

Kartar Singh Vs. State

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Court : Delhi

Decided On : Nov-11-2014

Judge : Pratibha Rani

Appellant : Kartar Singh

Respondent : State

Judgement :

\$~R-6 * IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on :

03. 11 .2014 Pronounced on :

11. .11.2014 % + CRL.A. 870/2009 KARTAR SINGH Through : Appellant Mr.Amardeep Singh, Mr.M.L.Yadav, Mr.Baljinder Singh, Mr.Bhagwant Singh and Mr.Mansimran Singh, Advocates. versus STATE Through : Respondent Ms.Rajdipa Behura, APP for the State. CORAM: HON'BLE MS. JUSTICE PRATIBHA RANI PRATIBHA RANI, J1 This is an appeal under Section 374 Cr.P.C. filed on behalf of the Appellant impugning the judgment dated 07.09.2009 and order on sentence dated 09.09.2009 passed by the learned Sessions Judge, Delhi, whereby the Appellant was convicted and sentenced to rigorous imprisonment for ten years and fine of Rs.5,000/- for committing the offence punishable under Section 376 IPC. The Appellant was further convicted and sentenced to undergo rigorous imprisonment for six months and fine of Rs.1,000/- for committing the offence punishable under Section 506 IPC in case FIR

No.391/2001, Sessions Case No.22/08 Police Station Patel Nagar. Both the sentences were ordered to be run concurrently.

2. The occurrence for which the Appellant has been convicted had taken place on 24.06.2001 within the jurisdiction of Police Station Patel Nagar . On that date, at about 4:02 p.m., DD No.20A was recorded at Police Station Patel Nagar in respect of galat kaam being done with a 8 years old girl at Prem Nagar Gali No.7 and that the offender had been apprehended. The DD entry was assigned to SI N.R.Lamba, who along with Ct. Suresh left for the spot. SI N.R.Lamba found the child victim and her parents present at the spot. He was also handed over Kartar Singh (Appellant herein) who was in injured condition. The child victim A (name withheld to conceal her identity) made statement (Ex.PW-2/A) in the presence of her parents, on the basis of which he sent rukka (Ex.PW-11/B), pursuant to which case FIR No.391/2001, under Sections 376/506 IPC was registered.

3. As per the statement (Ex.PW-2/A) made by Km. A, at that time she was studying in 3rd standard. She alongwith her friend was on the roof top and they were plucking black plum (jamun). In the meantime, Kartar Singh, residing in the adjoining house called her and dragged her to his roof. He asked her to stand silently or he would kill her. Thereafter, he lowered her underwear upto legs and also lowered his underwear and started doing galat kaam. She started crying and asked him to let her go, but she was not allowed to go. She started bleeding from her private part and had lot of pain. Thereafter, he ran away from there. After wearing her underwear, she returned home.

4. The child victim as well as the Appellant were taken for medical examination. The exhibits were sent to FSL. After completion of investigation, charge-sheet was filed.

5. The Appellant at the time of arrest in this case had given his age as 17 years. On the basis of school record, as his date of birth was 21.12.1979, he was held to be not a juvenile and sent by the Juvenile Justice Board to face trial as an adult.

6. When the case was assigned to the Court of Sessions, charge for committing the offence under Section 376/506 IPC was framed, to which the Appellant

pleaded not guilty and claimed trial.

7. The prosecution examined 15 witnesses in all to bring home the guilt of the Appellant/Accused. In his statement under Section 313 Cr.P.C., while denying the case of the prosecution, the Appellant claimed that there was some misunderstanding which resulted in to beatings being given to him by the parents of the victim, who thought that he had misbehaved with her. Since the Appellant was bleeding due to the beatings given to him, apprehending that the Appellant might get a case registered against them, they lodged this false FIR against him. He also submitted that his blood group is AB and he can subject himself to any medical examination to establish this fact. He also examined one defence witness in his support, i.e. DW-1, Dr.M.S.Lakshmi, to prove his blood test report (Ex.DW-1/A) to establish that his blood group was AB Negative.

8. After considering the testimonies of the child victim and her parents, the learned Trial Court found their testimonies to be creditworthy, inspiring confidence and not requiring any further corroboration. Thus, believing the testimonies of PW-2 child victim and her parents, the Appellant was convicted and sentenced in the manner stated above.

