

Abhay Singh vs.state

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SooperKanoon Citation : sooperkanoon.com/1207317

Court : Delhi

Decided On : Jul-26-2017

Appellant : Abhay Singh

Respondent : State

Judgement :

* % + IN THE HIGH COURT OF DELHI AT NEW DELHI ABHAY SINGH
Judgment Reserved on: July 20, 2017 Judgment Delivered on: July 26 , 2017
CRL.A.968/2015 Appellant Through: Mr.Aditya Vikram, Advocate (DHCLSC)
versus STATE CORAM: HON'BLE MS. JUSTICE PRATIBHA RANI Through:
Mr.Kewal Singh Ahuja, APP for the State Respondent JUDGMENT1 This jail
appeal has been filed by the appellant/convict against the judgment dated 6th July,
2015 whereby he has been convicted for committing the offences punishable
under Sections 376/506(I) IPC & Section 6 of the Protection of Children from
Sexual Offences Act, 2012 in short POCSO. Vide order on sentence dated 8th
July, 2015, the appellant has been sentenced as under:-

"(i) Under Section 376 IPC R.I. for a period of seven years with fine of ` 2,000/-
and in default, to undergo SI for three months (ii) Under Section 506(I) SI for a
period of one year IPC CRL.A.968/2015 Page 1 of 22 (iii) Under Section 6 of
POCSO Act R.I. for a period of ten years with fine of `2,000/- and in default, to
undergo SI for three months All the sentences were ordered to run concurrently
with benefit of Section 428 Cr.P.C.

2. Briefly stating, the prosecution case runs as follows:-

"The appellant (hereinafter referred to as convict) is father of the child victim J (name withheld to conceal her identity). The wife of the convict had expired leaving behind two children i.e. the child victim J and her younger brother, who was 14 years old at the time of occurrence. In the written complaint Ex.PW-2/A which formed the basis of registration of FIR No.186/2012 under Sections 376/506(I) IPC & 6 of POCSO Act at PS Sonia Vihar, the child victim stated that she was a student of 9th standard and she was residing at the address mentioned in the complaint along with her brother A (name withheld as minor) and father Abhay Singh. Her mother Smt. Lalli Devi had expired about four years prior to this incident. As per the complaint dated 12th December, 2012, Ex.PW-2/A about 4-5 months back when she was alone at home and her brother was away to school, her father came home and did galat kaam (balatkaar) with her and also warned her not to disclose this incident to anyone. Due to fear she kept quiet. Again on 11th December, 2012 at about 7.00 a.m. when her brother was sleeping in the same room, her father committed rape on her but due to fear she kept quiet. On the same day in the evening at CRL.A.968/2015 Page 2 of 22 about 7.00 p.m. when her brother had gone to sell the vegetables, she was alone at home. There was also power cut at that time. Her father came home and she was made to lie down. After removing her pajaami again he did galat kaam with her. When she resisted he scolded her. Thereafter, her father left for temple and she also left home. During night time, she continued wandering here and there waiting for the sunrise and reached the police station on the next day. After her medical examination at GTB hospital, her statement Ex.PW- 2/A was recorded at the police station wherein she prayed for legal action against her father.

3. The endorsement Ex.PW-14/B by the investigating officer while preparing rukka records that the complainant J came to the police station and informed about galat kaam being done by her father. NGO/Counselor Neetu Joshi reached the police station and child victim was sent to GTB hospital where her MLC No.5353/2012 Ex.PW-9/A was prepared. As per the MLC, the hymen was intact. The sealed exhibits were seized and after recording statement of child victim, rukka was sent for registration of case under Sections

IPC.

4. On the same day father of the child victim was arrested. On 14th December, 2012 the child victim was produced before the learned Metropolitan Magistrate for getting her statement recorded under Section 164 Cr.P.C.

5. While making statement under Section 164 Cr.P.C., child victim J mentioned her age as 17 years and has made the statement recorded in Hindi and translated as under:-

"CRL.A.968/2015 Page 3 of 22 6. My papa Abhay Singh tried to commit rape in the morning and raped on the same day in the evening when my younger brother A (name withheld being minor) aged about 14 years had gone to the vegetable shop of Papa to sell the vegetables. I and Papa were at home at that time. My papa came. I was sleeping on the bed. He forcibly removed my salwar and his clothes. Then Papa had put his organ used for passing urine into my organ used for passing urine. On the next day I made complaint to the police but on that date due to fear of Papa I could not raise alarm. In order to bring home the charge against the convict, prosecution examined 14 witnesses.

