

**Raja Vs. State of Rajasthan**

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**Court :** Rajasthan

**Decided On :** Jul-28-1997

**Reported in :** 1998CriLJ1608

**Judge :** A.S. Godara, J.

**Acts :** [Indian Penal Code \(IPC\), 1860](#) - Sections 354, 363, 366A, 375, 376 and 511; Code of Criminal Procedure (CrPC) - Sections 313

**Appeal No. :** Criminal Jail Appeal No. 148 of 1997

**Appellant :** Raja

**Respondent :** State of Rajasthan

**Advocate for Def. :** D.S. Rathore, P.P.

**Advocate for Pet/Ap. :** B.K. Pareekh, Amicus Curiae

**Judgement :**

**A.S. Godara, J.**

1. This appeal Has been preferred by the convict appellant being aggrieved by the judgment and order Bated 27-2-97 passed by the learned Addl. Sessions Judge No. 2, Chittorgarh whereby the accused-appellant has been convicted under Section 376/511, I.P.C. and has been awarded a sentence of four years' R. I. and

a fine of Rs. 400/- and, in default of payment of fine, one month's S. I.

2. Briefly stated, the facts giving rise to the prosecution of the appellant are that P.W. 3 Madan Lal is resident of Village Tamlao while P. W. 4 Smt. Sampat is his wife. P.W. 8 Kum. Sugani is his daughter. Kum. Santosh, who was aged about four years at the time of the alleged occurrence, is their younger daughter. On 2-3-96, Madan Lal along with his wife Smt. Sampat; as well as their son P. W. 5 Badri Lal lodged a verbal report at the Police Station, Rawat Bhata that on 1-3-96 at about 8 P. M, they were present at their house. Their children along with Kum. Santosh were playing outside their residence. The appellant, who is also resident of their village, used to visit their house in connection with lifting of dead cattle. The accused came to their house and was sitting outside their residence. Kum. Sugani shouted that the accused Had lifted and taken away Kum. Santosh towards their enclosure. On this, both Madan Lal as well as Smt. Sampat came out of their house and ran towards their enclosure. They found that the accused-appellant had become naked by taking out his male-organ from the wearing clothes and Kum. Santosh was felled on the ground and was attempting to insert his penis into private part of Kum. Santosh. They immediately started throwing stones at the accused-appellant and threatened him and this made the accused-appellant to escape from the place of occurrence. Kum. Santosh was taken to her house. There was no mark of injury on the vaginal part of Kum. Santosh. This incident was reported to Kana and Jagannath Bheels. Due to night, they could not reach the Police Station in the night and so the matter was reported at the Police Station on the next day. Consequently, FIR No. 42/96 was registered and the investigation was completed resulting in filing of charge-sheet under Sections 363, 366A and 376/511, I.P.C. in the court of Civil Judge (JD) and Judicial Magistrate, Rawat Bhata and, on commitment, the trial court charged the accused-petitioner under Section 376/511, I.P.C. only to which the accused pleaded not guilty and claimed to be tried and hence the trial was commenced and, consequently, after examination of as many as 8 prosecution witnesses, examined the accused-appellant under Section 313, Cr.P.C. who denied this incident in toto and further stated that since the prosecution witnesses wanted to extort money from him and he did not oblige them and, as a result, they had falsely given testimony against him. He did not lead any defence evidence.

3. The learned trial Judge, after hearing both the sides, convicted and sentenced the appellant resulting in this appeal, as above.

4. I have heard the learned Amicus Curiae for the appellant as well as the learned P.P. and have also gone through the impugned judgment along with the record of the trial court and considered the same carefully.