9. The grievance of the Appellant is that the learned Trial Court has not correctly appreciated the evidence of the prosecution witnesses, especially the Doctors who examined the victim. While referring to the statement of PW-10 Dr.Ruchi, who was the senior most Doctor of the team, consisting of three doctors that examined the child victim, as per the opinion of Dr.Ruchi, the penetration of penis was ruled out but penetration of finger could not be ruled out. Further, PW-5, Dr.Monika agreed that hymen could be ruptured by insertion of finger in the vagina. Learned counsel for the Appellant has also referred to the improvements made by the child victim at different stages of the case. In her first statement Ex.PW2/A made before the police, she only referred the galat kaam done with her, whereas while appearing as PW-2, the child victim stated that the accused put his urinary part in her urinary part, which is clear improvement over her initial version and which establishes that she was a tutored witness making a false statement before the Court, may be at the behest of her parents.

10. Learned counsel for the Appellant further submitted that from the MLC of the Appellant as well the statement of Police Officers i.e. SI N.R.Lamba and Ct. Suresh, it is established that the Appellant was in injured condition at the time of his arrest in this case and in fact his blood has been used in soiling the underwear of the child victim. Even his injury sheet prepared by the Police at the time of his medical examination was torn. Learned counsel for the Appellant has drawn the attention of this Court to the aspect that it has emerged on record that the soiled underwear which the victim was wearing at the time of incident had been removed by her mother and fresh one was given to her to wear before she was taken to the hospital. If it was so then how and from where the Doctor could seize the underwear which the child was wearing at the time of commission of the offence.

11. Learned counsel for the Appellant vehemently argued that the evidence has not been properly appreciated by the learned Trial Court for arriving at the conclusion that the rape has been committed on the child aged about 7 years.

12. On behalf of the State, Ms.Rajdipa Behura, learned APP has submitted that this is a case where the offender had been apprehended at the spot and injury being caused by family of the victim on the person of the Appellant at the time of his apprehension and arrest, in itself is no ground to disbelieve the otherwise creditworthy statement of the child victim and her parents, who have not only described the entire incident, but also identified the Appellant to be the person who committed the act of sexual assault on her. Learned APP further submitted that the statement of the child victim to the effect that she was dragged to another roof by the Appellant stands established from the bruises on her left forearm which must have been suffered by her at the time when she was pulled to another roof. Learned APP for the State while referring to the MLC of the child victim, stated that it records fresh hymen tear and in view of the fact that the child was just 7 years old, the MLC is sufficient to prove the sexual assault on the child and criminally intimidating her. She prayed for dismissal of appeal contending that the Appellant has been rightly convicted by the learned Trial Court under Section 376/506 IPC. It is further submitted by her that the minimum sentence has been awarded to the Appellant in this case for committing the offence punishable under Section 376 IPC on a young girl aged about 7 years and on this score also, no leniency can be

shown to him.

13. In order to appreciate the rival contentions, it is necessary to refer to the testimony of the child victim about the act being committed by the Appellant and then to find out as to whether the act stated to have been committed by Appellant amounts to commission of rape or some other offence is proved against him. As already noted, DD No.20A contained the information of galat kaam being done with an eight year old girl. When the Investigating Officer visited the spot the act complained of by the child victim was that (i) she was made to stand against the wall (ii) her kachchi was lowered down upto her legs and (iii) he lowered down his kachcha and started doing galat kaam.

14. It is necessary to refer to the statement of the child victim with due consideration of the fact that she was just 7-8 years at the time of occurrence and not even able to name the organs of the body of the male and female at that time. It is also necessary to add that her statement Ex.PW2/A has been recorded in the presence of her parents and the act committed by the Appellant has been described as galat kaam. VERSION of PW-2 A - CHILD VICTIM AS RECORDED IN STAEMENT Ex.PW2/A (i) On 24.06.2001 at about 11.30 AM, she alongwith her friend S was on the roof top of house of S and they were plucking black plum (jamun). (ii) In the meantime, Kartar Singh, residing in the adjoining house called her and dragged her to his roof. (iii) Kartar Singh asked her to stand silently or he would kill her. (iv) Thereafter, Kartar Singh lowered her underwear upto legs and also lowered his underwear and started doing galat kaam. (v) She started crying and asked him to let her go, but she was not allowed to go. (vi) She started bleeding from her private part and had lot of pain. (vii) Thereafter, Kartar Singh ran away from there. After wearing her underwear, she returned home. VERSION OF PW-2 A/HISTORY/OPINION AS RECORDED IN MLC EX.PW-4/A As per the MLC Ex.PW4/A of the Child Victim namely A prepared at Lady Hardinge Medical College & Smt. Sucheta Kriplani Hospital, New Delhi : Date and time of medical examination :