7. The convict was also examined under Section 313 Cr.P.C. to enable him to explain the incriminating evidence appearing against him. He denied having committed rape on his daughter and claimed his false implication as he used to object the friendship of the child victim with bad elements.

8. The learned Addl. Session Judge placed reliance on the statement of the child victim and observed that absence of injury on the body or on private parts of victim was of no consequence. The motive for false implication of the convict was disbelieved. Thus, relying on the statement of the child victim and taking into consideration her age, her father i.e. the convict was held guilty and sentenced in the manner stated above.

9. Dissatisfied by the verdict given by learned ASJ, the appellant has challenged the finding of guilt.

10. Mr.Aditya Vikram, Advocate (DHCLSC) appearing on behalf of the appellant has contended that:-

"CRL.A.968/2015 Page 4 of 22 (i) The child victim is his own daughter and he had been taking care of his both children as father. (ii) The child victim was having friendship with some bad elements to which he used to object which was to her disliking. (iii) On being instigated by the boys with whom she was having friendship, she lodged this false complaint. (iv) The testimony of the victim of she being repeatedly raped in June/July 2012 and twice on 11th December, 2012 is not corroborated by the medical evidence. Her MLC shows that there was no fresh or old injury on her private part or any other part of the body. As per MLC the hymen was intact which would have been a remote possibility had she been raped three times over a period of six months and twice on the day before registration of FIR. (v) There are material contradictions in the version of the child victim. Her version in FIR is exaggerated mentioning three incidents of rape. Though her statement under Section 164 Cr.P.C. is limited to two incidents of the same date only. (vi) Her deposition before the Court is limited to one incident of rape in the evening of 11th December, 2012 without referring to any other such incident by the appellant either in the morning of 11th December, 2012 or 4-5 months prior thereto. (vii) Presence of semen on the clothes or gadda or vaginal swabs of the victim at the most can suggest an attempt being made, hence on the basis of FSL report, the appellant could not have been convicted under Section 376 IPC but only for attempt to commit rape. CRL.A.968/2015 Page 5 of 22 (viii) The statement of the child victim is full of contradictions and untrustworthy and even her conduct after the alleged first rape i.e. four months prior to the registration of FIR and even a day prior to registration of FIR, is highly unnatural. (ix) The brother of the child victim who was aged about 14 years was sleeping in the same room where the alleged rape was committed in June/July, 2012 at 7.00 am for the first time. But he was never examined by the prosecution which creates a dent in the story narrated by the victim. (x) The child victim has admitted that mobile phone was available in their house and police can be informed by calling 100 number but she never informed the police or her teacher or the neighbours about she being sexually assaulted by her own father. The victim has stated in the complaint on 11th December, 2012 that when her father left for temple after committing rape in the

evening she also left home but in cross-examination she has stated that she has taken bath after the incident before she left the house. (xi) As per the child victim, she was hiding herself behind the bushes and trees but there are no bushes or tree near her house or in the vicinity. Even the IO has not investigated on this issue as to where the victim was throughout the night. (xii) The MLC of the victim shows that hymen was intact and there was no mark of injury on her private parts or body which falsifies her version that she was subjected to rape twice on 11th December, 2012 as well 4-5 months prior to that date. CRL.A.968/2015 Page 6 of 22 11. Mr.Kewal Singh Ahuja, learned APP for the State while refuting the contentions and supporting the reasoning given by the learned ASJ for convicting the appellant submitted that the impugned judgment requires no interference by this Court for the reason that the complainant/victim herein is none else but his own daughter and her statement is corroborated by CFSL result. Learned APP for the State has submitted that scientific evidence was collected and CFSL report shows presence of semen in vaginal swab which could not have been detected in case the child victim was not sexually assaulted by her father. Learned APP further submitted that the child victim was fully dependent on her father as her mother had expired and brother was younger to her. It has also been contended that father being in dominating position, the rape being committed on a mattress, the question of suffering any injury could not have arisen either on the private part or on any other part of the body. Learned APP for the State submitted that merely because the hymen is intact does not mean that she was not sexually assaulted or raped by her father as even the slightest penetration is sufficient to constitute the offence of rape. She could not disclose about the rape earlier due to fear and threat by her father, hence the learned Trial Court has rightly convicted the convict under Section IPC.

