

(2015) 07 PAT CK 0142

In the Patna High Court

Case No : Criminal Misc. No. 49227 of 2013

Girish Chandra Sharma

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 02-07-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173(2), 482
Penal Code, 1860 (IPC) — Section 122, 34, 354, 375, 376

Citation : (2015) 4 PLJR 566

Hon'ble Judges : Ashwani Kumar Singh, J.

Bench : Single Bench

Advocate : Rajendra Narayan and Shakti Suman Kumar, for the Appellant; Uday Chand Prasad, for the Respondent

Judgement

Ashwani Kumar Singh, J.—This application under Section 482 of the Code of Criminal Procedure (for short "the Code") is directed against the order dated 9.1.2013 passed by the learned Chief Judicial Magistrate, Patna in S.K. Puri P.S. Case No. 278 of 2012, whereby finding a prima facie case to be made out under Sections 376 /511 of the Indian Penal Code (for short "IPC"), the petitioner has been summoned to face trial. By the said order, the learned Chief Judicial Magistrate has made over the case to another Judicial Magistrate for enquiry and commitment. The First Information Report (for short "FIR") of S.K. Puri P.S. Case No. 278 of 2012 was registered on the basis of a written report submitted by one Savita Mishra to the Officer-in-Charge of the S.K. Puri Police Station on 30th November, 2012. The informant has alleged in the FIR that she was a tenant in the house of one Tarkeshwar Singh in Mohalla-Gandhi Nagar falling within the jurisdiction of Sri Krishnapuri Police Station. On 30th November, 2012 at about 6.00 p.m. her daughter Soni Kumari aged about 8 years had gone up on the roof of the house for playing. When she did not come back after lapse of some time, she sent her son Rahul to call Soni Kumari. After some time, his son Rahul and daughter Soni Kumari came down from the roof. She found that both were a bit frightened. She saw a currency note of Rs. 10/- denomination in the hand of her

daughter Soni Kumari. When she enquired from her, she started crying and disclosed that the petitioner had called her up on the roof to take toffee. Thereafter, he took her in a room and put her on his lap. At that time he had unfastened the zip of his pant. He started kissing her but in the meantime, Rahul came and when he opened the door, the petitioner left her and fled away towards kitchen. She also disclosed that the petitioner had given her Rs. 10/- and asked her not to disclose about the incident to anyone.

2. It has further been alleged that when the informant came to know about the entire incident, she made a hue and cry, as a result of which several persons of the locality assembled and assaulted the petitioner. Somehow the informant intervened and saved him from lynching by the mob. She also informed the police regarding the occurrence pursuant to which the police came and arrested the petitioner.

3. On the basis of the aforesaid allegations, an FIR was registered under Section 354 IPC. The police investigated the case and on conclusion of investigation submitted a report under Section 173(2) of the Code against the petitioner. He was sent up for the offences under Sections 376 /511 IPC. After receipt of police report, the learned Chief Judicial Magistrate took cognizance of the offence under Section 376 /511 IPC and vide order dated 9.1.2013 made over the case to another Judicial Magistrate for enquiry and commitment. The aforesaid order dated 9.1.2013 is under challenge before this Court.

4. Mr. Rajendra Narayan, learned senior counsel appearing for the petitioner has submitted that there is nothing in the police report beyond the allegation of calling the victim up on the roof on the pretext of giving toffee, putting her on his lap and kissing her. Even in course of investigation no other aggravated factor transpired. He has submitted that in course of investigation the informant, the victim and the victim's brother have been examined but none of them has made any allegation beyond the allegation made in the FIR. Initially the police had registered the FIR under Section 354 IPC but after investigation only on the basis of opinion of the supervising officer charge-sheet was submitted by the Investigating Officer of the case under Sections 376 /511 IPC. It has been submitted that even if the entire allegations made in the FIR are taken to be true, the ingredients of the offences punishable under Section 376 IPC would not be attracted. In support of his submissions, learned counsel for the petitioner has placed reliance on the decisions of the Supreme Court in Koppula Venkat Rao Vs. State of Andhra Pradesh, , Tarkeshwar Sahu Vs. State of Bihar (Now Jharkhand), and an unreported judgment of this Court dated 11.5.2015 passed in Cr. Misc. No. 46176 of 2012.

5. Per contra, learned counsel for the State has contested the matter. He has submitted that there is no error in the impugned order dated 9.1.2013 passed by the learned Chief Judicial Magistrate, Patna. According to him, the victim was a minor girl aged about 8 years and taking advantage of her innocence the petitioner had made an effort to ravish her. However, he concedes that no other

aggravated factor has transpired in course of investigation beyond what has been alleged in the FIR. He has contended that even on the basis of allegations made in the FIR ingredients of the offences punishable under Sections 376 /511 IPC are attracted.

6. I have heard the respective counsel for the parties and perused the record.

7. The allegations made in the FIR have duly been corroborated by the witnesses in course of investigation. The question which would arise for consideration is whether or not on the basis of admitted case of the prosecution the ingredients of the offences punishable under Sections 376 /511 IPC would be attracted.