24. 06.2001 at 7:20 p.m. Informant : Self Patient has given history of having sexually assaulted by a boy, named Kartar, 17 years today at 11:30 A.M. on

24.06.2001, while she was playing at her friends house at the terrace. Kartar called her and lifted her across a cemented wall, then taking her undergarments off, put his hand inside. She came home after that when her mother noticed blood staining over her undergarments, case was reported to police. Patient brought by the police for documentation. GC : Patient fully conscious, bruise mark present over left forearm On the MLC, Dr.Ruchi has given the following opinion on 24.06.2001 at 8.15 PM at : Point-F to F : Hymen torn freshly Point-B to B : Sexual assault cannot be ruled out. On the MLC itself, it is again recorded by Dr.Monica on 24th June at 8:15 p.m. at Point -D to D : History reviewed gives clear history of sexual intercourse, history of ejaculation is not there. VERSION AS RECORDED IN STATEMENT164CR.P.C. (i) While she was present on the roof of house of her friend S to pluck Jamun, the Appellant called her to play with his dog Tuffy. (ii) He caught her hand. When she started weeping, he asked her to keep quiet or he would give beating. (iii) He made her stand against the wall. Thereafter he removed her kachchi as well his kachchi. He put his poonch in her. (iv) She returned home and at that time, she was weeping. DEPOSITION MADE BEFORE THE COURT AS PW-2 (i) On the date of the occurrence, she was playing hide and seek with her friend S on the roof of her house and it was the turn of PW-2 to find her friend. (ii) At that time, the Appellant, who was known to her, came there and called her to his roof. (iii) He was also having his pet dog Tuffy and invited her to play with the pet dog. (iv) After calling her to his roof, he made her to stand against the wall, removed her undergarments as well as his undergarments. She further stated that : Meri Pesab Karne Wali Jagah Par Apni Pesab Karne Wali Cheej Rakh Dee. When PW-2 A - the child victim was subjected to crossexamination, she admitted that : (i) she could not have climbed the wall between the two roofs to go to the roof of the Accused; (ii) when she was pulled by the Accused from other side of the wall, in that process she received injury on her arm from the bricks; (iii) After the incident, she was dropped back in the same manner in which she was pulled by the Accused to his roof. (iv) She had told the Doctor that Usne Meri Pesab Karne Wali Jagah Par Apni Pesab Karne Wali Cheej Rakh Dee. She did not tell the Doctor that the Accused put his hand inside. She had not told the Doctor that Kartar Singh had done galat kaam with her. Whatever happened with her was committed upon her while standing against the wall. She

was not made to lie down on the floor. She had also told the Magistrate in her statement that Usne Meri Pesab Karne Wali Jagah Par Apni Pesab Karne Wali Cheej Rakh Dee and nowhere in her statement she has stated that the Accused had put his hand inside.

15. Thus, the different versions given by the child victim at different stages of the case prove that whatever initially was described as galat kaam, was changed to insertion of hand and then to insertion of private part by the Appellant into her private part.

16. It may be noted here that as per MLC, except the recording the factum of tear of hymen, no injury on the private part has been noticed nor any treatment has been given to her. The Advise as recorded on the MLC is Refer to forensic for smear examination and evidence of sperm.

17. Since the parents of the child victim are not the witness to the occurrence, with a view to ascertain the actual act committed by the Appellant, it is necessary to examine the statements of the three lady Doctors, who examined the child victim on the date of alleged incident.

