
(2011) 08 MAD CK 0005

In the Madras High Court

Case No : Criminal A. No. 309 of 2009 and M.P. No. 1 of 2011

Balan (a) Kulla Balan

APPELLANT

Vs

The State of Tamil Nadu

RESPONDENT

Date of Decision : 18-08-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 313(1), 342, 389(1)
Penal Code, 1860 (IPC) — Section 122, 323, 34, 375, 376

Citation : (2011) 08 MAD CK 0005

Hon'ble Judges : T. Mathivanan, J

Bench : Single Bench

Advocate : Bhiman, for the Appellant; A.N. Thambidurai, Additional Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Honourable Mr. Justice T. Mathivanan, J.—Challenge is made in this appeal by the appellant/accused to the conviction and sentence

imposed on him dated 16.04.2009 and made in S.C. No. 91 of 2007 on the file of the Learned Sessions Judge Mahila Court, Chengalpattu.

2. Pending disposal of this appeal the appellant has filed a petition u/s 389(1) Cr.P.C to suspend the sentence and fine imposed on him. When the

petition was taken up for hearing, Mr.V.Bhiman, the learned counsel for the appellant has urged before this court that instead of taking this petition

in CrI.M.P. No. 1 of 2011 for suspending the sentence, the main appeal could be taken up and disposed of as it is in the admission stage.

Mr.A.N.Thambidurai, learned Additional Public Prosecutor has also conceded to take up the main appeal itself for disposal. Since the learned

counsel for the appellant as well as the learned Additional Public Prosecutor have mutually agreed to take up the appeal for disposal, this Court

has heard both the learned counsels and the appeal is accordingly disposed of in this judgment.

3. The facts germane to the case are detailed as under.

3.1. PW 3 who is the victim girl aged about 8 years at the relevant period is the daughter of PW 1 and PW 2. PW 4 is the owner of the house

wherein PW 1 and PW 2 had been residing along with their daughter PW 3 as tenant. The appellant being the first accused in this case had also

been residing in the house of PW 4 along with his wife who is the second accused in this case. The house of the appellant was just located

opposite to the house of PW 1 and PW 2.

3.2. That on 13.06.2006 in the morning the appellant had taken PW 3 to his house, and he himself had undressed first and then PW 3 was

stripped off and made nude. After making her to lie, the appellant had placed his penis in the vagina of PW 3 and withdrawn, and he was repeating

this act. Since she felt pain, she had cried out as amma amma. At about 10.30 am., when PW 1 was returning to her house from her work spot her

younger son only was found playing. Her elder daughter viz., PW 3 was not present there. Since the door of the house of the appellant was partly

opened, she had just peeped inside. While so, she happened to see that the appellant and her daughter were in compromising position. Her

daughter (PW 3) was found lying on the floor while the appellant was lying on her. Both were in nude posture. On noticing this PW 1 had shouted

at the appellant brought her daughter home.

3.3. In the evening when PW 2 had returned from the work spot PW 1 had informed him about the incident. Then PW 1 and PW 2 went to the

house of the appellant and shouted at him. While so, the appellant along with his wife who is the second accused in this case had assaulted PW 2.

On the next day i.e., on 14.06.2006 at about 01.45pm., when PW 9, Inspector of Police attached to Palavaram Police Station was present in his

office PW 1 had lodged a complaint under Ex.P1. On receipt of the complaint PW 9 had registered a case in Crime No. 796 of 2006 u/s 376(2)

(f) and u/s 323 of IPC. The printed first information report was marked as Ex.P10. Ex.P1 and Ex.P10 were sent to the Learned Judicial

Magistrate, Tambaram and the copies were sent to Police higher officials. Then PW 9 had examined PW 3, victim girl in the presence of PW 10,

Inspector of Police attached to All Women Police Station, Ashok Nagar and recorded her statement. He had also sent the victim girl (PW 3) to

Crompton Government Hospital along with a medical memo.