5. The learned Amicus Curiae, while pointing out towards some of the discrepancies and contradictions in the statements of P. W. 3 Madan Lal, P.W. 4 Smt. Sampat, P. W. 5 Badri Lal and P, W. 7 Kum. Sugani, submitted that all these witnesses of the alleged occurrence are close relations and interested and, therefore, in absence of medical evidence, it becomes quite doubtful whether any incident, as alleged by the prosecution, took place and that it was the accused-appellant who had attempted to commit offence of rape. Alternatively, his further submission is that though the prosecution has failed to prove beyond reasonable manner of doubt that it was the appellant who committed such an offence but, at any rate, the prosecution story is accepted in its entirety, even then no case under Section 376/511, I.P.C. is made out, specially when P.W. 3 Madan Lal himself reported in the FIR that there were no marks of violence or injury on the vaginal part of Kum, Santosh and, as a result, at the most, an offence under Section 354, I.P.C. can be said to have been committed and hence there is every justification for reduction in sentence looking to the provisions of Section 354, I.P.C. He also maintained that since the appellant and Madan Lal were inimical and some dispute, as suggested in the cross-examination of the witnesses, arose between the appellant and Madan Lal at the village well and it provided a motive to Madan Lal to wreak vengeance on the appellant.

6. However, the learned P.P. forcefully countered all these submissions maintaining that the impugned order was well merited and that since the appellant did not succeed in inserting slightest part of his penis into vagina of Kum, Santosh and, therefore, there did not arise any question of causation of any injury or mark of violence on the private parts of Kum. Santosh and, consequently, there was no medical examination as well. Besides, since Kum. Sugani made a hue and cry attracting attention and presence of her parents immediately after Kum. Santosh

was removed from outside of her house towards the 'bara' and, whereat, when the accused was found to have brought himself in a naked position to seduce Kum. Santosh to sexual intercourse but, because of intervention of Madan Lal, Kum. Santosh and Badri Lal, he could not succeed in completing the act of sexual intercourse and, apprehending his arrest at the hands of these witnesses, he immediately made good his escape from the place of occurrence and, in the circumstances, the conviction of the accused-appellant, as above, does not warrant any interference on any ground whatsoever.

7. As regards offences under Sections 363 and 366A, I.P.C., though the appellant was challaned for commission of these offences as well but, the learned trial Judge did not charge the appellant for commission of these offences and, therefore, he was charged with and tried for commission of offences punishable under Section 376/511, I.P.C.

8. As regards the incident, P.W. 3 'Madan Lal is the father of Kum. Santosh. Kum. Santosh who is said to be aged about 3-1/2 years to four years at the time of the alleged incident and so she was of a tender age and it has resulted in her non-examination by the trial court.

9. However, P.W. 7 Kum. Sugani who was aged about 6 years at the time of the alleged incident and is also elder sister of Kum. Santosh, has clearly stated that it was appellant who took Kum. Santosh towards the 'bara' and she shouted attracting presence of their parents. Badri Lal also supports this fact. Both Madan Lal as well as Smt. Sampt (P.W. 4) support statement of Kum. Sugani. Though, Kum. Sugani, since she did not understand the sanctity and importance of oath and, therefore, she was not administered any oath but, even after being a child witness, her conduct inspires full confidence/There are no circumstances to hold that she was either prompted or motivated to falsely depose against the appellant. On the other hand, she immediately cried and her conduct is further fortified by the ocular testimony of P.W. 3 Madan Lal as well as P.W. 4 Smt. Sampat. All these witnesses immediately went towards the 'bara' whereat Kum. Santosh was taken by the appellant. Though the prosecution version is that all these four witnesses saw the appellant attempting to commit sexual intercourse on Kum. Santosh but

there are substantial contradictions in their statements in regard to seeing the appellant while attempting to commit this offence before he fled away from the place of occurrence when challenged by these witnesses.