18. PW-4 Dr.Gurpreet has stated that when the eight years old child victim was brought to the hospital, she was examined by the three lady Doctors including her, Dr.Monica and Dr.Ruchi. The MLC (Ex.PW-4/A) of the child victim is in the handwriting of Dr.Monica, who signed the same at point A and she also signed on the same at Point B. She has also stated that the history as given by the child victim was of sexual assault by Kartar Singh aged 17 years on that date at 11:30 a.m. In the history given , the child also referred that she was called by Kartar, who lifted her across the cemented wall and then after taking off her undergarments, put his hand inside. The history was later on reviewed at 8:15 p.m. and on the MLC from portion D to D, it has been recorded that a clear history of sexual assault is there but no history of ejaculation is there.. She stated that this portion D to D does not bear her signature. The general condition of the child victim has been described as fully conscious and general appearance also good. There were no bruises, no sign of local trauma. Hymen was torn and there was no fresh bleeding per vagina. Some bruises were present over left forearm. In her cross-

examination, she admitted that the word freshly with the words hymen torn was added with different pen in different ink. She also admitted that finger cannot be inserted in the vulva/vagina of the child of this age. However, hymen can be ruptured by introducing finger in the vagina. It may or may not leave mark if finger is forcibly inserted in the vagina. Bleeding can be spontaneously stopped after hymen is ruptured.

19. PW-10 Dr.Ruchi was also a Member of the Team, who examined the child victim. Her response to the Court questions is material for decision of this case, hence extracted here:

I say that there was no possibility of penetration of the penis because the reports have come out negative. I cannot say now how old the tear of hymen torn was. The possibility of the penetration of the finger as per the history given by the patient/victim cannot be ruled out.

20. PW-5 Dr.Monica, who has examined the child victim on the basis of history given by the informant, recorded history in the MLC in her own hand. She has stated that when she examined the patient (child victim), she was fully conscious and her general condition was good. On local examination, there were no bruises, no sign of local trauma, hymen was ruptured, but there was no bleeding per vagina. She has further stated that after half an hour, the history was reviewed from the girl and then she gave history of sexual intercourse, but history of ejaculation was not given. She had bruises marks over left forearm. In her own words, My clinical impression was that sexual assault cannot be ruled out and it depends on the forensic examination of the smear, swab and the specimen taken from vagina for the evidence of sperms.

21. When she was questioned about the reviewed history, as recorded from portion D to D on the MLC (Ex.PW-4/A), she stated that she did not remember the words used by the patient during the course of review history. However, she denied the suggestion that the same was written at the instance of Police and father of the patient (victim). She admitted that word freshly was written subsequently as earlier it was left out. She has also stated that she did not find any swelling or bruising or any injury in the vulva or vagina during course of her

examination. If any injury etc. had occurred within one day before my examination, it would have been there and would have been noticed by her. She did not observe any bleeding on account of tearing of the hymen, even though it has been mentioned as freshly torn. She cannot say whether or not any blood had oozed from genitals of the patient within 12 hours prior to her having examined the patient.

22. When the attention of PW-5 Dr.Monica was drawn to the Taylors Principles and Practice of Medical Jurisprudence, her reply was that :

I am in agreement with portion mark A to A on page No.60 of the 12th edition of the said book which mentions that: It is impossible to conceive that forcible intercourse should take place in childhood without bruising, effusion of blood, or a laceration of the private parts. The size of an adult male organ must necessarily cause some local injury in the attempt to enter the vagina of a child. If the violation has taken place within 2 or 3 days, the appearances presented by the parts may be as follows:

(1) Reddening or frank inflammation with abrasion or tearing of the liningmembrane, introitus or of the vagina.

(2) Muco-purulent discharge from the vagina of a yellowish or greenish-yellow colour, staining the clothing; the urethra may possibly share in the inflammation.

(3) In recent cases blood may be oozing from the injured parts or clots of blood may be found in the vulva.

(4) The hymen may be entirely destroyed, or may show lacerations. Owing to their inflamed state, a proper examination of the parts is often difficult - any attempt to separate the thighs for this purpose causing great pain. For this reason also, the child walks with difficulty and complains of pain in walking. I am also in agreement with the observation made by the said author at portion B to B onn page 61-62 wherein it is mentioned: When there are no marks of violence or physical injury, because none originally existed or had disappeared in the course of time, a medical witness must leave the proof of rape to other evidence. The absence of