3.4. At about 03.35pm., he had been to the place of occurrence, inspected the same in the presence of the witnesses and prepared an observation

mahazar and a rough sketch under Exs.P11 and P12 respectively to that effect. Then at about 4pm., he had recovered the green colour nighty

which was worn by the victim girl at the time of occurrence in the presence of the witnesses under a mahazar which was marked as Ex.P13. At

about 05.45pm., he had arrested the appellant and his wife near Malanganandapuram Lake. On interrogation the appellant had voluntarily given

the confessional statement in the presence of PW 5 and PW 6 which was reduced in to writing by PW 9. On the basis of his disclosure statement

(Ex.P14), the dhoti which was worn by him prior and after the sexual intercourse with the victim girl was seized under a seizure mahazar. The

nighty of the victim girl and the dhoti of the appellant was marked as MO1 and MO2 respectively. On the fixed date i.e., on 15.06.2006, the

appellant and his wife being the second accused in this case were sent to court along with the victim girl. On the requisition under Ex.P16, the first

accused and the victim girl PW3, were sent to medical examination by the Learned Judicial Magistrate, Tambaram.

3.5. PW 7 Dr.Ranjini Bheemrao had examined the first accused to ascertain his potentiality. After completion of her examination on 16.06.2006,

she had issued a certificate of examination for sexual offences under Ex.P6 in which she had stated that there is nothing to suggest that he is

impotent. Similarly, PW 8 Dr.Pramila had examined the victim girl PW3. and after the completion of her examination she had issued two

certificates;

(1) Ex.P8 in which she has stated that she was of opinion that the victim girl was aged about 6 years but below 8 years.

(2) Ex.P9 certificate of examination for sexual offences in which she had stated that;

(a) vulva normal

(b) vagina admits tip of the little finger,

(c) hymen intact,

(d) perineal intact

(e) Cervix clear,

(f) no nail marks or any other injuries seen on the face, mouth, lips, chest and thigh.

3.6. Since PW 9 went on transfer, the case records were taken up by PW 11 for further investigation. PW 12 Tmt.Vimalathyagarajan, Scientific

Officer from the Forensic Sciences Laboratory Chennai, had examined the dhoti stained with the semen. After her examination she had issued a

Serology report dated 22.09.2006, in which she had stated that the semen found on the dhoti was detected to be human origin and that the result

of grouping test was inconclusive. PW13 Dr.Kamalakshi Krishnamoorthy, Assistant Director, FSL Chennai had examined MO1 and MO2 viz.,

nighty and the dhoti and after her examination she had issued Ex.P18 Biology report, in which she had stated that in Item Nos. 1 and 2 viz., nighty

and dhoti, no blood was detected, whereas in Item No. 2 Dhoti, semen was detected but not in Item No. 1. They both were examined by PW 11

and recorded their statements. After the completion of his investigation PW 11, had laid a final report against the appellant as well as against his

wife (A2) under Sections 376(2)(f) and 323 r/w 34 IPC. With the evidence of PW 13 the prosecution has closed its side.

3.7. When the incriminating circumstances arising out of the testimonies of the prosecution witnesses were explained to the appellant as well as to

his wife (A2), during the course of the proceedings u/s 313(1)(b) of Cr.P.C. the appellant had replied that on account of a dispute arisen out of a

chit transaction, this complaint was foisted on the instigation of PW 4 Shankar. Neither oral nor documentary evidence was led on behalf of the

defence. On evaluating the evidences both oral and documentary, the trial court has found the appellant/first accused guilty u/s 376(2)(f) convicted

thereunder and sentenced as aforesaid. In so far as the offence u/s 323/34 IPC is concerned, both the appellant and his wife were found not

guilty and were also acquitted of the charges.

4. Heard Mr.Bhiman, learned counsel for the appellant and Mr.A.N.Thambidurai the learned Additional Public Prosecutor.

5. In so far as this case is concerned the testimonies of PW 1, PW 3, PW 4 and PW 8 are quite relevant. The facts need not be repeated once

again as they have been narrated in detail in the opening paragraph of this judgment.

