannot insist the corroboration for her evidence from any other sources much less the medical evidence also. But the question is whether the oral evidence of this prosecutrix is cogent and worth believable so far as the alleged offence punishable under Section 376 of IPC? When it is the case of the prosecution that the clothes were collected immediately by the Police and sent for FSL examination, if really such incident has taken place and there was a bleeding from the private part of the victim girl as deposed by her on oath, there could have been some piece of evidence in the report of FSL. But no such material is forthcoming and even the doctor (P.W.9), who issued Ex.P-8 stating that there is rupture of hymen, also deposed in her evidence that according to her there was no evidence of recent sexual intercourse. At paragraph No.8 of her deposition she further deposed that she has received FSL report, which according to her was negative report and rupture of hymen could be for so many reason other than the sexual intercourse. On receipt of FSL report she has given her final report that there was no recent sexual intercourse.

30. However, looking to the evidence of the prosecution witnesses, it has come on record satisfactorily that there were injuries on the chest portion of the victim girl. She has also deposed that it is accused who came and caught hold her tightly and he asked her when she is going to the school and she told that she is going to the school on the following day. So her evidence to that extent goes to show that the accused was present at the spot. He made an attempt to commit the rape on her. To

that extent the prosecution placed the material about the attempt made by the present accused person on the victim girl and even with regard to the injuries on the chest portion of the victim girl, defence was not able to establish during the course of the trial that they were self inflicted injuries only with an intention to book false case against the present appellant. Therefore, to that extent the case of the prosecution is acceptable regarding the attempt by the accused for committing the sexual intercourse on the victim girl.

31. It is no doubt true so far as attempt to commit rape is concerned, there is no charge framed by the Sessions Court. In the absence of that whether this Court can convict the accused-appellant for the said offence of attempt to commit rape. In this connection I am referring to Section 221(2) of Cr.P.C., which reads as under:

"221. Where it is doubtful what offence has been committed. -

(1) xxxx

(2) If in such a case the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of sub-section (1), he may be convicted of the offence which he is shown to have committed, although he was not charged with it."

32. According to this provision if there is evidence for some other offences even though there is no charge framed against accused person for the said charge he can be convicted. Hence, looking to the materials placed on record, the accused is liable to be convicted for the offence of attempting to commit rape. I have heard both sides on the sentence to be imposed on the accused i.e., 376 read with Section 511 of IPC, so also for the offence under Section 452 for trespassing which has been held by the Trial Court and same is confirmed Accordingly, I pass the following :

ORDER

i. The appeal is allowed-in-part.

ii. The judgment and order of conviction passed by the Trial Court for the offence punishable under Section 376 of IPC is hereby set aside and same is modified holding that the appellant-accused is liable for the punishment of attempting to commit rape punishable under Section 376 read with Section 511 of IPC and he is sentenced to undergo imprisonment for a period of three years two months, which he has already undergone, and he has also to pay a fine of Rs.75,000/- for the offences of attempting to commit rape and in default of payment of said amount he has to further undergo imprisonment for two years for the said offences.

iii. The conviction order passed by the Trial Court as against the appellant-accused for the offence punishable under Section 452 of IPC and sentence imposed is hereby confirmed.

iv. If the amount of Rs.77,000/- is realised for both the offences out of that an amount of Rs.75,000/- be paid to victim PW.l as compensation under the provisions of Section 357 of Cr.P.C. and the remaining amount of Rs.2,000/- shall be remitted to the State.

v. The appellant-accused has to deposit the said amount before the trial Court within four weeks from today.

vi. The fine amount, if deposited already is to be taken into consideration while calculating Rs.77,000/-.

vii. The above sentences for the offence under Section 452 and also for the offence of attempting to commit rape under Section 376 read with Section 511 of IPC shall have to run concurrently.

viii. Intimate the concerned Trial Court accordingly to take steps in the matter.