12. I have considered the rival contentions and carefully gone through the record.

13. The learned Trial Court convicted the appellant for the following reasons:-

"CRL.A.968/2015 Page 7 of 22 (i) In view of the opinion expressed by Modi in Medical Jurisprudence and Toxicology (Twenty First Edition) and Parikhs textbook

of Medical Jurisprudence and Toxicology, even slightest degree of penetration of the vulva by the penis with or without emission of semen would constitute the offence of rape without producing any injury to the genitals or leaving any seminal stains. Thus the rape is possible even when the hymen is intact. (ii) The convict being father was in a dominant position thus there was no scope for the victim to resist firmly. (iii) The defence that he objected to the friendship of his daughter with other boys was disbelieved on the ground that no girl would dare to implicate her father with such a shameful allegation unless compelled by reality. (iv) Human semen was detected on Ex.1f1 and Ex.1f2 i.e. two micro slides containing vaginal secretion. (v) The testimony of the child victim and the FSL examination in respect of Ex.1f1 and Ex.1f2 i.e. two micro slides containing vaginal secretion, Ex.1f3 i.e. a piece of cotton wool swab taken from the vaginal secretion of the victim, Ex.2a i.e. the inner leggings, Ex.2e i.e. the underwear of the victim and Ex.3 i.e. the mattress used in the incident were considered sufficient to convict the appellant under Sections 376/506(I) IPC & Section 6 of the POCSO Act.

14. There can never be more graver and heinous crime than the father being charged of raping his own daughter. He not only delicts the law but it is a betrayal of trust. The father is the fortress and refuge of his daughter in whom the daughter trusts. Charged of raping CRL.A.968/2015 Page 8 of 22 his own daughters under his refuge and fortress is worse than the gamekeeper becoming a poacher and treasury guard becoming a robber. [AIR 2006 SC381State of Himachal Pradesh vs. Asha Ram]..

15. It is a case where the family consists of three members i.e. father -the accused; daughter - the complainant aged about 15 years and son, who was aged about 14 years but mature enough to shoulder responsibilities as he was handling their vegetable shop independently as well.

16. On appreciating the rival contentions, this Court finds that child victim has given different versions at different points of time.

17. The child victim was taken to GTB hospital on 12th December, 2012 at 1.30 pm by W/Ct.Geeta Rani, 1639/NE. She was examined by Dr.Viras (PW-8) and Dr.Dinesh, CMO (PW-12). In the MLCEX.PW8/A, it is recorded as under:-

"Pt. brought by Wct. Geeta Rani 1639 NE PS Sonia Vihar for medical examination. No H/o LOC, Vomitting, ENT Bleeding Pt. Conscious oriented. O/E BP - 1 Pulse - 76/m Chest]. NAD CLS]. L/E No other external injury seen. Adv. Refer to Gynae-10 for medical examination. CRL.A.968/2015 Page 9 of 22 18. The prescription slip Ex.PW9/A recording the provisional diagnosis has also been prepared by Dr.Viras (PW-8). Neither in the MLC nor in the provisional diagnosis slip, there is any mention of alleged history of sexual assault by the father.

19. At the back of provisional diagnosis slip Ex.PW9/A, the Gynaecologist Dr.Tannavi Aggarwal (PW-9) at 3.00 pm has for the first time recorded the alleged history of sexual assault by father for two times on 11th December, 2012. Thereafter the doctor has further recorded as under:-

"Breast - soft, no injury marks/discharge. P/A- Soft no marks L/E - Hymen intact. No injury marks present on any part of body/ No bite or scratch marks. 20. Till recording of the statement Ex.PW2/A of the child victim after her medical examination, we do not have even a DD entry about the complaint with which the child victim came to the police station, who attended her, who accompanied her and what entry was made in the DD before sending the child victim for medical examination.