6. PW 3 being the victim girl aged under 8 years was not able to specify the date and time of occurrence in her evidence. She would however state

that she was taken by the appellant to his house, removed her dress as well as his dress, made her to lie and subsequently, put his penis on her

private part and taken out. She had also stated that he had been repeating this act. She has also disclosed another fact that when she felt pain she

cried out as "amma amma". But this fact has not been stated by PW 1 either in her chief or in her cross examination. She would state that at about

10.30am., on 13.06.2006 when she was returning to her house from her work spot her younger son alone was found playing but she was unable

to find her elder daughter viz., PW 3 the victim girl. As revealed from her evidence, the door of the appellant's house was partly opened, and

when she had just peeped inside, she happened to see the appellant and her daughter were lying in compromising position. PW 3 was found lying

nude on the floor while the appellant was lying nude over her. The evidence of PW 3 victim girl, with regard to her crying as "amma amma" out of

pain has not been supported by PW 1. If she was able to hear the cry of her daughter she would have stated in her evidence that after hearing the

crying sound of her daughter, she had been to the house of the first appellant and seen the occurrence, but she had not stated like that. Even in her

complaint under Ex.P1 also she did not disclose this fact.

7. In her complaint she would state that at 10.00am., when she was returning from the work spot her daughter PW 3, was present in the opposite

house. Since the door was partly opened she peeped inside and found that the appellant was indulging in sexual intercourse with her daughter after

removing and placed aside his lungi. Even in her chief examination also PW 1 has stated the same version.

8. On coming to the evidence of PW 9, Investigating Officer, he would state that on the basis of the disclosure statement under Ex.P4, the accused

had taken him and produced a dhoti which was said to have been worn by him prior and after the sexual intercourse. But no lungi was seized by

PW 9 as spoken to by PW 1 in her complaint. PW 5 and PW 6 who are said to be the mahazar witnesses have turned hostile as they have not

supported the case of the prosecution.

9. PW 4 Shankar, is the owner of the house of PW 1, PW 2 and the appellant. As adumbrated supra, both PW 1, PW 2 and the appellant were

residing in the house belonging to PW 4. PW 4 have spoken to about a similar previous incident. He would state that 1 1/2 years before, at the

bank of lake at about 01.30pm., when he had been there for answering the call of nature, he had found the appellant lying over the victim girl and

on seeing him the appellant had started running. Immediately he had informed this fact to PW 1, but PW 1 did not initiate any action on the

information supplied by PW 4. Though PW 3, victim girl had disclosed this fact in her evidence, she had not informed about the previous incident

either to her mother or to her father. PW 2 being the father of the victim girl had not seen the occurrence directly but he was informed about this

fact by PW 1.

10. PW 11, who had laid the charge sheet had charged the appellant and his wife under the following two charges;

(1) As against the appellant (A1) - u/s 376(2)(f).

(2) As against the appellant(A1) and his wife Selvi @ Murugammal (A2) - u/s 323 r/w 34 IPC.

11. The trial court has found both the appellant and his wife (A2) not guilty u/s 323 r/w 34 IPC and therefore, they were acquitted of the above

said charges. But the appellant was found guilty u/s 376(2)(f) IPC, as the victim girl PW3, was under the age of 8 years at the time of occurrence.

12. In so far as this case is concerned, the testimonies of PW 1, PW 3, PW 8 and Ex.P9 are available against the appellant. Based on the

testimonies of Pws. 1,3,8 and Ex.P9 a question is arisen as to whether these evidences are sufficient to bring the criminal conduct of the appellant

under the amplitude of Section 375(sixthly) to punish him u/s 376(2)(f) of IPC.

13. The phrase "rape" has been explained u/s 375 of IPC. Section 375 enacts as follows;

A man is said to commit ""rape"" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling

under any of the six following descriptions:-

First - Against her will.

Secondly - Without her consent.

Thirdly - With her consent, when her consent

has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly - With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be law-fully married.

Fifthly.- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by

him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.- With or without her consent, when she is under sixteen years of age.

Explanation - Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

14. In the given case on hand as per Ex.P8, age certificate issued by PW 8, Dr.Pramila, tutor in FSL Chennai, PW 3 was aged about 6 years but

below 8 years. Therefore, it is crystal clear that the testimonies of PW 1, PW 3 and PW 8 with the assistance of Ex.P9 certificate of examination

for sexual offences issued in respect of the victim by PW 8 are going to pointing out that the very intentional act of the appellant may be termed as

an offence of rape and therefore, he may be brought under the amplitude of the ingredient sixthly of Section 375 of IPC because the victim was

aged below 8 years at the material time.

