

**Ramesh Vs. State of Madhya Pradesh Through P.S. Kannod**

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**SooperKanoon Citation :** [sooperkanoon.com/508297](http://sooperkanoon.com/508297)

**Court :** Madhya Pradesh

**Decided On :** Jul-14-2008

**Reported in :** 2008(5)MPHT139

**Judge :** S.L. Kochar, J.

**Appellant :** Ramesh

**Respondent :** State of Madhya Pradesh Through P.S. Kannod

**Judgement :**

**S.L. Kochar, J.**

1. The appellant has preferred this appeal against his conviction under Sections 363, 366 and 376 read with Section 511 of the Indian Penal Code and sentence of R.I. for seven years and fine of Rs. 500/- on each count and in default of payment of fine to suffer additional R.I. for three months on each count passed by the learned Special Judge, Dewas in Special Case No. 02/2003 by judgment dated 5-7-2003.

2. According to the prosecution case on 28-2-2002, in Village Siroliya Bujurg in the evening the appellant took the prosecutrix aged 8 to 9 years for purchasing something for her from the shop and instead of taking to the shop, he took her inside the forest. Appellant threatened the prosecutrix at the point of knife for lying down on the ground and thereafter, removed his clothes and sat on her body. Prosecutrix

started weeping upon which the appellant got up and went away. While weeping the prosecutrix returned back to her house and disclosed about the incident to her mother and father. The incident was also informed to Village Chowkidar Chhitar and Sarpanch Rambharose. Report of the incident (Exh. P-1) was lodged on the next day. Police prepared the spot map (Exh. P-2) and sent the prosecutrix for medical examination and was examined by Dr. Namita Thakur (P.W. 2). Her MLC report is Exh. P-3. The prosecutrix belonged to the Scheduled Tribe community. A certificate to this effect was collected by the Investigating Officer and on completion of investigation, charge-sheet was filed against the appellant for the above mentioned offences as also under Section 3(2)(v) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989.

3. The appellant refuted the charges, therefore, put to trial. He did not examine any witness in defence. Learned Trial Court, while acquitting the appellant from the charge under Section 3(2)(v) of the SC & ST (Prevention of Atrocities) Act, finding him guilty for the remaining offences, convicted and sentenced as mentioned hereinabove.

4. Having heard learned Counsel for the parties and after perusing the entire record, this Court is of the view that the offences punishable under Sections 363 and 376/511 of the Indian Penal Code would not be made out against the appellant, even if the complete prosecution case is accepted.

5. The prosecutrix aged ten years has admitted in cross-examination Para 3 that her clothes were not removed by the appellant. She has also nowhere stated in her entire statement that the appellant tried to penetrate his male organ into her. She has specifically stated that the appellant sat on her chest and on her raising cry, got up and went away. Regarding incident, only evidence available is the statement of the prosecutrix alone. There is no dispute that if the prosecutrix is a minor girl and taken away from the lawful guardianship without consent of her guardian or parents, that would amount to commission of offence of kidnapping as defined under Section 361 of the Indian Penal Code, which reads thus:

361. Kidnapping from lawful guardianship.- Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or

any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation :- The words 'lawful guardian' in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception:- This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

6. The prosecutrix in Para 4 has specifically stated that she was taken by the appellant for purchasing some thing for her in presence of mother and father and after giving information to them of this fact. In this state of evidence, the offence under Section 363 of the Indian Penal Code punishment for kidnapping as defined under Section 361 of the Indian Penal Code would not be made out against the appellant. The appellant took the prosecutrix with the consent of her mother and father, but, the offence under Section 366 of the Indian Penal Code is clearly made out against the appellant, because he took away the prosecutrix by deceitful means. Abduction is defined under Section 362 of the Indian Penal Code in the following terms:

362. Abduction.- Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.

7. In the instant case, the appellant took the prosecutrix with the consent of her guardian for purchasing something for her from the shop and after going up to some distance, instead of taking her to the shop, threatened and took her to the forest for commission of illicit intercourse. Therefore, the offence under Section 366 of the Indian Penal Code is clearly made out against the appellant.

8. The offence punishable under Section 376 read with Section 511 of the Indian Penal Code, attempt to commit rape, would not be made out against the appellant, because he did not remove the clothes of the prosecutrix and also did not expose

his male organ. He had not tried to penetrate his male organ into her private part. He sat on the chest of the prosecutrix and stood up the moment she raised cry. The Supreme Court in the case of Aman Kumar v. State of Haryana : 2004 CriLJ1399 has observed thus:

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.

