CASE NO.:
Appeal (crl.) 1016 of 1997

PETITIONER:
Aman Kumar and Anr.

RESPONDENT:
State of Haryana

DATE OF JUDGMENT: 10/02/2004

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT.

JUDGMENT:
JUDGMENT

ARIJIT PASAYAT,J

Two appellants faced trial for having allegedly committed rape on a girl of tender age whose name need not be indicated and she can be described as the victim or the prosecutrix. The trial Court found the accused persons guilty of offence punishable under Section 376 (2)(g) of the Indian Penal Code, 1860 (in short the 'IPC'). They were each sentenced to undergo imprisonment for 10 years and to pay a fine of Rs.500/-each with default stipulation. In appeal, the conviction and sentence were upheld.

Prosecution version in a nutshell is that on 5.8.1993 the prosecutrix had gone to the field to ease herself at about 10.00 a.m. When she had reached near the field, the accused persons caught hold of her right arm and dragged her forcibly to the field. Accused Shiv Dayal shut her mouth with her chuni and both the accused persons thereafter forcibly raped her. They threatened to kill her if she told about the incident to anybody. She went to her house weeping and narrated the incident to her mother. One Karan Singh had seen the accused persons going away from the field. Since the father (PW-11) and brother of the prosecutrix were not at home the mother (PW-9) described the incident to a member of the Panchayat (PW-12). Report was lodged with police on 7.8.1993. Investigation was undertaken. The prosecutrix was medically examined and the accused persons after arrest were also medically examined. After completion of investigation, charge sheet was filed for alleged commission of offence punishable under Section 376/506 IPC. As the accused persons pleaded innocence, the trial was held. Thirteen witnesses were examined to further the prosecution version. The prosecutrix was examined as PW-7 while her mother was examined as PW-9 and father as PW-11. The accused persons pleaded that they have been falsely implicated. As Ran Singh, the brother of the prosecutrix had mis-appropriated funds of a temple and the accused persons had made a grievance, a meeting was held on 5.8.1993 where the allegations were specifically made. On 6.8.1993, Ran Singh and his friends had stopped the accused-Aman and had given him lathi blows. The accused Shiv Dayal and others had come to his rescue and he was taken to the hospital where he remained till 12.8.1993. On the basis of a complaint made by Ami Chand, brother of accused Aman, a case had also been instituted against Ran Singh and Others. The accused persons examined a doctor who stated that on 6.8.1993 he had examined accused Aman and found several injuries on his

person. Another witness was examined to show about the assaults by Ran Singh and others. During trial, interestingly except the prosecutrix no other witness of relevance including the mother of the prosecutrix, her father and Karan Singh who had supposedly seen the accused persons going away from the field immediately after the occurrence, supported the prosecution version. The trial Court held that even though the mother of the prosecutrix and other witnesses whose evidence would have thrown some light had not supported the prosecution version, yet the testimony of the prosecutrix herself was considered sufficient for the conviction to be made and accordingly conviction was done as afore-stated. Similar was the view taken by the High Court in the appeal filed by the accused persons.

In support of the appeal, learned counsel for the appellants submitted that the prosecution version is highly improbable. Though the prosecutrix's evidence alone can form the foundation of conviction, yet in the background facts of the present case, it is clearly indicated that there was false implication on account of differences between the accused persons and the brother of the prosecutrix, and the Courts below should not have acted on her evidence. Furthermore, the evidence of the prosecutrix even if accepted does not prove commission of rape and the medical evidence also supports such a view. At the most, on the evidence taken on its entirety, and even if accepted to be true, it can be said that there was a preparation to commit rape, but the act was not actually done.

Per contra, learned counsel for the State submitted that in our traditional bound country a rural girl of tender age would not tarnish or damage her own reputation and image merely because her brother had any dispute with or animosity against the accused persons by volunteering to falsely claim that she had been raped and defiled. According to him, the evidence not only shows the intention to commit the rape, an attempt to do it and successful completion thereof. Therefore, the evidence of PW-7 cannot be discarded. The reasons as to why some of the prosecution witnesses including the mother of the prosecutrix did not support the prosecution case during the stage of trial, have been noticed by the trial Court and the High Court. It has been noted that on the date of their evidence, the case against brother of the prosecutrix was posted and it appeared that compromise had been arrived at to bury the hatchets. Therefore, the Courts below were not prepared to give much weight to the evidence of those who turned hostile, or consider it to be a just ground to discard the evidence of the prosecutrix for purpose of rejecting the case of the prosecution.

It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the

context of an accomplice would suffice.