15. The explanation to Section 375 contemplates that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

To establish "penetration" the evidence of PW 3, PW 8 and Ex.P9 assume more importance. On coming to the evidence of PW 3, she would

state that the appellant had put his male organ in her private part and withdrawn. She has also stated that he had been continuing the act viz.,

putting and withdrawing his male organ. Apart from this she would state that out of pain she was crying as ""amma amma"". While so, her mother

had come there and shouted at the appellant and taken her from there.

16. On coming to the evidence of PW 1, she would state that when she had

peeped through the partly opened door, she had noticed in dismay that both the appellant and her daughter were in compromising position. While her daughter was lying down in nude, the appellant was found lying over her in nude just like that of having sexual intercourse as husband and wife. But she did not state that her daughter was crying out of pain. In the complaint under Ex.P1, she would state that when she had peeped through the partly opened door, she had found that the appellant was indulging in unlawful sexual act with her daughter after removing and placing aside his lungi. But in the complaint also she never state that her daughter PW 3 was crying out of pain.

17. On coming to the evidence of PW 8, Dr.Pramila, she would state that no nail marks or any other injury was seen on the face, mouth, lips, chest and thigh of the victim girl PW 3. She has also stated that PW3's valva was normal, vagina admits tip of the little finger, hymen intact, perinea intact. It is pertinent to note here that if there was penetration definetly PW 8 would have found some congestion, bruise around the hymen or around the labia minora of PW 3. But in this case nothing was found.

18. In this connection the Mr.A.N.Thambidurai the learned Additional Public Prosecutor has submitted that as per the judicial pronouncement of several High Courts and the Apex Courts an intercourse could be had even without causing rupture or even without inflicting injuries in the private part of the victim both externally and internally. But here to constitute penetration, the evidence of PW 1 and PW 3 are not sufficient. The evidence of PW 8 and the documentary evidence under Ex.P9 are not supporting the act of penetration in this case. Therefore, it cannot be heard to say that penetration was established in this case.

19. In Premnarayan Vs. State of M.P., the accused when caught hold of the prosecutrix at the flour mill of her father and forcibly dragged her by the side of bushes and trees; he threw her down on the ground and removed her under garments making her naked; and he did attempt at penetration; the prosecutrix started bleeding from private parts, the offence of rape or at least attempt to commit rape is proved.

20. In an another case in Sanju @ Sanjay Patangrao Jagtap Vs. The State of Maharashtra (At the instance of Sr. P.I.), the accused had committed rape on girl of 5 years of age but she was not medically examined but accused

had made extra-judicial confession that he had attempted to commit rape and finding of semen stain on victim's underwear in chemical examination lent support to the prosecution case. It was held that his conviction could be altered from Section 376 to one u/s 376/511.

21. The learned counsel for the appellant/first accused while advancing his arguments has submitted that as deposed by Dr.Pramila PW8, that

penetration was not possible because no injuries either externally or internally were found on the victim girl PW 3. He has also argued that as

deposed by PW12, Scientific Officer, FSL Chennai and PW 13 Assistant Director of FSL, Chennai and on the basis of Exs.P17 and P18 no

seminal stain was found on the nighty MO1 which was worn by the victim girl at the time of occurrence, no blood stain was also found in MO1.

Further he has also submitted that though seminal stain was found on MO2 dhoti it was not proved that it was belonged to the appellant. Though it

is stated in Ex.P17 that the seminal stain was found to be of human origin, the result of grouping test was found inconclusive. Further on making

reference to Ex.P18 Biological report she would state that no blood stain was found in MO2 dhoti and no seminal stain was found in MO1 nighty.

22. He has also argued that the non-detection of blood stain and non-proof of seminal stain on the dhoti belonging to the accused person, it could

not be stated that the offence of rape was established by the prosecuting agency as against the appellant.

23. He has also maintained that when the incriminating circumstances were explained to the appellant as well as to his wife when they were

examined during the proceedings u/s 313(1)(b) of Cr.P.C. the first appellant had clearly replied that there was a dispute between him and PW 4

with regard to a chit transaction and hence, on the instigation of PW 4 this case was foisted by the prosecuting agency by availing the assistance of

PW 1, connecting her minor daughter with the appellant as if he had committed sexual assault on the innocent victim girl. He has also canvassed

that there was an abnormal delay in lodging the complaint by PW 1 with regard to the alleged offence of rape. He has also argued that as revealed

from the evidence of PW 1, the occurrence took place at 10.30am., in the morning of 13.06.2006. But Ex.P1 complaint was lodged before PW 9

only on 14.06.2006 at about 01.45pm., and therefore, there was a delay of 27

hours in lodging the complaint which has not been satisfactorily explained by the prosecuting agency.

