

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 561 OF 2009

STATE OF RAJASTHAN

... APPELLANT

:Versus:

SRI CHAND

... RESPONDENT

J U D G M E N T**Pinaki Chandra Ghose, J.**

1. This appeal, by special leave, has been filed by the State of Rajasthan against the judgment and order dated 24.01.2007 passed by the High Court of Rajasthan, Jaipur Bench, Jaipur, in S.B. Criminal Leave to Appeal No.255 of 2003, whereby the High Court rejected the appeal of the State filed against the acquittal of the respondent.

2. The facts of this case, as per the prosecution story, are that on 1.08.2002, Gujarmal son of Sukkan Ram Lali, resident of Baseth, P.S. Kathumar, District Laxmangarh (Rajasthan), submitted a written report at Police Station Kathumar stating therein that on 31.7.2002, at around 10 A.M., his daughter the prosecutrix, aged 12 years, had gone to the jungle to graze buffaloes. Sri Chand son of Madan Lal Saini, whose house is in the jungle, approached his daughter, the prosecutrix and told her that his sister was calling her. By luring her in this way, Sri Chand took his daughter the prosecutrix to his house. No one was there in the house and Sri Chand took his daughter the prosecutrix inside the room, closed the door from inside, forcibly undressed her and made her to lie on the ground and started raping her forcibly. The prosecutrix cried upon which Sri Chand put some cloth in her mouth. Hearing her cries, Bihari Saini, who was passing nearby, reached there and he witnessed the whole incident. Saroj wife of Prahlad also reached at the site. Out of fear, accused Sri Chand fled away from the place of incident.

3. On the basis of the above written report, Case No.116/2002 was registered under Section 376/511 of the Indian Penal Code, 1860 ("IPC") and investigation started. During the course of investigation, Investigating Officer ASI Heera Lal visited the site and prepared a site map. Statements of complainant Gujarmal, prosecutrix and Bihari Saini were recorded under Section 161 of Cr.P.C. Statement of prosecutrix was also got recorded under Section 164 Cr.P.C. and she was further examined at Alwar to ascertain her age, medical and for X-ray. A report regarding her age was obtained in which the age of prosecutrix was stated as 16 years. Accused Sri Chand was arrested and was got examined regarding his potency to perform sexual intercourse. After the investigation, it was found that accused Sri Chand committed the offence under Section 376/511 of IPC. A charge-sheet was filed in the Court of Judicial Magistrate, Kathumar, and thereafter the case was committed to the Court of Additional District and Sessions Judge, Laxmangarh, for adjudication. Accused Sri Chand was served the charge-sheet and he denied the charges and claimed for trial.

4. Before the Trial Court, the prosecution examined ten witnesses and after analyzing the evidence on record and after hearing the arguments advanced on behalf of the parties, the Trial Court acquitted the accused respondent by granting him probation. The State of Rajasthan preferred an appeal before the High Court, for grant of leave to appeal against the order of acquittal, which was rejected. Aggrieved by the order of the High Court, the State of Rajasthan has preferred this criminal appeal, by special leave, before this Court.

5. We have heard the learned counsel appearing for the State of Rajasthan and the learned counsel appearing for the accused respondent and have perused the judgment rendered by the Additional District and Sessions Judge, Fast Track, Laxmangarh.

6. The Court of Additional District and Sessions Judge, Fast Track, Laxmangarh, noticed in his judgment that though there is a serious charge of attempt to rape against the accused but the First Information Report has been lodged with a delay of about 28 hours for which neither any explanation has been given in the Report nor

the complainant has mentioned anything in his statement about the said delay, which makes the prosecution case doubtful. The learned Sessions judge further found that the statement of PW3 Biharilal Saini cannot be doubted as it corroborates the statement of PW5 the prosecutrix herself. However, PW3 had stated that when he reached the house of Sri Chand he saw Sri Chand fleeing away while prosecutrix was inside and her clothes were disturbed. The learned Sessions Judge noted that non production of Saroj, an alleged eye witness, is an important circumstance; however, the testimony of prosecutrix cannot be discarded on this ground. The prosecutrix in her statement has corroborated the story in FIR, as recorded above. However she only says that the accused did bad work with her. On repeated questioning about what bad work was done, she remained quiet with head bowed down. The learned Sessions judge found that there is consistent statement of the prosecutrix and PW3 that accused Sri Chand undressed her as well as himself. Therefore, the learned Sessions Judge found the offence under Section 354 of IPC as proved. Thereupon, the learned

Sessions Judge went on to grant the accused benefit of Probation of Offenders Act in view of his clear record and no prior conviction.

7. The learned High Court after hearing counsels for both the sides and having examined the judgment of the Sessions Judge refused to grant leave to appeal.

