Prahlad Vs. State

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Court : Delhi

Decided On : Dec-17-2014

Judge : Pratibha Rani

Appellant : Prahlad

Respondent : State

Advocate for Def. : Mr. Neeraj Kumar Singh

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on :

08. 12.2014 Pronounced on :17.12.2014 % + CRL.A. 1285/2011 PRAHLAD Through: ..... Appellant Mr.Avninder Singh, Advocate. (DHCLSC) versus STATE Through: ..... Respondent Mr. Neeraj Kumar Singh, APP for the State with SI Manohar Lal, PS Rajouri Garden. CORAM: HON'BLE MS. JUSTICE PRATIBHA RANI PRATIBHA RANI, J.

1. The present appeal has been preferred by the Appellant Prahlad against the judgment and order on sentence dated 4.5.2011 passed by learned Addl. Session Judge in Session Case No.186/2008 whereby he has been convicted for committing the offence punishable under Section 376 (2)(f) IPC and sentenced to undergo RI for 10 years with fine of Rs.10,000/- and in default of payment of fine, to undergo SI for one year.

2. Briefly stating, the case FIR No.138/2008 under Section 376/511 IPC was registered at Police Station Rajouri Garden against the Appellant on the basis of statement Ex.PW7/A made by the Complainant Dalsukh, father of child victim P (name withheld to conceal her identity). As per the complaint Ex.PW7/A, the Complainant is a widower having three daughters aged about 9 years, 8 years and 6 years. The Complainant deals in old plastic items and clothes as hawker and used to leave his house in the morning and come late in the evening.

3. On the date of incident, when he returned home in the evening, he tried to give milk and rusk to P but felt that P was not feeling well. Then he was informed by his elder daughter B that P was taken by Prahlad i.e. the Appellant to feed her rice but he had committed galat kaam with her. He noticed blood stains on the jeans of P. He discussed the matter with neighbours and therafter the public persons started searching for the accused. PCR was informed. Appellant Prahlad was apprehended and given beating by the public person. The child victim as well as the Appellant were sent to DDU Hospital for their medical examination. Exhibits were sent to FSL and after completion of investigation, chargesheet was filed against the Appellant.

4. However, the peculiar thing that is noticed by the Court is that despite the fact that FIR was registered under Section 376/511 IPC and MLC did not confirm the rape being committed on the child victim, without recording any reason in the final report under Section 173 Cr PC, the chargesheet has been filed for committing the offence under Section 376 IPC. It can also be seen that on the chargesheet wherever initially the offence allegedly committed was mentioned to be under Section 376/511 IPC, fluid has been applied over 511to project it to be a case under Section 376 IPC without recording in the final report at what point of time the offence under Section 376/511 IPC was converted to 376 IPC and on what basis.

5. After committal of the case to the Court of sessions, charge for committing the offence punishable under Section 376 was framed to which the Appellant pleaded not guilty and claimed trial. It needs to be brought on record that the Appellant was unrepresented even at the stage of charge and legal aid counsel has been provided to him at a later stage. Thus, at that stage it was not brought to the notice

of learned Trial Court that charge required to be framed was under Section 376/511 IPC as there was no medical/scientific evidence to confirm the rape, which fact also appears to have escaped the notice of learned Trial Court.

6. On conclusion of trial, the learned Trial Court was of the view that from the testimony of the child victim and medical/scientific evidence, the prosecution had been able to prove a case under Section 376 IPC against the Appellant beyond reasonable doubt. Hence vide impugned judgment and order on sentence, the Appellant has been convicted for committing the offence punishable under Section 376 IPC and sentenced in the manner stated above.

7. I have heard Mr.Avninder Singh, Advocate (DHCLSC) for the Appellant and Mr. Neeraj Kumar Singh, APP for the State.

8. Learned counsel for the Appellant submitted that from the evidence adduced by the prosecution, it was a case of attempt to commit rape only. Learned counsel for the Appellant further submitted that the MLC of the child victim and FSL result do not prove that rape was committed on her despite that he has been convicted for committing the offence under Section 376 IPC.

9. On behalf of State, Mr.Neeraj Kumar Singh, APP submitted that the Appellant has been rightly convicted for committing the offence punishable under Section 376 IPC. Learned APP for the State submitted slightest penetration is sufficient to constitute the offence of rape. Learned APP for the State has drawn the attention of this Court to the fact that blood was detected on the jeans which the child victim was wearing at the time of occurrence. Learned APP further submitted that as per the MLC of the child victim, a small laceration was found present on posterior fourchette. Learned APP for the State submitted that in the given facts and circumstances, the Appellant has rightly been convicted for committing rape on the child victim who was aged about 6 years at that time of occurrence.

