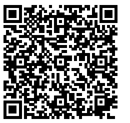


Rajasthan High Court Web Copy - Not Official

HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

S.B. Criminal Appeal No. 272/1991

Suwalal son of Gopi, resident of Ambapura, PS Malpura, at present Bawadi PS Todaraisingh, District Tonk.

----Appellant

Versus

State of Rajasthan.

----Respondent

For Appellant(s) : Ms. Anzum Parveen
For Respondent(s) : Mr. Suresh Kumar, PP

HON'BLE MR. JUSTICE ANOOP KUMAR DHAND

JUDGMENT

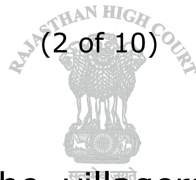
13/05/2024
REPORTABLE

1. The appellant impugns the judgment dated 03.07.1991, passed by the Sessions Judge, Tonk in Sessions Case No.20/1991 by which he has been convicted under Section 376/511 IPC and sentenced to undergo 3 years and 6 months of rigorous imprisonment with a fine of Rs.100 and in default thereof to undergo 3 months simple imprisonment.

Factual matrix of the case:

2. Brief facts of the case are that on 09.03.1991, the Complainant-Juwara (PW-3) lodged a complaint (Ex.P2) at the Police Station, Todaraisingh, District Tonk, alleging therein that his grand-daughter “D” aged about 6 years was drinking water at the Pyau (Water Booth) near Dharamshala, where the accused came around 8:00 PM in the evening and forcefully took her into Dharamshala with an intention to commit rape on her. When the

(Downloaded on 10/06/2024 at 04:23:23 PM)



girl raised hue and cry, the villagers arrived and rescued her, otherwise the accused might have had committed rape on her. Upon this report, a Crime Report No.40/1991 (Ex.P3) was registered at the Police Station, Todaraisingh, District Tonk, for the offence punishable under Section 376/511 IPC. After investigation, charge sheet was submitted against the appellant for the above offence, and thereafter the Trial Court framed charges against the appellant for the above offence, wherein the appellant pleaded not guilty and claimed trial.

Rajasthan High Court
Web Copy - Not Official

3. During the course of trial, the prosecution examined as many as 7 witnesses and exhibited 5 documents. Thereafter the statements of the appellant were recorded under Section 313 Cr.P.C.

4. Upon conclusion of the trial, the learned Trial Judge vide judgment dated 03.07.1991 convicted and sentenced the appellant for the offence, as aforesaid. Hence this criminal appeal.

Submissions on behalf of the appellant:

5. Learned counsel for the appellant submits that looking to the allegations levelled against the appellant, by the prosecutrix 'D' (PW-2) in her statements, no offence under Section 376/511 IPC is made out. Counsel submits that, the only allegation against the appellant is that he took off the inner-wear of the prosecutrix and also undressed himself. Counsel submits that there is no allegation of attempt to rape levelled against the appellant and there is no corroborative medical evidence against the appellant connecting him with the alleged incident. Counsel submits that under these circumstances, the Trial Court has committed an error in

(Downloaded on 10/06/2024 at 04:23:23 PM)

convicting the appellant for the above offence. Hence, under these circumstances, interference of this court is warranted and the appellant is liable to be acquitted of all the charges.

Submission on behalf of the State:

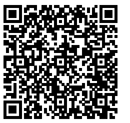
6. Per contra, learned Public Prosecutor opposed the arguments raised by the counsel for the appellant and submitted that as per the statements of the prosecutrix 'D' (PW-2) specific allegations are there against the appellant that he took-off the inner-wear of the prosecutrix and undressed himself as well. Counsel submits that no cross examination has been done by the appellant from the said witness at the time, when the statements of the prosecutrix 'D' (PW-2) were recorded. Counsel submits that under these circumstances, the offence of attempt to rape has been established. Counsel submits that considering, overall evidence available on the record, the learned Trial Court has rightly convicted the appellant for the offence, as stated above. Lastly, he argued that under these circumstances, no interference of this Court is warranted.

Analysis & Discussion:

7. Heard and considered the submissions made at Bar and perused the material available on the record.

8. Perusal of the record indicates that the FIR (Ex.P3) was registered at the instance of grand-father of the prosecutrix 'D' i.e., PW-3 Juwara wherein allegation was levelled against the appellant that he has forcefully taken the prosecturix 'D' inside the Dharamshala and when the prosecutrix 'D' raised hue and cry the villagers gathered there and rescued her. Similar statement has

(Downloaded on 10/06/2024 at 04:23:23 PM)



Rajasthan High Court Web Copy - Not Official

been given by this witness when his statements were recorded during the course of the trial.

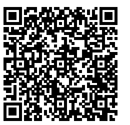
9. The entire prosecution case is based on the sole testimony of prosecutrix 'D' (PW-2), with whom the incident has occurred. This Court has carefully examined the statement of this witness, who has categorically stated in her examination-in-chief that when she reached near talab to see the marriage procession of 'Bania' family, the accused arrived and took her into the Dharamshala and took off her inner-wear and undressed himself as well and when she shouted, the accused fled-away.