8. We find that that FIR was recorded under Section 376 read with Section 511 of IPC i.e. attempt to rape and not rape per se. There is no eye witness on record apart from the prosecutrix herself as PW3 Biharilal only saw the accused fleeing away and Saroj, the alleged eye witness, was never produced before the Court nor her statement was recorded under Section 161 Cr.P.C. Also, no medical examination of the prosecutrix has been conducted. The prosecutrix has in her statement stated that the accused Sri Chand took her inside her house, closed it, undressed her and undressed himself. Thereafter, she states, he got on to her and did bad work. On being repeatedly asked what bad work was done, she kept quiet and bowed her head, in embarrassment understandably. One must not lose sight of the fact that the prosecutrix was a minor child at the

time of the incident. The father (PW6) of the prosecutrix has categorically stated that bad work meant rape. However, we find difficulty in veracity of his statement since he was not an eye witness and was not even told about the incident by the prosecutrix. He was told details of the incident by Biharilal (PW3) who is not an eye witness to the incident. However, Biharilal was the first person to have learnt of the offence from the prosecutrix and he has completely corroborated her version. By this consistent evidence what is proved beyond reasonable doubt is the offence under Section 354 of IPC. However, the question of attempt to rape is not proved beyond reasonable doubt. On the question of attempt to rape, learned counsel appearing for the respondent has sought to rely on two precedents being **Aman Kumar and Anr. Vs. State of Haryana**, (2004) 4 SCC 379, and **Tarkeshwar Sahu Vs. State of Bihar (now Jharkhand)**, (2006) 8 SCC 560. In both the cited judgments it is held that for the act to constitute offence of rape penetration is pre-requisite (this is the pre 2013 Criminal Amendment position of law) and therefore for the offence of attempt to rape the accused must have so advanced in his actions that it

would have resulted into rape had some extraneous factors not intervened. It is held in Aman Kumar's case that in order to come to the conclusion that attempt to rape is committed it should be shown that the accused was determined to have sexual connection (penetration) with the prosecutrix at all events inspite of all resistance. In the present case the accused fled away on when the PW3 came to the place of incident due to shouting of the prosecutrix. This shows he wasn't determined to have sexual connection with the prosecutrix despite all resistance and odds. Also it would be relevant to note that there are inconsistencies in the statement of the prosecutrix wherein she states that she had suffered injuries on her breast but same is not corroborated by the medical evidence. Also, Saroj, who is an important eye witness, is not produced as a witness. In this view of the matter, we find it difficult to hold that offence of attempt to rape is proved to a sufficient measure.

9. Now we move to the question of sentence vis-à-vis the benefit granted under the Probation of Offenders Act, 1958. In **Azhar Ali Vs. State of West Bengal**, (2013) 10 SCC 31, this Court while

dealing with the question of applicability of 1958 Act to an offence under Section 354 of IPC, found as follows:

“12. In the instant case, as the appellant has committed a heinous crime and with the social conditions prevailing in the society, the modesty of a women has to be strongly guarded and as the appellant behaved like a roadside Romeo, we do not think it is a fit case where the benefit of the 1958 Act should be given to the Appellant.”

10. In *State of Himachal Pradesh Vs. Dharam Pal*, (2004) 9 SCC 681, this Court was dealing with probation of offenders in case of offence of attempt to commit rape. The finding of this Court in the said judgment is relevant for all the offences against the women, which is as follows:

“6. According to us, the offence of an attempt to commit rape is a serious offence, as ultimately if translated into the act leads to an assault on the most valuable possession of a woman i.e. character, reputation, dignity and honour. In a traditional and conservative country like India, any attempt to misbehave or sexually assault a woman is one of the most depraved acts. The Act (Probation of Offenders Act, 1958) is intended to reform the persons who can be reformed and would cease to be a nuisance in the society. But the discretion to exercise the jurisdiction under Section 4 (of the Probation of Offenders Act, 1958) is hedged with a

condition about the nature of the offence and the character of the offender.”

In above case although this Court did not interfere with the benefit of probation granted by the High Court due to peculiar facts of the case however it did not approve the reasoning given by the High Court.

11. In the present case the accused is not a minor, rather he has committed an offence against a minor girl who is helpless. Further, it is clear from the evidence on record that he ran away only when the prosecutrix screamed and PW3 came to the place of incident, which goes on to show that the accused could have had worse intentions. The offence is heinous in nature and there is no reason for granting benefit of probation in this case. The Trial Court has not given any special consideration to the character of the accused apart from the fact that this was the first conviction of the accused. We find this is far from sufficient to grant probation in an offence like outraging the modesty of a woman.

12. In view of the discussion in the foregoing paragraphs, we allow this appeal to the limited extent that the accused respondent is not

granted the benefit of Probation of Offenders Act, 1958, but his conviction is maintained under Section 354 I.P.C. only. The accused respondent is hereby sentenced to rigorous imprisonment for two years. The respondent is directed to surrender within a period of two weeks to serve out the sentence, failing which the Additional District and Sessions Judge, Laxmangarh, shall take necessary steps to take him into custody to serve out the sentence. Let a copy of this judgment be sent to the Additional District and Sessions Judge, Laxmangarh, for information and necessary action.

.....J
(Pinaki Chandra Ghose)

JUDGMENT

.....J
(Uday Umesh Lalit)

**New Delhi;
May 11, 2015.**