

HIGH COURT OF MADHYA PRADESH,
PRINCIPAL SEAT AT JABALPUR
SINGLE BENCH : HON'BLE SHRI JUSTICE J.P.GUPTA

Criminal Appeal No. 976/1999

Gajanand S/o Chamru Lal @ Bhuria Lohar

Vs.

The State of Madhya Pradesh

Shri Manish Datt, Senior Advocate with Shri Pradeep Hazari, Advocate for the appellant.

Shri C.K. Mishra, G.A. for the respondent/ State.

Whether approved for reporting : (Yes / No).

J U D G M E N T

(31/08/2018)

The appellant has preferred the present appeal being aggrieved with the judgment dated 30.1.1999 passed by IInd Addl. Sessions Judge, Waraseoni, District Balaghat, in S.T. No. 105/1997 whereby the appellant has been convicted for the offence under Sections 376 read with Section 511 of the I.P.C. and sentenced to undergo R.I. for 3 years, with default stipulation.

2. The prosecution case, in brief, is that the prosecutrix was minor at the time of incident and was studying in class II. On 6.4.1997 there was Sunday and due to

holiday she had gone to graze her she goats far away from her house in a field. At that time appellant accused came there and threw down the prosecutrix and after undressing the prosecutrix and himself, attempted to commit rape with her. On the hue and cry of the prosecutrix, the appellant fled away. Thereafter, prosecutrix returned back to her house weeping and narrated the entire incident to her mother Durgawati. Then they narrated the incident to grandfather Netlal, Sarpanch Hemanlal, Up Sarpanch Dulichand, Kotwar Rameshwar and Shankarlal Mahar and lodged the report at Police Station Lalbarra, on the basis of which First Information Report, Ex.P/1, was lodged and crime no.64/1997 was registered against the appellant for the offence punishable under sections 376, 511 and 323 of the I.P.C. and the matter was investigated. The prosecutrix was sent for her medico legal examination. Appellant was arrested on 24.7.1996 and his medical examination was conducted. After due investigation, a charge sheet was filed before the concerned JMFC, who committed the case to the Court of Sessions. The court of Sessions Judge, Satna, framed the charge against the appellant for the offence under Sections 376, 511 and 323 of the I.P.C. The appellant abjured the guilt and claimed to be tried. His defence was that he has been falsely implicated.

3. The learned court below after adducing the oral as well as documentary evidence convicted the appellant under section 376 read with Section 323 of the I.P.C. and sentenced him, as mentioned above.

4. Aforesaid findings of the learned trial Court has been assailed on the ground that the findings of the learned trial Court are illegal, erroneous and contrary to law as the evidence have not been appreciated in right perspective and further submitted that the learned trial Court has failed to consider the difference between preparation of rape and attempt to rape.

5. Looking to the facts and circumstances of the case, hardly the act of the appellant discloses preparation of rape which is not an offence. In such circumstances, the appellant may only be convicted for commission of offence punishable under section 354 of the IPC. The appellant has remained in custody for near about 6 months. Incident is more than 20 years old. At that time, age of the accused was nearly 20 years, therefore, the period already undergone would meet the ends of justice, hence, the sentence be reduced accordingly.

6. Learned Government Advocate opposed the aforesaid contention and supported findings of the learned trial Court and prayed for dismissal of the appeal.

7. Having considered the contentions of learned counsel for the parties and perusal of the record, in view of this court, the contention of the appellant have substance. Before coming to any definite conclusion, it would be appropriate to scan the evidence on record. Prosecutrix P.W. 1 was a 9 years old girl. She has stated that on the date of incident, near about 2:30 P.M., when

she was grazing her she goats and appellant was also grazing his ox, the appellant came towards her and caught hold her both hands and pulled her towards himself and thereafter, the appellant put off her panty and also put off his pant and then he laid down to her on the ground. While she started crying, the accused left her. On that occasion something pinched on her back then she returned back to her house weeping and told the incident to her mother and then with her mother she went to the police station and lodged report, Exh. P-1 and from the police station she was sent for medical examination. During cross examination she has also narrated that the appellant inserted his private part into her private part. She felt pain due to which she screamed.

8. Durgawati PW-2, mother of the prosecutrix, has also stated that the prosecutrix told her that the appellant committed sexual intercourse with her and also stated that there was blood stains on her undergarments and also on her stomach and then independent witness, Sarpanch of the village Hemanlal PW-3 has stated that the mother of the prosecutrix told him that appellant undressed the prosecutrix and with the intention to commit misdeed, he laid down on her and on her crying, the appellant fled away. The same fact was disclosed by the prosecutrix to him then he advised her to lodge the report. He did not see the blood stains on the undergarments of the prosecutrix. The prosecutrix and her mother did not tell him that the appellant committed

sexual intercourse with the prosecutrix.