10. It is worthy to note here that not a single question was put by the appellant, in cross examination, to this witness meaning thereby the accused has accepted the testimony of this witness, which was recorded in the examination-in-chief. Now the question which remains for consideration before this Court is whether any offence under Section 376/511 IPC is made out or not.

11. For an offence to commit attempt of rape, the prosecution must establish that it has gone beyond the stage of preparation. The difference between mere preparation and actual attempt to commit an offence consists chiefly in the greater degree of determination, as has been held by the Hon'ble Apex Court in the case of **Madan Lal Vs. State of Jammu & Kashmir** reported in **AIR 1998 SC 386**. In para 12, the Hon'ble Apex Court observed as under:-

> "The difference between preparation and an attempt to commit an offence consists chiefly in greater degree of determination and what is necessary to prove for an offence of an attempt to commit rape has been

(Downloaded on 10/06/2024 at 04:23:23 PM)



> committed is that the accused has gone beyond the state of preparation."

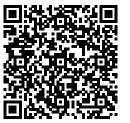
12. The question is whether in the facts and circumstances of the present case, offence under Section 376/511 IPC can be held to be proved or not and whether these facts make out a case for offence under Section 354 IPC or not?

Rajasthan High Court Web Copy - Not Official

13. What constitutes an "attempt" is a mixed question of law and fact depending largely on the circumstances of the particular case. "Attempt" defines a precise and exact definition. Broadly speaking, all crimes which consist of the commission of affirmative acts are preceded by some covert or overt conduct which may be divided into three stages. The first stage exists when the culprit first entertains the idea or intention to commit an offence. In the second stage, he makes preparations to commit it. The third stage is reached when the culprit takes deliberate overt steps to commit the offence. Such overt act or step in order to be "criminal" need not be the penultimate act towards the commission of offence. It is sufficient if such act or acts were deliberately done and manifest a clear intention to commit the offence aimed, being reasonably proximate to the consummation of the offence.

In order to constitute "an attempt", first, there must be an intention to commit a particular offence; second, some act must have been done which would necessarily have to be done towards the commission of the offence and third, such act must be "proximate" to the intended result. The measure of proximity is not in relation to time and action but in relation to intention to commit a crime. In other words, the act must reveal, with reasonable certainty, in conjunction with other facts and

(Downloaded on 10/06/2024 at 04:23:23 PM)



circumstances and not necessarily in isolation, an intention, as distinguished from a mere desire or object, to commit the particular offence, though the act by itself may be merely suggestive or indicative of such intention, but that it must be, that is, it must be indicative or suggestive of the intention.

Rajasthan High Court Web Copy - Not Official

14. In the case of **Rex Vs. Lloyed** reported in **(1836) 7 C&P 318**, Lord Patterson, J. on the point: whether the act of the accused amounted to an attempt to commit rape in summing up held as under:

> "In order to find the accused guilty of an assault with intent to commit a rape, you 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. We believe that in this country indecent assaults are often magnified into attempts at rape, and even more often into rape itself; and we think a conviction of an attempt at rape ought not to be arrived at, unless the Court be satisfied that the conduct of the accused indicated a determination to gratify his passions at all events, and in spite of all resistance. In the present case, having regard to the medical evidence, and to the varying statements made at different times by the complainant, we find it impossible to place entire reliance upon her statement; and, as to the extent of the violence to which she was subjected, there is no evidence except her own statement. The Sessions Court has not believed her allegation that penetration took place and has consequently refused to convict the accused of rape. We feel a similar hesitation in coming to the conclusion, on the complainant's unsupported statement that the accused's conduct amounted to an attempt to commit rape. He seems to have desisted before he was interrupted; and no evidence has been given to show that the complainant's person showed marks of violence (while the Civil Surgeon's evidence is to the contrary effect), nor that the clothes, either of the complainant or the accused showed any stains which would indicate to what point the accused's criminality had proceeded."

In that case conviction was made under Section 354 I.P.C.

(Downloaded on 10/06/2024 at 04:23:23 PM)

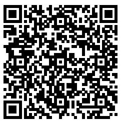
15. The distinction between an attempt to commit rape and to commit indecent assault is sometimes very measure. For the former, there should be some action on the part of the accused which would show that he is just going to have sexual connection with the prosecutrix. For an offence of an attempt to commit rape the prosecution must establish that it has gone beyond the stage of preparation. The difference between mere preparation and actual attempt to commit an offence consists chiefly in the greater degree of determination.

16. This Court in the case of **Sittu Vs. State of Rajasthan** reported in **AIR (Raj.) 1967 (3) 149**, while dealing with the case whether case for offence under Section 376/511 I.P.C. was found or not, held that where girl was forcibly made naked, the accused tried to force male organ into her private parts despite strong resistance from her, would amount to attempt to commit rape and not merely indecent assault.