21. In the first report Ex.PW-2/A the child victim has narrated three incidents as under: (i) 4-5 months prior to 12th December, 2012 (i.e. registration of FIR) when she was alone at home and her brother had gone to school. (ii) On 11th December, 2012 at about 7:00 AM when her brother was sleeping. CRL.A.968/2015 Page 10 of 22 (iii) On the same day i.e. 11th December, 2012 at about 7:00 PM when her brother had gone to sell the vegetables and there was power cut.

22. At the time of registration of FIR she stated that after her father left for mandir she had left home during night and continued wandering here and there and then reached the police station.

23. As per statement under Section 164 Cr.P.C. recorded on 14th December, 2012 her father attempted to commit rape in the morning and on the same day in

the evening he raped her when her younger brother aged about 14 years was away to sell vegetables on the shop of her father. Next day she made complaint to the police.

24. During her deposition as PW-2, the child victim stated about being raped in June or July, 2012 by her father and at that time she was sleeping on a folding bed and her brother was sleeping on takhat in the house. The subsequent incident she has mentioned to be on 12th December, 2012 in the evening at about 7:00 PM instead of 11th December, 2012 (which may be due to failure to recollect the correct date) when her brother had gone to sell the vegetables. She has stated that on 12th December, 2012 after committing rape her father took bath and left for temple. Thereafter she also took bath and left home after bolting the door and was hiding behind the bushes and the field under the trees and she proceeded slowly-slowly and waited for the sun to rise and then approached the police station where she made complaint against her father.

25. The child victim, while giving version in the complaint Ex.PW-2/A of being raped thrice, has made improvement while her CRL.A.968/2015 Page 11 of 22 statement was recorded under Section 164 Cr.P.C. before the learned Metropolitan Magistrate. No doubt a daughter is not expected to level false allegations of rape against her own father as arrest of the father in a situation in which she and her brother were, had the effect of rendering them homeless with no financial support from any corner.

26. The first incident of rape on 11th December, 2012 has taken place at about 7.00 a.m. and at that time the brother aged about 14 years was sleeping in that very room. But he has not been cited/examined as a witness. Even no explanation is coming forward by the prosecution as to why the brother, who must have come to know about the incident immediately after the father was arrested on 12th December, 2012, was not questioned.

27. PW-14 SI Monika - the investigating officer has admitted that she did not examine the brother of the victim and he was not made as a witness though he was 14 years of age. She voluntarily stated that since the brother of the child victim was not present at the time of incident, he was not cited as a witness. This

part of the statement of the investigation officer is contrary to record. It is victims own version that the rape was committed when her brother was sleeping in the same room. Even at the time, when the Investigating Officer reached alongwith the child victim to her house to prepare a site plan and seize the bichhona, she has nowhere stated that the door was locked. As per the investigating officer, the father of the child victim was arrested from Gali No.2 when after completing the proceedings at the spot they were proceeding towards Police Station. Only the brother would have been present if the house was not locked. CRL.A.968/2015 Page 12 of 22 28. The statement of the victim (PW-2) during trial is that in the month of June and July, 2012 at about 7.00 am she was sleeping on the folding cot and her brother was sleeping on a Takht in the room. At that time her father removed her salwar and inserted her penis in her private part and threatened that if she disclose this incident to anyone he would kill her. The next incident has been stated to have taken place on 12th December, 2012 when her brother has gone to sell the vegetables in the evening. There was power cut also at that time. Her father had also gone to sell the vegetables but he returned by that time. She opened the door and went to sleep. Her father brought her down from the bed and again committed rape on her at about 7.00 p.m. She stated that on that date no other incident had happened with her. After committing rape, her father took bath and left for temple. Thereafter she had also taken bath and left her house after bolting the door and was hiding behind the bushes and trees in their field. She waited for sun rise and thereafter went to the police station where she made her complaint Ex.PW-2/A. At the police station one madam also came and enquired about the incident. She was sent for medical examination where her MLC was prepared. Thereafter she was brought by the IO to her house where site plan was prepared at her instance and at that time her father was in the gali and was arrested by the IO on her identification.