marks of violence on the genitals of the child, when an early examination has been made, is strong evidence that rape has not been committed. A false charge might easily be made and sustained if medical opinions were hastily given on the statements of the mother and the child in the absence of physical appearance to corroborate the accusation. If there has been considerable delay before examination, inflammation may have developed and this may obscure the original character of the injuries. (Photocopy of the marked portions have been placed on record by Ld. Counsel for accused and the book has been shown to the witness.) Touching of breast, genetals or putting of fingers in vagina of a girl would be termed as Sexual assault. My clinical impression that sexual assault cannot be ruled out was not dependent on report of chemical examiner which was to be received subsequently in respect of smear, swap and specimen taken from vagina for evidence of sperms. The report of the examiner regarding the smear, swap and the specimen taken from vagina for evidence of sperms is necessary to form opinion regarding sexual intercourse having taken place. It is correct that as per Report No.FSL....2001/B-2000 dated 18.09.2001 on judicial file, no semen was detected in the microslides regarding smear. On perusal of the FSL Report and the MLC prepared by me it can only be said that no ejaculation appears to have taken place and it cannot be said that no intercourse took place. I had not re-examined private parts of the prosecutrix between 7.20 p.m. and 8.15 p.m. It is correct that hymen can get ruptured by insertion of finger in the vagina.

23. From the testimony of PW-5 Dr.Monica as well as from the FSL result, it is established that on local examination there was no sign of rape being committed on the child victim nor she stated so before the Doctors, who examined her. Once it is proved on record that the history given by the child victim (PW-2) was that of insertion of hand, hymen tear being possible if finger is inserted and there is no sign of penetration of male organ into the private part of the child victim, the learned Trial Court could not have convicted the Appellant for committed the offence punishable under Section 376 IPC. Subsequent improvements made on the MLC from point D to D wherein the Doctor has written clear cut history of sexual assault, but no history of ejaculation is recorded, how the child aged about 8 years could use the words sexual intercourse and ejaculation, is difficult to understand because in her deposition before the Court, the child victim specifically

stated that three years prior to her deposition before the Court she did not know the name of organ from where men urinate and from where women urinate, but she knew them on the date of deposition. How an innocent child of that age could have used the above words remained unexplained, as even PW-5 Dr. Monika has neither given any reason as to why the history was rewritten nor could recollect the words used by Pw-2 - the child victim to explain the act of sexual intercourse or ejaculation. PW-5 Dr.Monika, in her cross examination, admitted that she examined the child victim only once when she prepared the MLC. Since the patient did not require any treatment, what made PW-5 Dr.Monika to record the history again on the MLC at point- D to D so as to give an opinion of clear sexual intercourse with no history of ejaculation, could not be explained by her. She even could not recollect the words in which the child victim explained the act on the basis of which portion D to D was written on the MLC.

24. From the testimony of the child victim, the act committed by the Appellant that stands proved is that after pulling her to his roof, he lowered her and his undergarments and inserted his hand (finger) in her private part. It may also be noted here that the height of the Appellant was so much that he could pull the child victim from the adjoining roof after bending on the parapet wall and in that process the child victim suffered some bruises on her left arm.

25. Now, the question that arises for consideration is for what offence the Appellant can be convicted for insertion of finger in the private part of the child victim. It may be noted here that the case pertains to the year 2001, i.e. prior to the amendment in Section 375 IPC. Once this Court has formed an opinion that on the basis of evidence available on record, no offence of rape is proved against the Appellant, it is to be seen by the Court as to for what offence the Appellant can be convicted.

26. The legal position is well settled that if an accused is charged for a major offence but is not found guilty thereunder and if the facts established the lesser offence, he can be convicted for the same. Reliance in this regard can be placed on Tarkeshwar Sahu vs. State of Bihar (2006) 8 SCC560 27. In Tarkeshwar Sahu case, the accused was convicted for committing the offence punishable under