10. P. W. 3 Madan Lal clearly stated that, being informed by Kum. Sugani, all of them went running towards the 'bara' and he saw that the appellant became naked and was about to sit on Kum. Santosh but his son (Badri Lal), while abusing the appellant, threatened him and on this the appellant fled away from the scene of occurrence. He lifted Kum. Santosh and took her to Kana Bheel. Thereafter, lifting Kum. Santosh in his lap, he returned to his house and that Kum. Santosh remained unconscious for about an hour. Lastly, he lodged Ex. P. 3 information, on which Ex. P. 5 FIR is based. He admitted in his cross-examination that the 'bara' was situated behind his residence and there was no source of light and that the height of the thorny-fencing of the enclosure was upto chest and nobody, either sitting or sleeping inside the 'bara', could be seen from outside. He also admitted that, due to defective vision, he could not see the appellant himself and instead he was told by his son (Badri Lal) that the appellant was inside the 'bara' who had run away from there. He further stated that he saw Kum. Santosh for the first time after the incident when Kum. Santosh was being brought from the house of Kana Bheel by Badri Lal towards his house. In the circumstances, as is admitted by Madan Lal, due to defective vision, in absence of light, in the aforesaid circumstance, he could not have been able to see the accused-appellant inside the 'bara' even if he was naked and was at the verge of attempting to commit sexual intercourse on Kum. Santosh.

11. This leads to conclude that Madan Lal is not the witness of the actual commission of the offence and instead he can be relied to the extent that Kum. Sugani immediately informed about taking away of Kum. Santosh by the appellant and, as a result, they all went running towards the 'bara' and, before they could apprehend the appellant, he escaped from the 'bara' leaving Kum. Santosh at the 'bara'.

12. P. W. 4 Smt. Sampat also supported the statement of her husband Madan Lal and further stated that the appellant forcefully took Kum. Santosh to the 'bara' and,

immediately, hearing cries of Kum. Sugani, they ran towards the 'bara'. Badri was ahead of them. They threw stones. Badri Lal lifted Kum. Santosh from the 'bara'. She also stated that Kana was standing at his house and the incident was reported to him. She further stated that she saw 'dhoti' of the accused to be untied and the accused-appellant wanted to outrage modesty of Kum. Santosh. He fled away from the scene of occurrence on their reaching at the 'bara'. They also informed of this incident to all the villagers and they were told to report the matter to the Police and, accordingly, the incident was reported to the police, as above.

13. In her cross-examination, she stated that she was ahead of his son and was being followed by her son Badri Lal while her husband was behind them. She further stated that Kum. Sugani shouted twice or thrice on which they ran towards the 'bara'. She further stated that it was Badri Lal who had brought Kum. Santosh from the 'bara' and it materially contradicts the statement of P. W. 3 Madan Lal that it was he who lifted Kum Santosh and, after taking her to Jagannath, brought her to their house.

14. P. W. 5 Badri Lal while supporting statement of his father as well as mother, stated that on shouting of Kum. Sugani that the appellant had lifted and taken away Kum. Santosh, they all went towards the 'bara'. He saw that Kum. Santosh was made to lie on the ground and that the appellant who had untied his 'dhoti' was attempting to insert his penis into the private part of Kum. Santosh. He hit appellant with a stone and the appellant immediately ran away from there. He brought his sister to his house. She had become unconscious and she was given water after which she regained her consciousness. He admitted that they reached the Police Station on the next day at about 4 P.M. He also admitted presence of Kana at the place of occurrence but Kana has not been produced by the prosecution. However, P. W. 6, Jagannath has been examined and he has not supported the prosecution version resulting in getting him declared hostile to the prosecution who has also been subjected to cross-examination by the learned P.P. However, he does not support the incident to the extent that the accused succeeded in completing any alleged act of attempted rape. He contradicted above statement of his mother and instead stated that he was in the forefront while they were heading towards the 'bara' and he was being followed by his mother and

this statement of his is quite contradictory to his earlier statement given in Ex. D. 3 police statement wherein he clearly stated that, both his father as well as mother ran towards the 'bara' and he had followed them. He also further stated in Ex. D. 3 police statement that his mother lifted and brought Kum. Santosh to her house and so as regards lifting of Kum. Santosh, if any, and her's being brought to her house either by Madan Lal or by Suit. Sampat or by P. W. 5 Badri Lal, as stated above, is completely contradictory inter se as well as to the police statement given by these witnesses.