29. Since while deposing before the Court as PW-2, the child victim did not state about any incident of rape/attempt to rape in the morning of 11th December, 2012 or four months prior to that, with the CRL.A.968/2015 Page 13 of 22 permission of the Court learned APP has put some leading question which are extracted hereunder: Q. Is it correct that in the incident, which happened about 4-5 months prior to 11.12.2012, your brother had gone to his school at the time of the

incident?. Ans. I do not remember. Q. Is it correct that the accused had also attempted to commit wrong act on you on 11.12.2012 in the morning hours?. Ans. I do not remember. 30. Although the incident has taken place on 11th December, 2012 her mentioning the date of incident to be 12th December, 2012 seems to be due to lapse of time. As on 12th December, 2012 she reported the matter to the police.

31. PW-11 Rahul Sharma, Teacher, EDMC Primary School, Dayal Pur, Delhi-94 has stated that as per school record the date of birth of the prosecutrix is 11th July, 1997 thus at the time of first incident of rape in June/July 2012 she was about 15 years of age.

32. As per CFSL report, during the medical examination of the victim following exhibits were collected: Clothing, both inner and outer (Ex.2a to 2c) Mattress used in the incident (Ex.3) Nail scrapings (Ex.1c) Breast swab (Ex.1d) Clipping of public hair (Ex.1e) Vaginal secretion (Ex.1f) CRL.A.968/2015 Page 14 of 22 Washing from vagina (Ex.1h), etc. The said exhibits were subjected to CFSL examination and human semen was detected on Ex.1f1 and Ex.1f2 i.e. two micro slides containing vaginal secretion, Ex.1f3 i.e. a piece of cotton wool swab taken from the vaginal secretion of the victim, Ex.2a i.e. the inner leggings, Ex.2c i.e. the underwear of the victim and Ex.3 i.e. the mattress used in the incident.

33. The CFSL report shows the presence of semen on her clothes, bichona or vaginal swabs of the victim, this is despite the fact that the victim has stated that she has taken bath on the evening on 11th December, 2012 before leaving home. It is not clear from her statement that after taking bath she was wearing the same clothes or had changed. The report of chemical examiner recording the presence of semen on bichona or the clothes of the victim in itself is not sufficient to prove that she was raped.

34. In Taylors Principles & Practice of Medical Jurisprudence Volume II 12th Edition page 60, it is mentioned 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 the 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 two or three days, appearance as presented by the parts may be as follows: (1) Reddening or frank inflammation with abrasion or tearing of the lining-membrane, introitus or of the vagina. (2) Muco-purulent discharge from the vagina of a yellowish or greenish- yellow color. staining the clothing; the urethra may possibly share in CRL.A.968/2015 Page 15 of 22 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.

35. Reverting to the facts of the present case had the child victim been repeatedly raped by her father i.e. once in June/July, 2012 and twice on 11th December, 2012, she would have suffered some injury on her private part. For the reason that her father was a grown-up man whereas she was a girl of tender age i.e. about 15 years old.

36. Since the report of the chemical examiner Ex.14/F shows the presence of semen on the clothes and vaginal swab but the medical evidence as recorded in the MLC Ex.PW-8/A does not show that the private part of the victim had any mark of violence. Had there been penetration by a fully grown-up person like her father, even the slight penetration would have caused some injury in its attempt to enter the child's vagina.

37. As per the Modis jurisprudence, frequent intercourse and parturition completely destroy the hymen, which is myrtiformes. However, no such small tags were detected even on a gynaecological examination of the prosecutrix.

38. In the case Pappu vs. State of Delhi 2009 Cri.L.J.

3342 the Division Bench of this Court has observed as under:-

"Medical Jurisprudence evidences that in adolescent girls the hymen is situated relatively more posteriorly and for said reason there is a possibility of rape being committed without the hymen being torn; the converse whereof would be that if the hymen of an adolescent girl is torn due to rape, the penetration has to be a deep penetration. The Medical Jurisprudence guides that the CRL.A.968/2015 Page 16 of 22 labia majora are the first to be encountered by the male organ and they are