8. In order to appreciate the rival submissions advanced by the respective counsel for the parties as also to decide the issues involved in the case, at this stage, I think it apposite to take into consideration the relevant provisions of the Penal Code.

9. Section 375 IPC defines rape and illustrates the circumstances relating to rape and Section 376 IPC provides punishment for the same. Section 375 IPC, as it stood prior to its amendment, vide the Criminal Law (Amendment) Act, 2013 (Act 13 of 2013) dated 2nd April, 2013, reads as under:--

"375. Rape.--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 lawfully 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."

10. Section 511 IPC provides for punishment for attempting to commit the offences punishable with imprisonment for life or other imprisonment, which reads as under:--

"511. Punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment.--Whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment, or to

cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both."

11. The essence of allegations made in the FIR is as under:--

- (i) The petitioner called the victim up on the roof of the house on the pretext of giving her toffee;
- (ii) When she came up on the roof, he called her in a room;
- (iii) When she entered the room, he took her on his lap;
- (iv) At that time, he had unfastened the zip of his pant;
- (v) He started kissing the victim;
- (vi) He gave Rs. 10/- to the victim and asked her not to disclose anything to anyone; and
- (vii) When the victim's minor brother went to call her at the roof of the house and entered the room, he left her and fled away towards kitchen.

12. The allegations as discussed above would show that the informant or the victim did not allege rape. The petitioner did not commit any overt act amounting to rape as defined in Section 375 IPC or did not even commit rape. The petitioner neither used any force nor gave any threat to the victim. When the victim's brother came in the room, the petitioner fled away.

13. In the aforesaid background of the facts, it is to be seen whether cognizance could have been taken for the offences punishable under Sections 376 /511 IPC or the allegations made in the FIR would attract the ingredients of the offence punishable under Section 354 IPC.

14. Section 354 IPC prescribes punishment for assault or criminal force to woman with intent to outrage her modesty. It reads as under:--

"354. Assault or criminal force to woman with intent to outrage her modesty.-- Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a terms which may extend to two years, or with fine, or with both."

15. The Supreme Court has elaborately discussed and considered the distinction between intention to commit, preparation to commit and attempt to commit a crime in Koppula Venkat Rao Vs. State of Andhra Pradesh, , in paragraphs 8 to 11 which read as under:--

"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, and 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 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 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.

10. 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 or consummation/completion. 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.

11. 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."

16. In *Tarkeshwar Sahu Vs. State of Bihar (Now Jharkhand)*, , the Supreme Court has considered in detail whether an offence of a particular nature would amount to an attempt to commit rape or would come within the purview of Section 354 of the Indian Penal Code. In that case, the prosecutrix, aged about 12 years, came out of her house to answer call of nature. Accused forcibly took her to his "gumti" for committing illicit sexual intercourse with her. The prosecutrix raised an alarm, and immediately thereafter, several persons including the father of the prosecutrix came from the adjoining houses and caught the accused before he could even make any attempt to ravish the prosecutrix. The trial Court convicted the accused under Sections 376 /511 of the Indian Penal Code. The appeal preferred by the accused was dismissed by the High Court. The judgment and order passed by the High Court was challenged in appeal before the Supreme Court. After hearing the parties, before reaching to any conclusion, the Supreme Court considered the facts of several cases decided earlier by different courts in paragraphs 45 to 56, which are as under:--

"45. In *State of Kerala v. Hamsa* [, (1988) 3 Crimes 161 (Ker.) it was stated as under:--(Crimes p. 164, para 5)

"What the legislature had in mind when it used the word modesty in Sections 354 and 509 of the Penal Code was protection of an attribute which is peculiar to woman as a virtue which attaches to a female on account of her sex. Modesty is the attribute of female sex and she possesses it irrespective of her age. The two offences were created not only in the interest of the woman concerned, but in the interest of public morality as well. The question of infringing the modesty of a woman would of course depend upon the customs and habits of the people. Acts which are outrageous to morality would be outrageous to modesty of women. No particular yardstick of universal application can be made for measuring the amplitude of modesty of woman, as it may vary from country to country or society to society."

46. A well known author Kenny in his book Outlines of Criminal Law (19th Edn., para 146, p. 203) has dealt with the aspect of indecent assault upon a female. The relevant passage reads as under:--

"In England by the Sexual Offences Act, 1956, an indecent assault upon a female (of any age) is made a misdemeanour and on a charge for indecent assault upon a child or young person under the age of sixteen it is no defence that she (or he) consented to the act of indecency."

47. In State of Punjab Vs. Major Singh, a three-Judge Bench of this Court considered the question--whether modesty of a female child of 71/2 months can also be outraged. The majority view was in the affirmative. Bachawat, J. on behalf of majority, opined as under:--

"The offence punishable under Section 354 is an assault on or use of criminal force to a woman with the intention of outraging her modesty or with the knowledge of the likelihood of doing so. The Code does not define "modesty". What then is a woman's modesty?