Sections 376/511 IPC. After being convicted by the Court of Session, his appeal was dismissed by the High Court. Aggrieved by the dismissal of the appeal by the High Court, he preferred appeal before the Supreme Court. The Supreme Court noticed that there was evidence to the effect that after forcibly taking the Prosecutrix to Gumti to outrage her modesty, nothing further could be done as Prosecutrix raised alarm. She was rescued by her father and the villagers. In para 9 of the report, the following question was formulated, which in the given circumstances, was required to be considered : Now, the moot question which squarely falls for our consideration pertains to the correct and appropriate sections of the Indian Penal Code under which the Appellant is required to be convicted according to the offence he had committed. 28. After discussing Section 375 IPC and earlier decisions in paras 11 to 17 of the report, the Supreme Court arrived at the conclusion that the conviction of the Appellant under Section 376/511 IPC was wholly unsustainable. In para 19 of the report, the Supreme Court has considered as to whether in the absence of any other charge, could the accused be acquitted or he could be convicted for committing any other offence. Here it would be apposite to quote paras 18 to 27 of the report which are as under : 18. In the backdrop of settled legal position, when we examine the instant case, the conclusion becomes irresistible that the conviction of the appellant under Sections 376/511 IPC is wholly unsustainable. What to talk about the penetration, there has not been any attempt of penetration to the slightest degree. The appellant had neither undressed himself nor even asked the prosecutrix to undress so there was no question of penetration. In the absence of any attempt to penetrate, the conviction under Section 376/511 IPC is wholly illegal and unsustainable.

19. In the instant case, the accused has been charged with Sections 376/511 IPC only. In absence of charge under any other section, the question now arises whether the accused should be acquitted; or whether he should be convicted for committing any other offence pertaining to forcibly outraging the modesty of a girl. In a situation like this, we would like to invoke Section 222 of the Code of Criminal Procedure, which provides that in a case where the accused is charged with a major offence and the said charge is not proved, the accused may be convicted of the minor offence, though he was not charged with it. Section 222 Cr.P.C. reads

as under:

222. When offence proved included in offence charged.-(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it. (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it. (3) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged. (4) Nothing in this section shall be deemed to authorise a conviction of any minor offence where the conditions requisite for the initiation of proceedings in respect of that minor offence have not been satisfied. In this section, two illustrations have been given which would amply describe that when an accused is charged with major offence and the ingredients of the major offence are missing and ingredients of minor offence are made out then he may be convicted for the minor offence even though he was not charged with it. Both the illustrations given in the said section read as under: (a) A is charged under Section 407 of the Indian Penal Code (45 of 1860) with criminal breach of trust in respect of property entrusted to him as a carrier. It appears that he did commit criminal breach of trust under Section 406 of that Code in respect of the property, but that it was not entrusted to him as a carrier. He may be convicted of criminal breach of trust under the said Section 406. (b) A is charged under Section 325 of the Indian Penal Code (45 of 1860), with causing grievous hurt. He proves that he acted on grave and sudden provocation. He may be convicted under Section 335 of that Code.

20. In the case *Lakhjit Singh and Anr. v. State of Punjab*, MANU/SC/0905/1994, this Court had an occasion to examine the similar question of law. In this case, the accused was charged and tried under Section 302 of the Indian Penal Code but ingredients of Section 302 were missing but ingredients of Section 306 were present, therefore, the Court deemed it proper to convert the conviction of the appellant from Section 302 to Section 306 IPC. In this case, it was urged that the accused cannot be tried under Section 306 IPC because the accused were not put

to notice to meet a charge under Section 306 IPC and, therefore, they are prejudiced by not framing a charge under Section 306 IPC; therefore, presumption under Section 113A of Indian Evidence Act cannot be drawn and consequently a conviction under Section 306 IPC cannot be awarded. According to this Court, in the facts and circumstances, Section 306 was attracted and the appellants' conviction under Section 302 IPC was set aside and instead they were convicted under Section 306 IPC.

21. A three-Judge Bench of this Court in the case of *Shamnsaheb M. Multtani v. : State of Karnataka* (2001)2SCC577 had an occasion to deal with Section 222 of the Code of Criminal Procedure. The Court came to the conclusion that when an accused is charged with a major offence and if the ingredients of major offence are not proved, the accused can be convicted for minor offence, if ingredients of minor offence are available. The relevant discussion is in paragraphs 16, 17 and 18 of the judgment, which read as under:

16. What is meant by "a minor offence" for the purpose of Section 222 of the Code?. Although the said expression is not defined in the Code it can be discerned from the context that the test of minor offence is not merely that the prescribed punishment is less than the major offence. The two illustrations provided in the section would bring the above point home well. Only if the two offences are cognate offences, wherein the main ingredients are common, the one punishable among them with a lesser sentence can be regarded as a minor offence vis--vis the other offence.