Though the prosecutrix's version in Court was of rape, when it is compared with the one given during investigation, certain irreconcilable discrepancies are noticed. The evidence regarding actual commission of rape is at variance from what was recorded by the police during investigation. The evidence of P.W. 11, the father who according to the prosecution made a departure from what he allegedly stated during investigation is to the effect that his wife P.W. 9 told her (sic : him) that the prosecutrix was teased by the accused persons. Merely because he was termed as a hostile witness his entire evidence does not get affected. Significantly, the evidence of the prosecutrix and the doctor does not specifically refer to penetration which is sine qua non for the offence of rape.

There is no material to show that the accused were determined to have sexual intercourse in all events. In the aforesaid background, the offence cannot be said to be an attempt to commit rape to attract culpability under Section 376/511, IPC. But the case is certainly one of indecent assault upon a woman. Essential ingredients of the offence punishable under Section 354, IPC are that the person assaulted must be a woman, and the accused must have used criminal force on her intending thereby to outrage her modesty. What constitutes an outrage to female modesty is nowhere, defined. The essence of a woman's modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction

of the woman is very relevant, but its absence is not always decisive. Modesty in this section is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex. The act of pulling a woman, removing her dress coupled with a request for sexual intercourse, is such as would be an outrage to the modesty of a woman, and knowledge, that modest is likely to be outraged, is sufficient to constitute the offence without any deliberate intention having such outrage alone for its object. As indicated above, the word 'modesty' is not defined in IPC. The shorter Oxford Dictionary (3rd Edn.) defines the word 'modesty' in relation to a woman as follows: 'Decorous in manner and conduct; not forward or lewd; Shamefast; Scrupulously chaste'.

8. Medical evidence of Dr. Namita Thakur (P.W. 3) is also not sufficient to support constitution of offence of attempt to commit rape. She found one scratch near right eye of the prosecutrix. Prosecutrix nowhere stated that she was beaten or assaulted by the appellant. The prosecutrix has also not stated that she sustained this injury at the time of incident. The injury appears to be superficial one. Her hymen was intact and no injury was found anywhere on her body as well as her private parts. There was no sign of presence of semen, blood or any suspicious marks of stains on her underwear. Dr. Thakur has given specific opinion that there was absolutely no evidence of commission of intercourse on the prosecutrix. In these circumstances, the requisite ingredients for attempt to commit rape punishable under Section 376 read with Section 511 of the Indian Penal Code are not available in the instant case. The conduct of the accused was not showing full determination to gratify his passion at all events and in spite of all intervening factors and resistance as he tried his level best to commit sexual intercourse, but failed to make penetration.

9. Looking to the statement of the prosecutrix, medical evidence and statements of hostile witnesses Harisingh (P.W. 3) father of the prosecutrix, and Chhitarsingh (P.W. 4), Village Chowkidar, in the considered opinion of this Court, at the most offence punishable under Section 354 of the Indian Penal Code would be made out against the appellant for use of assault or criminal force to outrage the modesty of the prosecutrix.

10. In view of the foregoing discussion, this appeal is allowed in part.

11. The conviction and sentences of the appellant under Sections 363 and 376/511 of the Indian Penal Code are hereby set aside.

12. His conviction under Section 366 of the Indian Penal Code is maintained. He is also convicted under Section 354 of the Indian Penal Code.

13. On the question of sentence, learned Counsel for the appellant has submitted that the appellant is a first offender, a young married person having responsibility to maintain his family consisting of wife, children and old parents and for the offence punishable under Section 366 of the Indian Penal Code no minimum jail sentence is prescribed. At the time of incident, he was 36 years of age and is facing this prosecution since February, 2002, therefore, he maybe sentenced to the period already undergone (five years and seven months).

14. Looking to the totality of circumstances in the opinion of this Court, ends or justice would be served to sentence the appellant for the offence under Section 366 of the Indian Penal Code to the period already undergone and fine of Rs. 500/-, in default of payment of fine, to suffer additional S.I. for three months and under Section 354 of the Indian Penal Code R.I. for two years and fine of Rs. 500/-, in default of payment of fine to suffer additional S.I. for three months. Both these substantive jail sentences are directed to run concurrently.

15. Learned Trial Court is directed to release the appellant forthwith on his depositing the amount of fine as aforesaid and if not wanted in any other criminal case. Office is directed to send a copy of this judgment together with the record to the Trial Court for immediate compliance.