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**(1995) 07 OHC CK 0012**

**In the Orissa High Court**

**Case No : Criminal Appeal No's. 24 and 25 of 1989**

Damodar Behera and Another and Sagar Barik

APPELLANT

Vs

State of Orissa

RESPONDENT

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**Date of Decision : 26-07-1995**

**Acts Referred:**

Penal Code, 1860 (IPC) — Section 354, 376, 511

**Citation :** (1996) CriLJ 346 : (1995) 2 OLR 502

**Hon'ble Judges :** A. Pasayat, J

**Bench :** Single Bench

**Advocate :** S.C. Ghose, in Criminal A. No. 24/89 and L. Pradhan, in Crl A. No. 25/89, for the Appellant; Akhil Mohapatra, Standing Counsel and Sujata Jena, A.S.C., for the Respondent

**Final Decision :** Allowed

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## **Judgement**

A. Pasayat. J.

1. These two appeals are interlinked being directed against the same judgment of the learned Sessions Judge, Phulbani convicting each one of the appellants (hereinafter referred to as the "accused" by name) for offences punishable under Sections 376/511 read with Section 34 of the Indian Penal Code, 1869 (in short, "IPC") and sentencing each one of them to undergo rigorous imprisonment for one year.

2. Accusations which led to the trial and conviction of the accused persons are essentially as follows :

On 25-5-1988 around sunset time the victim whose name need not be indicated (PW 4) was returning to her village Konkola along with her sister and sister-in-law (PW 5) carrying some milled rice. The three accused persons met them on the way and asked them to have sexual intercourse with them. When accused Damodar Behera caught hold of the hand, accused Dandadhar Karmi and Sagar Barik removed sari from the person of the victim and attempted to commit rape

on her, PW 5 shouted for help hearing which Trilochan Mahakud, Koira Behera, Chanakhi Behera and Amulya Gauda rushed to the spot. On seeing them approaching the spot, the accused persons fled away. On 26-5-1988 information was lodged at Baunsuni Police Station by the brother of victim. A case was registered under Sections 354/34, IPC. On Police requisition doctor (PW 1) examined the victim, and submitted his report (Ext. 1.) According to PW 1, there were injuries on the left side chest of the victim girl. Few days thereafter on police requisition, the doctor (PW 2) examined the victim and did not find any indication of recent sexual intercourse, but opined that the victim was accustomed to sexual intercourse. Accused Damodar Behera was arrested on 7-6-1988, whereas other accused persons surrendered in Court subsequently. On completion of investigation charge-sheet was submitted.

3. Accused persons pleaded innocence. According to them, there was difference of opinion between accused Damodar and victim on account of sale consideration relating to a piece of land purchased by the victim from Damodar. One witness was examined on behalf of them to prove that the victim sustained injuries in a cycle accident.

4. On evaluation of evidence of seven witnesses examined to further the prosecution case, and one examined in support of the defence version, learned Sessions Judge found the accused persons guilty and convicted and sentenced them as indicated above.

5. In support of the appeals, Mr. S.C. Ghose, and Mr. L. Pradhan submitted that in view of the accepted position that there was hostility between accused Damodar and the victim, the case has been falsely foisted and on that score the prosecution case should have been held to be unbelievable. Additionally, it is submitted that a look at the statement in the FIR and the statement made during investigation would go to show that the witnesses exaggerated the alleged incident and tried to rope in the accused persons in the accusation of having committed rape on the victim. This according to them, is sufficient to show the mala fide intention to falsely implicate and harass the accused persons. Further, it is submitted that even if the prosecution version is accepted in its entirety a case punishable under Sections 376/511 is not made out, Mr. A. Mohapatra, learned counsel for State on the other hand supported the conviction and sentence.

6. Where animosity or hostility is pleaded and accepted, the Court does not throw out the evidence in its entirety because hostility or animosity cannot only provide basis for false implication, but also provide foundation for the crime. In such case deeper scrutiny of the evidence is necessary. That has been done in the instant case. Additionally, in a tradition bound country like ours, it is hard to believe that an unmarried girl of tender age will throw false accusations involving sexual offences on three persons which would ultimately tell upon her prestige and dignity in the society. While it cannot be laid down as a rule of universal application that no such accusation can be made, materials must be brought on

record to establish and justify a conclusion that a false and fabricated case has been put up. That does not appear to be a case here. It is true that where there are exaggerations the Court has to analyse the evidence to separate the grain from the chaff and separate the falsehood from the truth, the maxim *falsus in uno falsus in omnibus* is not a rule of law. At the most it is a rule of caution or prudence requiring the Court to be careful to separate grain from the chaff. The principle is not to be applied blindly, routinely or as if it is a rule of law. Falsity of testimony in one or some material particulars would not ruin it from beginning to end. While truth and falsehood are so intermingled that it is impossible to separate them, Court may throw out the prosecution version on its entirety. But where the truth and falsehood are clearly separable. Court can believe the prosecution version found to be truthful and cogent to record a conviction. I find no substance in the plea that the case was outcome of malice designed to harm reputation of the accused persons and to harass them.

7. The plea relating to applicability of Section 375 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 fails of success, must create alarm, which of 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.

8. 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 to 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.

9. 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, combined with the doing of some act adapted to, but 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 case of a mere preparation and an attempt.

10. In order to find an accused guilty of an assault 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 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.

11. Coming to the facts of the case, I find that the evidence on record clearly show that the sari of the victim had been removed by all the accused persons. Nothing beyond that appears to have been done. It is accepted that the accused ran away on seeing some persons. 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 Sections 376/511, IPC. But the case is certainly one of indecent assault upon a woman. Essential ingredients of the offence punishable u/s 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 saree, 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 English Dictionary (Third Edition) defines the word "modesty" in relation to woman as follows:

"Decorous in manner and conduct; not forward or lewd; Shame--fast : scrupulously chaste."

Modesty is defined 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 Liyed* (1876) 7 CP 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.

12. Accordingly, I set aside conviction of the appellants under Sections 376/511, read with Section 34, IPC, and convict them u/s 354, read with Section 34, IPC. Considering the fact that the occurrence took place about seven years back, I do not think it appropriate to send back the accused appellants to custody. The custodial sentence is restricted to the period already undergone. However, a fine of Rs. 500/- is imposed on each of the accused-appellants which on recovery shall be paid to the victim girl. In default of payment of fine, the accused-appellants shall undergo rigorous imprisonment for two months.

The appeals are allowed to the extent indicated above.