24. Countering his argument, the learned Additional Public Prosecutor has submitted that on perusal of the testimonies of PW 1 it is crystal clear

that she had explained the delay satisfactorily as to why she had to lodge the complaint on the next day. In this connection he would submit that

though the occurrence was taken place at 10.30.p.m., PW1 was not able to act on her own volition and therefore, she was waiting for the arrival of

her husband and after his coming back to home in the evening from the work spot she had narrated the incident and thereafter, they both went to

the appellants house and shouted at him. During the course of verbal altercation, the appellant and his wife had joined together and assaulted PW 2

and hence, he happened to lodge the complaint on the next day i.e., at 01.45pm. He has also added that under these circumstances, the delay is not

a criteria to discard the complaint under Ex.P9 and to drop the presumption that no occurrence was taken place as alleged by the prosecuting agency.

25. With regard to the explanation given by the first appellant as to why this case was foisted against him, the learned counsel for the appellant has

laid emphasis on the decision in State of Punjab Vs. Hari Singh and Others, . In this case at para 16, the apex court has held as follows;

16. Contextually we cannot bypass the decision of a three-Judge Bench of this Court in Shivaji Sahabrao Bobade and Another Vs. State of

Maharashtra, as the Bench has widened the sweep of the provision concerning examination of the accused after closing prosecution evidence.

Learned Judges in that case were considering the fallout of omission to put to the accused a question on a vital circumstance appearing against him

in the prosecution evidence. The three-Judge Bench made the following observations therein: (SCC p.806, para 16)

16.. It is trite law, nevertheless fundamental, that the prisoner's attention should be drawn to every inculpatory material so as to enable him to

explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential

miscarriage of justice has flowed. However, where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice

occasioned by such defect must be established by the accused. In the event of evidentiary material not being put to the accused, the court must ordinarily eschew such material from consideration. It is also open to the appellate court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him and if the accused is unable to offer the appellate court any plausible or reasonable explanation of such circumstances, the court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial court he would not have been able to furnish any good ground to get out of the circumstances on which the trial court had relied for its conviction.

26. At paragraph No. 18 the apex court has held that; ""18. What is the object of examination of an accused u/s 313 of the Code? The section itself declares the object in explicit language that it is ""for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him"". In *Jai Dev Vs. The State of Punjab*, Gajendragadkar, J. (as he then was) speaking for a three-Judge Bench has focussed on the ultimate test in determining whether the provision has been fairly complied with. He observed thus: *Jai Dev Vs. The State of Punjab*,

21. The ultimate test in determining whether or not the accused has been fairly examined u/s 342 would be to inquire whether, having regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him. If it appears that the examination of the accused person was defective and thereby a prejudice has been caused to him, that would no doubt be a serious infirmity.

27. On coming to the instant case on hand, the appellant, during the course of examination u/s 313(1)(b) Cr.P.C., had replied that a dispute was arisen between PW 4 and him in respect of a chit transaction and that in order to vacate him from the house, PW 4 Shankar and PW 2 Shekhar had jointly conspired to foist this case against him. The explanation offered by the appellant is not discernible.

28. The trial court has also rightly rejected the explanation offered by the appellant and therefore, this court is of view that all the incriminating circumstances arising from the testimonies of the prosecution witnesses were put

to the appellant during the course of the proceedings u/s 313(1)

(b) Cr.P.C. and he was also given sufficient opportunity to explain the incriminating circumstances. Therefore, it cannot be heard to say that the

examination of the appellant u/s 313 Cr.P.C. was a defective one.