15. They also did not state before the police that Kum. Santosh had become unconscious.

16. P.W. 7 Kum. Sugani, who is a child witness, could not be sworn oath since she did not understand the sanctity and importance of oath, as above, and, even an unsworn testimony, though her statement as supported by other witnesses in regard to taking away of Kum. Santosh by the appellant inspires confidence but, as regards commission of offence of attempted rape, she has, in the end of her cross-examination, clearly stated that she could not see the appellant running away from the 'bara' since he had already run away before she could reach there and, consequently, her statement in regard to actual commission or attempted commission of any offence, her testimony is of no help to the prosecution. There is no other witness regarding commission of the offence.

17. On the basis of above discussion, date, time and place of occurrence are not disputed. Identity of the appellant is also not disputed since he belongs to the same village where too all these prosecution witnesses belong. Besides, the appellant was often visiting the house of P. W. 3 Madan Lal and there was absolutely no rhyme or reason for them to have falsely named the appellant. As regards motive for the prosecution to have falsely implicated the appellant, he himself stated in his examination under Section 313, Cr.P.C. that since the prosecution witnesses wanted to extort money from him for not giving evidence against him and, on account of his failure, they have testified against him. As regards cross-examination of P.W. 3 Madan Lal, at the end of it, he did admit that the appellant's father had picked up a quarrel with him at the cattles' water point

situated near his house and he was also given thrashing by the father of the appellant but he clearly denied that he had either assaulted father of the appellant and instead he also stated that the appellant falsely alleged that his father was assaulted by the witness. The presence of Badri Lal at the place of occurrence was also omitted in Ex. D. 1 police statement of p. W. 3 Madan Lal.

18. In these circumstances, as regards commission of offence of attempted rape, as is defined under Section 375, I.P.C., though it cannot be denied that had there been slightest insertion of penis by the accused into the vaginal part of Kum. Santosh, the act of commission of sexual intercourse under Section 375, I.P.C. to attract punishment under Section 376 I.P.C. would have been complete but, any how, the prosecution case also does not claim that there was any completed act of commission of sexual intercourse and, therefore, there was no offence of rape having been committed against Kum. Santosh.

19. However, the prosecution allegations and consequential charge resulting in conviction of the appellant is that he attempted to commit sexual intercourse on Smt. Santosh and because of immediate appearance of the prosecution witnesses and the appellant having been assaulted and threatened before he could accomplish the act of sexual intercourse, he was forced to make 'good his escape from the scene of occurrence but the learned Amicus Curiae has submitted that the evidence of P. W. 3 Madah Lai, P. W. 4 Smt. Sampat, P. W. 5 Badri Lal and P. W. 7 Kum. Sugani, since P. W. 6 Jaganoath has been declared hostile, is self-contradictory, as pointed out above and, besides, it was night and in absence of source of light, as has been admitted by the prosecution witnesses and after 8 P.M., there was dark and, besides, looking to the admitted height of the thorny-fencing of the 'bara', since the witnesses could not have seen Kum. Santosh lying on the ground and the appellant either lying or sitting on her while being naked and exhibiting his penis in an attempt to commit sexual intercourse on Smt. Santosh. Besides, as is natural and so also borne out of the statements of the aforesaid prosecution witnesses, Kum. Sugani shouted attracting attention of her parents as well as her brother Badri Lal and all of them ran towards the 'bara', as is natural and, therefore, it was impossible for them to have seen the appellant sitting on Kum. Santosh in a naked position. Had it been so, he could not have

been allowed in the same position to have successfully fled away from the scene of occurrence. He could not have had any time or opportunity to have again tied his 'dhoti' and to have thereafter run away from the scene of occurrence unless the witnesses shouted from outside the 'bara' which dissuaded and forced the appellant to immediately run away from the scene of occurrence. Kum. Santosh has not been examined by the prosecution. No injury or mark of violence was caused on private parts of Kum. Santosh. As a result, in absence of examination of Kum. Santosh herself, as regards the position and the condition besides the actual act which was being committed by the appellant right at the time when the prosecution witnesses reached at or near the place of occurrence, is not established beyond reasonable manner of doubt by the prosecution. The statements of the aforesaid prosecution witnesses, as detailed above, are self-contradictory in this respect.