subjected to blunt forceful blows, depending on the vigour and the force used by the accused and counteracted by the victim. The narrowness of the vaginal canal makes it inevitable for the male organ to inflict blunt, forceful blows on the labia and such blows lead to contusion because of looseness and vascularity. The feature of such contusion is revealed against the pink background of the mucous membrane dark red contusion being evident to the naked eye. 39. Unfortunately no DD has been placed on record to reflect at what time and in what condition the victim entered the police station on 12th December, 2012 as FIR has been registered by PW-1 HC Dharam Vir Singh was working as Duty Officer on 12th December, 2012 from 4:00 PM to 12:00 midnight. He has received Rukka at 4:45 PM from SI Monika on the basis of which FIR was registered. PW-5 Ct.Rahul Chandra who joined investigation in his cross-examination stated that Police Station Sonia Vihar is at 10 mins walking distance. Even as per FIR Ex.PW-1/B the distance of place of occurrence from the police station is North/1.0 km. The date of occurrence in this case is 11th December, 2012 i.e. in the mid of December, when winter season is at its peak. In a chilly winter night for a minor girl to remain exposed to cold wave throughout the night, hiding under a tree or behind bushes, would have been a terrible experience. She has stated that during night she continued walking slowly-slowly. Police station being at a distance of 1 km. she would not have taken whole night to reach. Even if she was giving a thought whether to report the matter to the police or not, by the time the sun rises she would have made up CRL.A.968/2015 Page 17 of 22 her mind and would have reached the police station early morning. However, from the record it appears that she reached the police station in the afternoon and then taken to Guru Tegh Bahadur Hospital at about 1:30 PM.

40. Apart from the statement of the victim which has the element of imperfection at different stages and consistent so far as the incident dated 11th December, 2012 at 7.00 pm is concerned, there is no other corroborative evidence that penetration was actually effected. In such circumstances, the FSL report recording presence of semen is not sufficient to prove that the act was complete.

41. Now the question that arises for consideration is that if it was not a rape then under what category the offence committed on her body falls and can the

appellant be punished for committing under offence punishable under Section IPC on the basis of attempting to commit rape on her daughter.

42. In what circumstances a person can be convicted for attempt to commit rape were considered in detail in the case of Koppula Venkat Rao vs. State of Andhra Pradesh AIR 2004 SC1874 It was observed as under : there is first, intention 8. The plea relating to applicability of Section 376 read with Section 511, IPC needs careful consideration. In every crime, 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 CRL.A.968/2015 Page 18 of 22 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 under Section 122 (waging war against the Government of CRL.A.968/2015 Page 19 of 22 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 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. consummation/completion. or 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.

12. The sine qua non of the offence of rape is penetration, and not ejaculation. Ejaculation without penetration constitutes an attempt to commit rape and not actual rape. Definition of "rape" as contained in Section 375 IPC refers CRL.A.968/2015 Page 20 of 22 to "sexual intercourse" and the Explanation appended to the Section provides that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Intercourse means sexual connection. In the instant case that connection has not been established. Courts below were not correct in their view. 43. In the present case, the testimony of the victim finds corroboration from the medical evidence to the extent that an attempt was made to commit rape and it is a case of ejaculation without penetration. Hence, the convict could have been convicted only for committing the offence punishable under Section IPC.

20. In view of the above discussion, the conviction of the Appellant is altered from Section 376 to Section IPC.

44. The appellant has also been convicted under Section 6 of POCSO Act for committing the offence of penetrative sexual assault. In view of the above discussion, since it is not a case of penetrative sexual assault, the conviction of the appellant under Section 6 of the POCSO Act is altered to Section 10 of the POCSO Act.

45. Since the conviction of the appellant has been altered from under Section 376 to under Section IPC and from under Section 6 of POCSO Act to under Section 10 of POCSO Act, the sentence awarded to him for the said offences also need to be modified.

46. Considering the facts and circumstances of the case, the appellant/convict is sentenced to undergo rigorous imprisonment of five years and to pay a fine of 2000/- and in default of payment of fine, to undergo SI for seven days for the offence punishable under CRL.A.968/2015 Page 21 of 22 Section IPC and to further undergo RI for five years and to pay a fine of 2,000 and in default of payment of fine, to undergo SI for seven days for the offence punishable

under Section 10 of POCSO Act.

47. The conviction and sentence awarded to the appellant under Section 506 IPC is maintained. All the sentences shall run concurrently 48. The appeal is allowed in above terms.

49. The appellant be released after undergoing the above modified sentence, if not wanted in any other case.

50. TCR be sent back alongwith copy of this order.

51. A copy of this order be sent to the concerned Jail Superintendent for information and compliance. PRATIBHA RANI (JUDGE) JULY26 2017 pg CRL.A.968/2015 Page 22 of 22

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