29. Eventually, Mr.Bhiman, the learned counsel for the appellant has also submitted that if at all this court comes to the conclusion that the

appellant is the perpetrator of the delict let the conviction u/s 376(2)(f) might be modified to one u/s 376 r/w. 511 of IPC. In support of his

contention he has also placed reliance upon the following decisions;

1. Aman Kumar and Another Vs. State of Haryana, .

2. Koppula Venkat Rao Vs. State of Andhra Pradesh, .

3 Sakshi Vs. Union of India (UOI) and Others, .

4. Arjun Singh Vs. State of H.P., .

30. In the first case in Aman Kumar and Another Vs. State of Haryana, the apex court has held that;

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.

31. It is also held that;

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. The depth of penetration is immaterial in an

offence punishable u/s 376 IPC. 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. 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.

32. In paragraph 10 the apex court has held that;

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.

33. In paragraph No. 11 it is held that;

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.

34. In Koppula Venkat Rao Vs. State of Andhra Pradesh, in paragraph No,8 and 9, the apex court has held as follows;

8. 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.

9. 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 u/s 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.

35. Ultimately, in paragraph No. 13, the apex court has held that;

13. When the evidence of the prosecutrix is considered in the proper perspective, it is clear that the commission of actual rape has not been

established. However, the evidence is sufficient to prove that attempt to commit rape was made. That being the position, conviction is altered from

Section 376 IPC to Section 376/511 IPC. Custodial sentence of 3 and 1/2 years would meet the ends of justice. The accused who is on bail shall

surrender to custody to serve remainder of his sentence.

36. On coming to the present case on hand as revealed from the evidence of PW 4 one month prior to the occurrence the victim girl PW 3 was

taken by the very same appellant to the lake. Thereafter, she was made to lie and the appellant had hugged and kissed her. This was witnessed by

PW 4 and subsequently, he had disclosed this fact to PW 1. This has also been corroborated by PW 3, victim girl.

37. As already discussed in the earlier paragraphs, based on the evidence given by PW 3 and PW 8 as well as under Ex.P9, ""penetration"" is not

established. However, the testimonies of PW 3, PW 8, Ex.P9 and PW 1 are very much sufficient to hold that the appellant had committed the

offence of attempt to rape which would come under the ambit of Section 376/511 of IPC because an attempt is an overt act immediately

connected with the commission of an offence and forming part of a series of acts which, if not interrupted or frustrated or abandoned, would result

in the commission of the completed offence. Acts remotely leading towards the commission of an offence cannot constitute an attempt. The acts

must be immediately connected with the offence. An act done preparatory to the commission of an offence is not sufficiently proximate; and it is

not an attempt merely to procure materials with which to commit the offence.

38. As observed in *Shri Jakir Hossain v. State* reported in 2008 CriLJ 749 (Gau) an attempt is nothing but a preliminary crime, failure to commit

substantive crime.

39. In the instant case on hand, it is established that the appellant was having criminal intention to commit rape upon the victim girl PW 3. To put

his intention in action with a physical movement, he took PW 3 in to his house, made her to become nude and himself as well and subsequently,

made her to lie on her back on the floor and he was also found indulging in sexual assault as revealed from the evidence of PW 3 and PW 1. As

observed earlier if his over act, which was immediately connected with the commission of the offence was not interrupted by PW 1, it would be

resulted in the commission of the complete offence of rape. Since his series of acts was frustrated by PW 1, he had to abandon the sexual assault.

40. In the result the appeal is partly allowed. The conviction and sentence imposed on the appellant by the trial court u/s 376(2)(f) is modified to

one u/s 376/511 of IPC. It appears from the records that the appellant has so far spent 4 years and 22 days in the prison. Therefore, this court is

of view that to meet the ends of justice the custodial sentence of 4 years and 22 days would be sufficient. It also appears from the records that the

fine amount of Rs. 1000/- imposed by the trial court has not been paid by the appellant. Hence the default sentence of 6 months is also directed to

be merged with the custodial sentence which has already been served by the appellant.

41. Keeping in view of this fact the appellant is set at liberty. Connected miscellaneous petition is closed.

42. In the result the appeal is partly allowed. The conviction and sentence imposed on the appellant by the trial court u/s 376(2)(f) is modified to

one u/s 376/511 of IPC. It appears from the records that the appellant has so far spent 4 years and 22 days in the prison. Therefore, this court is

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be merged with the custodial sentence which has already been served by the appellant.

43. Keeping in view of this fact the appellant is set at liberty. Connected miscellaneous petition is closed.