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

11. At the outset, it may be noted that neither PW-7 Sh.Dalsukh - the Complainant nor PW-5 B - sister of the child victim are witnesses to the occurrence. The offence has been committed on the child victim at about 6.00 p.m. and she has been medically examined at about 10.45 p.m. on the same day. When the child victim was examined by PW-2 Dr.Nirmal S.R. Gynae, DDU Hospital, she recorded on the MLC Ex.PW1/A of the child victim as under : O/E : No external marks/sign of any injury on other body parts. G/E : A small laceration (+) on Post. Fourchette. No bleeding from lacerated site.

12. In Taylors Principles & Practice of Medical Jurisprudence Volume II12h 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 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.

13. In the instant case, the offender is a grown up male aged about 30 years as recorded on his MLC Ex.PW1/B and while committing rape on a young girl aged about 6 years, even slightest penetration would have resulted into tear and serious injuries on her private part which would have even required immediate surgery.

14. The child victim has also been examined under Section 164 Cr.PC and her statement before learned MM is to the following effect : Prahalad mere kapde utaar diya. Usne apne bhi utaar diya. Karne laga. Main rone lagi. Thappad mara. Main ghar chali gayi. 15. When the child victim was examined as PW-5 before the Court on 17.5.2010 i.e. almost after about 2 years from the date of occurrence, she, on seeing the accused Prahalad, stated that he was accused Prahalad and that he was residing at a distance from her jhuggi. She made the statement to the

following effect:- Yeh Mere Upar Susu Kar Raha Tha. Yeh Chawal Khilane Ke Bahane, Ghar Leh Gaya. Usne Apni Chaddi Kholi Thi. Usne Meri Chaddi Bhi Utari Thi. Phir Woh Susu Karne Lagatha. Usne Apni Susu Mere Private Part (Vagine) Pe Lagaya Tha. Mujhe Dard Hua Tha and Khoon Aya Tha. Phir Main Bhagkar Ghar Chali Gayi. 16. It may be noted here that when the child was taken by the Appellant for feeding her rice, except him and the child victim, there was no other person. Apart from the various injuries which he allegedly suffered at the hands of public, smell of alcohol has been recorded as positive. Thus, the act attributed by PW-5 P - the child victim is that after removal of clothes, he touched his private part with her private part and she felt pain. The laceration posterior fourchette could have resulted at that time but since the child was crying and feeling pain, he let her go. This is a case where right from the stage of registration of FIR, the offence committed by the Appellant was described as an attempt to rape. But for the reasons which remain unexplained in the final report, by putting fluid over 511 and allowing 376 IPC to be visible, the chargesheet was filed, which was not noticed by the learned Trial Court at the stage of charge or thereafter and Appellant was charged and convicted for committing the offence of rape.

17. 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 : 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, 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 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.

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 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. 18. PW-2 Dr. Nirmal, SR Gynae, DDU Hospital did not state the child victim being subjected to rape. As per the FSL result Ex.PW12/A and B, semen could not be detected on exhibits 1a & 1b i.e. two micro slides having whitish smear and exhibit 2 i.e. one baby jeans pant having dark drown stains and the blood detected on the jeans pant i.e.exhibit 2 was of human origin of Group-A.

19. From the statement of the child victim as well the medical/scientific evidence which appears in the form of MLC and FSL result, I am of the considered view that it was a case where the Appellant could have been convicted only for committing the offence punishable under Section 376/511IPC.

20. In view of the above discussion, the conviction of the Appellant is converted from Section 376 to Section 376/511 IPC.

21. As per the nominal roll dated 12.08.2013, the Appellant has undergone five years, five months and one day and also earned the remission of 7 months and 27 days. In the circumstances, the sentence awarded to the Appellant is modified to the extent that his substantive sentence is reduced to 5 years. The fine of Rs. 10,000/- is also reduced to Rs. 1,000/- and in default of payment of fine, to undergo SI for 7 days.

22. The appeal stands allowed in above terms.

23. A copy of this order be sent to the concerned Jail Superintendent with direction to set the Appellant at liberty, if not wanted in any other case. TCR be also sent back alongwith copy of this order. (PRATIBHA RANI) JUDGE DECEMBER17 2014 st