... the essence of a woman's modesty is her sex. The modesty of an adult female is writ large on her body. Young or old, intelligent or imbecile, awake or sleeping, the woman possesses a modesty capable of being outraged. Whoever uses criminal force to her with intent to outrage her modesty commits an offence punishable under Section 354 . 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, as, for example, when the accused with a corrupt mind stealthily touches the flesh of a sleeping woman. She may be an idiot, she may be under the spell of anaesthesia, she may be sleeping, she may be unable to appreciate the significance of the act; nevertheless, the offender is punishable under the section.

A female of tender age stands on a somewhat different footing. Her body is immature, and her sexual powers are dormant. In this case, the victim is a baby, seven-and-half months old. She has not yet developed a sense of shame and has no awareness of sex. Nevertheless from her very birth she possesses the modesty which is the attribute of her sex."

48. In Kanhu Charan Patra Vs. State of Orissa, the Orissa High Court stated as under:--

"The accused entered the house and broke open the door which two girls of growing age had closed from inside and molested them but they could do nothing more as the girls made good their escape. On being prosecuted it was held that the act of the accused was of grave nature and they had committed the same in a daredevil manner. As such, their conviction under Sections 354 /34 was held proper."

49. The High Court of Delhi in Jai Chand Vs. The State, observed as under:--

"The accused in another case had forcibly laid the prosecutrix on the bed and broken her pyjama's string but made no attempt to undress himself and when the prosecutrix pushed him away, he did not make efforts to grab her again. It was held that it was not an attempt to rape but only outraging of the modesty of a woman and conviction under Section 354 was proper."

50. In *Raja Vs. State of Rajasthan*, it was stated as under:--

"The accused took the minor to a solitary place but could not commit rape. The conviction of the accused was altered from Sections 376 /511 to one under Section 354 ."

51. The Court in *State of Karnataka v. Khaseel* [2004 Cri. LJ (NOC) 10 (Kant.)] stated as follows: [Cri. LJ (NOC) 10]. "The parents reached the sugarcane field when accused was in process of attempting molestation and immediately he ran away from the place. There was no evidence in support of allegation of rape and accused was acquitted of charge under Section 376 but he was held liable for conviction under Sections 354 /511 IPC."

52. The Court in *Nuna v. Emperor* [(1912) 13 Cri. LJ 469] stated as follows: (Cri LJ p. 469).

"The accused took off a girl's clothes, threw her on to the ground and then sat down beside her. He said nothing to her nor did he do anything more to her: [It is held] that the accused committed an offence under Section 354 IPC and was not guilty of an attempt to commit rape."

53. The Court in *Bisheshwar Murmu Vs. State of Bihar (Now Jharkhand)*, stated as under:--

"The evidence showed that the accused caught hold of the hand of the informant/victim and when one of the prosecution witnesses came there hearing alarm of the victim, offence under Sections 376 /511 was not made out and conviction was converted into one under Section 354 for outraging the modesty of the victim."

54. The Court in *Keshab Padhan v. State of Orissa* [1976 Cutt. LR (Cri.) 236] stated as under:--

"The test of outrage of modesty is whether a reasonable man will think that the act of the offender was intended to or was known to be likely to outrage the modesty of the woman. In the instant case, the girl was 15 years of age and in the midnight while she was coming back with her mother the sudden appearance of the petitioner from a lane and dragging her towards that side sufficiently established the ingredients of Section 354 ."

55. The Court in *Ram Mehar Vs. State of Haryana*, stated as under:--

"The accused caught hold of the prosecutrix, lifted her and then took her to a bajra field where he felled her down and tried to open her salwar but could not

do so as in order to make the accused powerless the prosecutrix had injured him by giving a blow of the sickle. The accused failed to give his blood sample with the result it could be presumed that his innocence was doubtful. Ocular evidence of the prosecutrix was also corroborated by other evidence. It was held that conviction of the accused under Sections 354 , 376 /511 was proper but taking a lenient view only two years" RI and a fine of Rs. 1,00(sic) was imposed on him."

56. In Rameshwar Vs. State of Haryana, the Court observed as follows: (Cri. LJ p. 786)

"Whether a certain act amounts to an attempt to commit a particular offence is a question of fact, dependant on the nature of the offence and the steps necessary to take in order to commit it. The difference between mere preparation and actual attempt to commit an offence consists chiefly in the greater degree of determination. For an offence of an attempt to commit rape, the prosecution must establish that it has gone beyond the stage of preparation."

17. After carefully analyzing the provisions pertaining to outrage the modesty to a girl and considering the ambit and scope of Sections 376 /511 and 354 of the Indian Penal Code, when I look to the facts of the present case, it would be evident that even on admitted facts, the ingredients of the offences punishable under Sections 376 /511 would not be attracted in the present case. It would be a case of outraging the modesty of the victim, which would come under Section 354 IPC.

18. In order to take cognizance of the offences punishable under Section 376 with 511 IPC the court has to be satisfied with the accused not only desired to gratify his passions but he intended to do so at all events. For the reasons recorded hereinabove, the application is allowed in part. The impugned order dated 9.1.2013 passed by the learned Chief Judicial Magistrate, Patna in S.K. Puri P.S. Case No. 278 of 2012 is set aside and the matter is remanded back to the Magistrate concerned to pass appropriate orders in accordance with law in the light of the observations made hereinabove treating it to be a case pending at the pre-cognizance stage.