20. However, as is most natural and the circumstances also speak a lot about it, there is no doubt that the accused-appellant finding Kum. Santosh who was only about 3-1/2 years to 4 years of age and playing outside her house by lifting her from there to the 'bara' and she was also found lying on the ground and, naturally, by lifting her in his own arms and, thereafter, felling her down on the ground in the 'bara', the accused-appellant did use criminal force with an intent to outrage or knowing it to be likely that he will thereby outrage her modesty and so far as this act of the appellant is concerned, the same is covered by the provisions of Section 354 IPC and no valid objection there against can be Sustainable.

21. Before concluding that the offence of even attempted rape, as above was committed, the prosecution has to prove that the act of the appellant went ahead of the act of preparation for commission of sexual intercourse on Kum. Santosh before-arrival of the prosecution witnesses on the scene. As regards it, as pointed out hereinbefore, there are contradictory statements of the prosecution witnesses and, as a result, the prosecution has failed to prove beyond reasonable manner of doubt that the appellant did succeed in commission of attempted rape by making himself naked and also lying or attempting to lie on Kum. Santosh before he was challenged by the prosecution witnesses. Had he been naked and was sitting over Kum. Santosh, it was but natural for him to have attempted to insert his penis into

the vaginal part of Kum. Santosh and looking to the age and condition of her parents, though the' appellant could not have easily succeeded in inserting .any part of his penis into the vaginal part of Kum. Santosh but, in case, there was any attempt, as alleged, it was but natural that there would have been some marks of violence on the vaginal parts of Kum. Santosh. There were none. Therefore, in view of the contradictory evidence, as regards commission of an offence punishable under Section 376/511, I.P.C., the same is not proved beyond reasonable manner of doubt and, as a result, the impugned finding in this respect resulting in conviction of the appellant for, commission of attempted rape is concerned, the same is against the prosecution evidence and so the finding of the trial court being against the 'evidence on record, is not sustainable and the appellant deserves to be acquitted of this charge. Instead, as discussed above, the circumstantial evidence, there being no motive on the part of the prosecution witnesses to have falsely made such an imputation and the allegation against the appellant in case no such incident took place and, therefore, looking to the nature of the allegations, there is no difficulty in concluding that the appellant is liable for commission of offence of attempting to outrage modesty of Kum. Santosh by forcibly lifting her in his arms and taking her to a lonely 'bara' of her father and dither forcing Or making her to lie on the ground before he could attempt to commit sexual intercourse on her.

22. In the circumstances, on the basis of prosecution evidence discussed hereinbefore, so far as offence under Section 354, I.P.C. is concerned, the appellant is proved beyond reasonable manner of doubt to have committed this offence.

23. As a result of above discussion, though the prosecution failed to prove charge under Section 376/511, I.P.C. beyond reasonable manner of doubt against the appellant and, as a result, he deserves to be acquitted of this charge and instead, as discussed above, he is proved to be guilty of commission of offence punishable under Section 354, I.P.C. and, accordingly, the judgment and conviction under appeal deserves to be modified to this extent and, accordingly, this appeal also succeeds in part.

24. On the basis of above discussion, this appeal is accepted in part and the conviction and sentence of the appellant under Section 376/511, I.P.C. is set aside and instead he is convicted under Section 354, I.P.C. and, accordingly, one year's R. I. is imposed on the appellant. The period of Police as well as Judicial; Custody of the appellant shall also be set-off against the period of imprisonment so imposed on the appellant.

25. This appeal is disposed of accordingly.

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