9. Rakesh Srivastava, PW-4, Sup Inspector, police station, Lalbarra has stated that he recorded the FIR Exh. P-1 and at that time, it was not disclosed by the prosecutrix that the appellant committed rape with her.

10. Dr. Y.R. Koleh PW-5, who examined the prosecutrix, has stated that there was one contusion near the left armpit on the back side which was caused by hard and blunt object, within 24 hours and prepared report Exh. P-2. Investigating Officer, Dinesh Singh, PW-6, has stated that he has recorded the police statement of prosecutrix wherein she did not state about the commission of rape with her.

11. From the aforesaid evidence, it is clear that the statement with regard to commission of rape by the appellant has been made by the prosecutrix and her mother falsely during the process of examination, contrary to the FIR and the police statements and the statement of independent witness Sarpanch Hemanlal, PW-3 and there is no support from the medical evidence. In these circumstances, learned trial Court has not committed any error to arrive at the conclusion that the appellant did not commit rape with the prosecutrix and he undressed the prosecutrix and undressed himself and laid down on the prosecutrix.

12. In view of this court, the aforesaid proved facts are not sufficient to come to the conclusion that the

appellant committed offence to attempt to rape. An act of attempt is totally different from an act of preparation. There is no evidence that after laying down on the prosecutrix, the appellant in order to commit rape put his penis on the vagina of the prosecutrix or made any further attempt to penetrate in the vagina of the prosecutrix or touch any sensual organ with hand. Hence, the act which has been proved shows only preparation. Moreso, it is also important in this case that there is no medical evidence with regard to competency of the appellant to commit sexual intercourse. There is also no evidence that the appellant was making efforts to insert his penis into the vagina of the prosecutrix, as it appears from the earliest version of the prosecutrix, mentioned in the FIR Exh. P-1 and only to that extent her statement is credible. Hence, it cannot be said that the prosecution has established beyond reasonable doubt that the appellant has committed offence of attempt to rape with the prosecutrix. In these circumstances, only the offence of assaulting the prosecutrix with a view to outrage her modesty is found to be proved.

13. In view of the aforesaid discussions, the appeal is partly allowed and the appellant's conviction and sentence under Section 376 read with Section 511 of the IPC is set aside. Instead, the appellant is convicted furthermore under Section 354 of IPC. So far as sentence is concerned, in this case the appellant has remained in custody during the trial from 26.4.1997 to 13.6.1997 and then after conviction from 30.1.1999 to 12.4.1999. This

is a 20 years old case old and at the time of incident, age of the appellant was 20 years and no purpose will be served by sending him back in imprisonment and the end of justice will be achieved by punishing the appellant to the period already undergone by him with a fine of Rs. 5,000/-. Hence, the appellant is sentenced to the period already undergone and fine of Rs. 5,000/- and in default of it further sentence of RI for six months. On realization of the fine, it would be paid to the prosecutrix as compensation.

14. The appeal is disposed of accordingly. Copy of the judgment be sent to the learned trial Court for compliance and necessary action.

(J.P.GUPTA)
JUDGE

VKV/-

HIGH COURT OF MADHYA PRADESH : PRINCIPAL SEAT AT JABALPUR

1	Case Number	Cr.A. No. 976/1999
2	Parties Name	Gajanand S/o Chamru Lal @ Bhuria Lohar vs. The State of Madhya Pradesh
3	Date of Judgment/Order	31.08.2018
4	Bench Constituted of	Hon. Shri Justice J.P. Gupta
5	Judgment delivered by	Hon. Shri Justice J.P. Gupta
6	Whether approved for reporting	YES
7	Name of the counsel for the parties	Shri Manish Datt, Senior Advocate with Shri Pradeep Hazari, Advocate for the appellant. Shri C.K. Mishra, G.A. for the respondent/State
8	Law laid down & Significant paragraphs number	12. An act of attempt to commit an offence is totally different from an act of preparation to commit an offence. There is no evidence that after laying down on the prosecutrix, the appellant in order to commit rape put his penis on the vagina of the prosecutrix or made any further attempt to penetrate in the vagina of the prosecutrix or touch any sensual organ with hand. Hence, the act which has been proved shows only preparation. Moreso, it is also important in this case that there is no medical evidence with regard to competency of the appellant to commit sexual intercourse. There is also no evidence that the appellant was making efforts to insert his penis into the vagina of the prosecutrix, as it appears from the earliest version of the prosecutrix, mentioned in the FIR Exh. P-1 and only to that extent her statement is credible. Hence, it cannot be said that the prosecution has established beyond reasonable doubt that the appellant has committed offence of attempt to rape with the prosecutrix. In these circumstances, only the offence of assaulting the prosecutrix with a view to outrage her modesty is found to be proved.

(J.P. GUPTA)
JUDGE