17. In the case of **Damodar Behera Vs. State of Orissa** reported in **1996 CrLR 346**, the Orissa High Court has held that where a person alleged to have removed saree of the victim and ran away on seeing some persons and there was no material showing that accused was determined to have sexual intercourse, in all events, the offence cannot be said to be attempt to commit rape to attract culpability under Section 376/511 I.P.C. but the case is certainly one of indecent assault upon a woman.

18. Perusal of both the provisions of Sections 376 and 511 IPC shows that, an offence of attempt to rape would be proved, if at all the case falls within the definition of Section 375 IPC. Perusal

(Downloaded on 10/06/2024 at 04:23:23 PM)



Rajasthan High Court Web Copy - Not Official

of the entire statements of the prosecutrix 'D' (PW-2) indicates that, no such attempt has been made by the appellant, by committing any of the acts, as defined under Section 375 IPC. But looking to the fact that the allegations have been levelled against the appellant, that he took-off the inner wear of the prosecutrix 'D' and also undressed himself, certainly, such act of the appellant does not amount to commission of offence under Section 376/511 IPC.

Conclusion:

19. In my opinion, from these facts no case for offence under Section 376/511 I.P.C. can be held to be proved. In other words, accused appellant cannot be held to be guilty of attempt to commit rape. The prosecution has been able to prove the case of assault or use of illegal force on the prosecutrix 'D' (PW-2) with an intention to outrage her modesty or with knowledge that her modesty was likely to be outraged. Thus, it is a clear case of Section 354 I.P.C. as the act of present accused has not proceeded beyond the stage of preparation.

20. Accordingly, conviction of the accused appellant is altered from Section 376/511 I.P.C. to 354 I.P.C. and findings of learned Sessions Judge, Tonk are altered and accused is to be convicted for offence under Section 354 I.P.C. in place of Section 376/511 I.P.C.

On Sentence:

21. Sentencing an accused in criminal trial is a very sensitive exercise and it is not just routine or mechanical order.

(Downloaded on 10/06/2024 at 04:23:23 PM)

Rajasthan High Court Web Copy - Not Official

22. In the present case, there is no dispute on the point that on the date of occurrence, the accused was below 25 years of age. The record of the trial Court further reveals that the accused has been in PC/JC for a period from 12.03.1991 to 16.04.1991, he was again sent to jail, while he was convicted by the learned Sessions Judge for offence under Section 376/511 I.P.C. He was sentenced by the Trial Court on 03.07.1991 and was released on bail on 07.08.1991 by this Court. Thus, he remained in jail from 03.07.1991 to 07.08.1991 and thus, he remained in jail for a total period of about 2½ months.

23. Looking to the following reasons, custodial sentence of the accused appellant is restricted to the period already undergone by him and that would meet the ends of justice:

(i) At the time when the offence under Section 354 I.P.C. was committed, the accused was below 25 years of age.

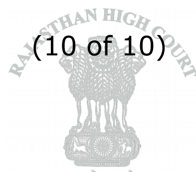
(ii) The incident took place on 09.03.1991 and near about 33 years have passed and this period is sufficient to exhaust anybody mentally, physically and economically.

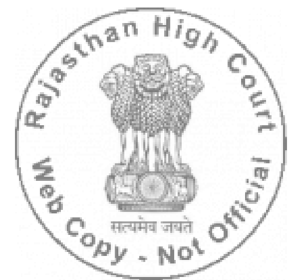
(iii) He has been in jail for about 2½ months during investigation, trial and appeal.

(iv) After such a long time for offence under Section 354 I.P.C. the accused should now not be sent to jail and this Court does not think it proper to send back the accused appellant in custody.

24. In the result, the appeal filed by the accused appellant is partly allowed, in the following manner:

(Downloaded on 10/06/2024 at 04:23:23 PM)





The judgment and order dated 03.07.1991 passed by the learned Sessions Judge, Tonk, by which the accused appellant was convicted for offence under Section 376/511 I.P.C. is altered to the extent that instead of offence under Section 376/511 I.P.C., he is convicted for the offence under Section 354 I.P.C. and findings of the learned Sessions Judge, Tonk are altered accordingly. However, for offence under Section 354 I.P.C., the accused appellant is sentenced to the period already undergone by him. The order of sentence dated 03.07.1991 passed by the learned Sessions Judge, Tonk stands modified accordingly.

25. Keeping in view the provisions contained in 437A IPC the appellant is directed to furnish a personal bond of Rs.50,000/- and one surety of the bond of the like amount before the Trial Court within a period of three months from today under the provisions of Section 437-A Cr.P.C, in case any appeal is submitted against this judgment before the Apex Court with the stipulation that the appellant would appear before the Apex Court after receipt of notice of any criminal appeal or Special Leave Petition. It is made clear that the aforesaid bonds would remain effective for a period of six months.

26. Record of the trial Court be sent back forthwith.

(ANOOP KUMAR DHAND),J

DIKSHA/2

(Downloaded on 10/06/2024 at 04:23:23 PM)