17. The composition of the offence under Section 304B IPC is vastly different from the formation of the offence of murder under Section 302 IPC and hence the former cannot be regarded as minor offence vis--vis the latter. However, the position would be different when the charge also contains the offence under Section 498A IPC (husband or relative of husband of a woman subjecting her to cruelty). As the word "cruelty" is explained as including, inter alia, harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

18. So when a person is charged with an offence under Section 302 and 498A IPC on the allegation that he caused the death of a bride after subjecting her to harassment with a demand for dowry, within a period of 7 years of marriage, a situation may arise, as in this case, that the offence of murder is not established as against the accused. Nonetheless, all other ingredients necessary for the offence under Section 304B IPC would stand established. Can the accused be convicted in such a case for the offence under Section 304B IPC without the said offence forming part of the charge?.

22. On careful analysis of the prosecution evidence and documents on record, the appellant cannot be held guilty for committing an offence punishable under Sections 376/511 IPC. According to the version of the prosecution, the appellant had forcibly taken the prosecutrix to his Gumti for committing illicit intercourse with her. But before the appellant could ravish the prosecutrix, she raised an alarm and immediately thereafter, her father PW1 Ram Charan Baitha and other co-villagers residing in the vicinity assembled at the spot and immediately thereafter, the appellant and the prosecutrix came out of the Gumti. In this view of the matter, no offence under Sections 376/511 IPC is made out.

23. In this view of the matter, it has become imperative to examine the legal position whether the offence of the appellant falls within the four corners of other provisions incorporated in the Indian Penal Code relating to outraging the modesty of a woman/girl under Sections 366 and 354. Section 366 IPC is set out as under:

366. Kidnapping, abducting or inducing woman to compel her marriage, etc. Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse

with another person shall be punishable as aforesaid.

24. The essential ingredient of the offence punishable under Section 366 IPC is that when a person has forcibly taken a minor girl with the intention as specified in that section, then the offence is clearly made out. In the instant case, the appellant at about 1.30 a.m. has forcibly taken the prosecutor/victim to his Gumti with the intention of committing illicit intercourse then the offence committed by the appellant would fall within the four forecorners of Section 366 IPC. In our considered view, the essential ingredients of the offence punishable under Section 366 IPC are clearly present in this case. We deem it appropriate to briefly reproduce the ratio of some decided cases. In *Khalilur Ramman v. Emperor* AIR1933 Ran 98 the Full Bench has observed as under: The intention of the accused is the basis and the gravamen of an offence under Section 366. In considering whether an offence has been committed under this section, the volition, the intention and the conduct of the woman are nihil ad rem except in so far as they bear upon the intent with which the accused kidnapped or abducted her. If the accused kidnapped or abducted the woman with the necessary intent, the offence is complete whether or not the accused succeeded in effecting his purpose, and even if in the event the woman in fact consented to the marriage or the illicit intercourse taking place. This Court in *Rajendra v. State of Maharashtra* (1997) SCC (Cri) 840 observed as under: Where the Courts had given cogent and convincing reasons for recording their finding that the accused had kidnapped the victim girl with intent to seduce her to illicit intercourse, conviction of accused under Section 366 was not interfered with. The High Court of Delhi in *Niranjan Singh v. State (Delhi)* (1986) 2 Cri 335 indicated that in what circumstances an offence under Section 366 IPC is made out. In this case, the Court, while dealing with a case under Section 366 IPC, observed as under: Where from the statement of prosecutrix, a girl of six years age it was evident that the accused took her on the pretext of getting her some biscuits to public toilets took off her salwar and also his own pant made her to lie on the floor and bent down on her when he was caught hold by a watchman in the locality, the accused would not be guilty of an attempt to rape however he would be guilty of an offence under Section 366 IPC. In *Vishnu v. State of Maharashtra* (1997) CrLJ1724(Bom) the High Court of Bombay observed as under: The accused were alleged to have kidnapped the girl

below 16 years of age from the lawful guardianship of her parents and taken her to another city. The coaccused had simply met the girl and had not instigated her to accompany the accused. Hence, her conviction was set aside. So far accused was concerned, his offence of kidnapping was proved beyond all doubts and he was convicted Under Section 363/366 IPC. Accused was however acquitted of the charge of rape Under Section 375 IPC as hymen of girl was intact and there were no outward sign of injuries or violence suggesting the sexual intercourse and consequently no rape could be said to have taken place.