The offence of rape occurs in Chapter XVI of IPC. It is an offence affecting the human body. In that Chapter, there is a separate heading for "Sexual offences", which encompass Sections 375, 376, 376A, 376B, 376C and 376D. "Rape" is defined in Section 375. Sections 375 and 376 have been substantially changed by Criminal Law (Amendment) Act, 1983, and several new sections were introduced by the new Act, i.e. 376A, 376B, 376C and 376D. The fast sweeping changes introduced reflect the legislative intent to curb with iron hand, the offence of rape which affects the dignity of a woman. The offence of rape in its simplest term is 'the ravishment of a woman, without her consent, by force, fear or fraud', or as 'the carnal knowledge of a woman by force against her will'. 'Rape or Raptus' is when a man hath carnal knowledge of a woman by force and against her will (Co.Litt. 123 b); or, as expressed more fully, 'rape is the carnal knowledge of any woman, above the age of particular years, against her will; or of a woman child, under that age, with or against her will'. (Hale P.C. 628) The essential words in an indictment for rape are rapuit and carnaliter cognovit; but carnaliter cognovit, nor any other circumlocution without the word rapuit, are not sufficient in a legal sense to express rape: (1 Hen. 6, 1a, 9 Edw. 4, 26 a (Hale P.C.628). In the crime of rape, 'carnal knowledge' means the penetration to any the slightest degree of the organ alleged to have been carnally known by the male organ of generation (Stephens Criminal Law, 9th Ed.,p.262). In "Encyclopedia of Crime and Justice" (Volume 4, page 1356), it is stated ".....even slight penetration is sufficient and emission is unnecessary". In Halsburys' Statutes of England and Wales (Fourth Edition) Volume 12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse. It is violation, with violence, of the private person of a woman, an outrage by all means. By the very nature of the offence it is an obnoxious act of the high order.

Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little (See Joseph Lines IC & K 893). It is well-known in the medical world that the examination of smegma loses all importance after twenty four hours of the performance of the sexual intercourse. (See Dr. S.P. Kohli, Civil Surgeon, Ferozepur v. High Court of Punjab and Haryana thr. Registrar (1979) 1 SCC 212). In rape cases, if the gland of the male organ is covered by smegma, it negatives the possibility of recent complete penetration. If the accused is not circumcised, the existence of smegma round the corona gland is proof against penetration, since it is rubbed off during the act. The smegma accumulates if no bath is taken within twenty four hours. The rupture of hymen is by no means necessary to constitute the offence of rape. Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of the hymen is not necessary. Vulva penetration with or without violence is as much rape as vaginal penetration. The statute merely requires evidence of penetration, and this may occur with the hymen remaining intact. The actus reus is complete with penetration. It is well settled that the prosecutrix cannot be considered as accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence

of rape. In examination of genital organs, state of hymen offers the most reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any significance to the findings. The shape and the texture of the hymen is variable. This variation, sometimes permits penetration without injury. This is possible because of the peculiar shape of the orifice or increased elasticity. On the other hand, sometimes the hymen may be more firm, less elastic and gets stretched and lacerated earlier. Thus a relatively less forceful penetration may not give rise to injuries ordinarily possible with a forceful attempt. The anatomical feature with regard to hymen which merits consideration is its anatomical situation. Next to hymen in positive importance, but more than that in frequency, are the injuries on labia majora. These, viz. labia majora are the first to be encountered by the male organ. They are subjected to blunt forceful blows, depending on the vigour and force used by the accused and counteracted by the victim. Further, examination of the females for marks of injuries elsewhere on the body forms a very important piece of evidence. To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under Section 376 IPC.

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 the 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.

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 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 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 under Section 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.

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. 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.

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.

Though the prosecutrix's version in Court was of rape, when it is compared with the one given during investigation, certain irreconcilable discrepancies are noticed. The evidence regarding actual commission of rape is at variance from what was recorded by police during evidence. The evidence of PW-11, the father who according to prosecution made departure from what he allegedly stated during investigation is to the effect that his wife PW-9 told her that the prosecutrix was teased by the accused persons. Merely because he was termed as a hostile witness his entire evidence does not get effected. Significantly, the evidence of prosecutrix and the doctor does not specifically refer to penetration which is sine qua non for the offence of rape.

There is no material to show that the accused were determined to have sexual intercourse in all events. In the aforesaid background, the offence cannot be said to be an

attempt to commit rape to attract culpability under Section 376/511 IPC. But the case is certainly one of indecent assault upon a woman. Essential ingredients of the offence punishable under Section 354 IPC are that the person assaulted must be a woman, and the accused must have used criminal force on her intending thereby to outrage her modesty. What constitutes an outrage to female modesty is nowhere defined. The essence of a woman's modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. Modesty in this Section is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex. The act of pulling a woman, removing her dress coupled with a request for sexual intercourse, is such as would be an outrage to the modesty of a woman, and knowledge, that modesty is likely to be outraged, is sufficient to constitute the offence without any deliberate intention having such outrage alone for its object. As indicated above, the word 'modesty' is not defined in IPC. The Shorter Oxford Dictionary (Third Edn.) defines the word 'modesty' in relation to woman as follows:

"Decorous in manner and conduct; not forward or lowe; Shame-fast; Scrupulously chast."

Modesty can be described as the quality of being modest; and in relation to woman, "womanly propriety of behaviour; scrupulous chastity of thought, speech and conduct." It is the reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions. As observed by Justice Patterson in Rex v. James Llyod (1876) 7 C&P 817. In order to find the accused guilty of an assault with intent to commit a rape, court must 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. The point of distinction between an offence of attempt to commit rape and to commit indecent assault is that there should be some action on the part of the accused which would show that he was just going to have sexual connection with her.

In that view of the matter, it would be appropriate to set aside the conviction of the appellants under Section 376 (2)(g) and convict them under Section 354 read with Section 34 IPC. Custodial sentence of two years each, with a fine of Rs.500/- each and a default stipulation of three months rigorous imprisonment in case of failure to pay the fine would meet the ends of justice. The appeal is allowed to the extent indicated above.