25. In the instant case, the act of the accused proves that during the kidnapping of the prosecutrix or forcibly taking her to the Gumti, the accused had intention or knew it likely that the prosecutrix would be forced to have illicit intercourse. Hence, it is not a mere case of kidnapping for indecent assault but the purpose for which kidnapping was done by the accused has been proved. It is a different matter that the accused failed at the stage of preparation of committing the offence itself.

26. In view of the foregoing facts and circumstances of the case, we are of the opinion that the crime committed by the accused was at initial stage of preparation. The offence committed does not come within the purview of offence punishable under Sections 376/511 IPC. The offence committed squarely covers the ingredients of Sections 366 and 354 IPC. The appellant was charged under Sections 376/511 IPC but on invoking the provisions of Section 222 of the Code of Criminal Procedure the accused charged with major offence can always be convicted for the minor offence, if necessary ingredients of minor offence are present.

27. On the basis of evidence and documents on record, in our considered view, the appellant is also guilty under Section 354 IPC because all the ingredients of Section 354 IPC are present in the instant case. 29. It may be noted that learned Trial Court cited Tarkeshwar Sahus case (Supra) but without applying the ratio of the said case to the facts of the present case, returned the finding that the Appellant had committed the rape. At least the learned Trial Court could have considered the decision of the Supreme Court in Niranjana Singh v. State (Delhi) (1986) 2 Cri.335 considered by the Supreme Court in Tarkeshwar Sahus case

(Supra), the facts and ratio of the case have already been quoted above in para 27.

30. Reverting to the facts of the present case, undisputed position is that the child victim is a very small girl aged about 8 years whereas the Appellant was a fully grown up man above 18 years of age and was of the height that after bending on the parapet wall, he could pull the child victim from the adjoining roof which was at much lower level, as the child victim of her own could not have crossed that wall to reach the roof of the Appellant. It is also proved from the statement of child victim that both of them were in standing position at the time when galat kaam was done. Wide gap between the height of the child victim and the offender, if two are in standing position as explained by the child victim, probability of rape being committed is very remote unless the position is changed either by the Appellant or the child victim is made to change her position.

31. In view of the above legal position on the subject and after examining the testimony of the child victim (PW-2), I am of the considered view that necessary ingredients of Section 366/354 IPC stand satisfied for the reason that the child victim was pulled by the Appellant to his roof with an intention to commit illegal sexual act and with that intention she was made to stand against the wall, her undergarments were lowered and finger was inserted in her private part. Despite the fact that the Appellant has not been charged for committing the offence punishable under Section 366/354 IPC, However, as per Section 222 Cr.P.C., if a person is charged with major offence and if ingredients of major offence are not proved, he can be convicted for the lesser offence. Since the offences punishable under Sections 366/354 IPC are minor offences, there is no legal bar in convicting the Appellant for committing the offences punishable under Sections 366/354 IPC.

32. In view of the above discussion, the appeal is partly allowed. The Appellant Kartar Singh is acquitted of the offence punishable under Section 376 IPC. His conviction under Section 506 IPC and substantive sentence awarded to him for the said offence i.e. to undergo RI for six months is maintained, however, the sentence awarded to him in default of payment of fine of Rs.1000/- each is modified to the extent that in default of payment of fine, he shall undergo SI for 7

days.

33. Appellant Kartar Singh is also convicted for committing the offence punishable under Section 366 IPC and sentenced to undergo RI for seven years with fine of Rs.2000/- and in default to undergo SI for 15 days.

34. Appellant is further convicted for committing the offence punishable under Section 354 IPC and sentenced to undergo RI for two years.

35. All the sentences shall run concurrently. The Appellants shall also be entitled to benefit under Section 428 Cr.P.C. The Appellant, if not wanted in any other case, be set at liberty after undergoing the above sentences.

36. Appeal stands disposed of in above terms. TCR be sent back alongwith the copy of this order.

37. A Copy of the order be sent to the concerned Jail Superintendent for information and necessary compliance. (PRATIBHA RANI) JUDGE
NOVEMBER11 2014 dc

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