

State Vs. Pankaj Chaudhary

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Court : Delhi

Decided On : Aug-17-2011

Judge : S. Ravindra Bhat; G.P.Mittal, Jj.

Acts : Indian Penal Code (IPC) - Sections 376, 377, 511, 506, 354; Code of Criminal Procedure (CrPC) - Section 164, 173, 313, 428; [Evidence Act, 1872](#)

Appeal No. : CRL. A. 813/2011; CRL. A. 993/2009

Appellant : State

Respondent : Pankaj Chaudhary

Advocate for Def. : Mr. Gopi Chand, Adv.

Advocate for Pet/Ap. : Mr. Saleem Ahmed, Adv.

Judgement :

1. The State in Criminal Appeal No.813/2011 and the Appellant (hereafter "Pankaj Chaudhary") in Criminal Appeal No.993/2009 impugn the judgment dated 12.11.2009 and the order on sentence dated 16.11.2009 whereby the latter, (i.e Pankaj Chaudhary) was convicted for the offence punishable under Sections 376 and 377 read with Section 511 Indian Penal Code (IPC). The Appellant was further convicted for the offence punishable under Section 506 IPC. He was awarded various terms of imprisonment for different offences.

2. The State is aggrieved by the impugned judgment on the ground that the Trial Court fell into error and committed a grave illegality in holding that since the hymen of the prosecutrix was intact; rape could not have been committed. It is urged on behalf of the State that the slightest penetration is sufficient to constitute the offence of rape and in cases of a small girl the hymen is situated deeply because of the rotundity of the labia majora on account of excessive fat content. It is urged that in view of the prosecutrix's testimony that Pankaj Chaudhary had struck his private part against her private part, the offence of rape was complete. Thus, the State avers that the Appellant ought to have been convicted for the offence of rape and carnal intercourse against the order of nature and not merely for an attempt.

3. On the other hand, Pankaj Chaudhary, in his appeal urges that there were discrepancies in the prosecutrix's testimony, he was falsely implicated because of a dispute between his uncle and prosecutrix's father regarding repayment of certain loan and therefore, he was entitled to be acquitted; in the alternative, it is urged that at the most an offence under Section 354 IPC and Section 506 IPC can be said to have been committed if the prosecutrix's testimony is read with her earlier version recorded by a Magistrate under Section 164 of the Code of Criminal Procedure (Cr.P.C.).

4. The prosecution had alleged that - the prosecutrix is a small girl, aged about 5/6 years. On 21.10.2007 at about 6:00 P.M., she was standing near the main entrance of her house. It is alleged that the Pankaj Chaudhary, (son of the landlords brother) was sitting in the staircase. He asked the prosecutrix to go upstairs. She followed his instructions and he followed her to the first floor. The Appellant removed the prosecutrix's pant (trousers) as well as his own pant. He laid the prosecutrix on the floor and struck her vagina with his private part. The prosecution version is that the Appellant also struck the prosecutrix's anus with his private part. The prosecutrix cried with pain. The Appellant scolded her and threatened her that if she would disclose the incident, she would be killed. It is alleged that the prosecutrix went down stairs. She was in a lot of pain and, narrated the entire incident to her mother PW-5 Smt. Rakhi Bisht. PW-5 called prosecutrix's father PW-1 Mukesh Singh Bisht and informed him about the offence

committed by the Appellant Pankaj Chaudhary against the prosecutrix.

5. On the next day the police was informed. The Statement of the prosecutrix Ex.PW-3/A was recorded by Inspector Alka Azad, who made her endorsement for registration of a case under Section 376/377 and 506 IPC.

6. The prosecutrix was medically examined. PW-4 Dr. Subodh on local examination found no mark of injury all over the body. The doctor found "redness present around hymen, hymen intact".

7. During investigation statement of the prosecution under Section 164 Cr.P.C. was recorded by the Metropolitan Magistrate wherein the prosecutrix did not state about the thrusting of the private part against hers, rather, she deposed that the Appellant "started moving his front portion of legs (action only). phir usne mere aage peeche (ek toilet karne wali jagah v ek potty karne wali jagah mein ungli maarne laga)" He then put his finger in prosecutrixs vagina and anus."

8. On completion of the investigation, a report under Section 173 Cr.P.C. was filed against the Appellant. On Appellants pleading not guilty to the charge, the prosecution produced 11 witnesses.

9. The Appellant, Pankaj Chaudhary was examined under Section 313 Cr.P.C. He denied prosecution evidence and pleaded false implication. He took the plea that he was implicated in the case falsely as some loan was got sanctioned by prosecutrixs father on the shop belonging to his tau (fathers elder brother). The same was not returned by him (the prosecutrixs father) resulting in a quarrel between the Appellant and prosecutrixs father (PW-1).

10. The Appellant examined DW-1 Rich Pal and DW-2 Afroz Alam in support of the defence version. The Trial Court believed the prosecution version, found the prosecutrix to be reliable and convicted the Appellant for the offence punishable under Section 376/377 read with Section 511 IPC and under Section 506 IPC.

11. While convicting the Appellant for attempt instead of substantive offence, the Trail Court held thus:-

"To constitute offence under section 376 or 377 IPC Penetration with the private part into vagina or anus is essential. Here PW-3 deposed in the court as well s stated to the police that accused had struck his private part to her vagina as well as anus Doctor had also not found anything by which it can be said that accused has succeeded in penetrating the vagina or anus. Therefore, from the above evidence on record, it is evident that the prosecution has not succeeded in proving its case u/s 377/ 376 IPC as charged. Rather than, prosecution has succeeded to prove that the accused had attempted to commit rape as well as attempt to commit incarnal intercourse from his private part by striking to the vagina as well as to the anus of the prosecutrix. Therefore, I hold the accused guilty of the offence u/s 376/ 377/ 511 IPC."

12. The Trial Court dealt with the prosecutrixs testimony as under:-

"....Now court has to assess whether the testimony of PWs are enough to hold the accused guilty of the offence u/s 376/ 377/ 506 IPC. Whole of the case of the prosecution revolves around the testimony of PW-3 „A (the name of the prosecutrix ought not have been given to conceal her identity). She is the prosecutrix as well as the victim. According to the counsel of the accused PW-3 is a tutored witness and she is of tender age and her testimony cannot be believed.

First of all it is made clear that in Indian [Evidence Act, 1872](#) does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, section 118 of the Evidence Act envisages that all persons should be competent to testify, unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions because of tender years, extreme old age, diseased - whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. The evidence of a child witness is not required to be rejected per se, but the court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality there of and reliability can record conviction, based thereon.

Now the court had already satisfied by putting certain questions to the „A, a child witness of age of 6 years that she can understand questions. She has enough intelligent to depose the fact about the incident which has happened upon her. Now, what „A has deposed is that at the time of incident she used to study in class 1st in Mother Mary Public school. At about 6 pm when she was standing at the main gate of the house, Pankaj Bhaiya was found standing at the step of staircase. Pankaj Bhaiya had asked her to come at first floor. She came at the first floor as per instructions of Pankaj Bhaiya and he had followed her. There was none other person present at first floor. Thereafter Pankaj Bhaiya had removed her pant and removed also his pant. Thereafter Pankaj Bhaiya had asked her to lie down on the floor and thereafter Pankaj Bhaiya had caused injury from his private part to her anus as well as vagina. She cried thereafter Pankaj Bhaiya pressed her mouth and hold her waist from other hand. Thereafter Pankaj Bhaiya had threatened her that if she disclose the fact to anybody then he would kill her. Thereafter after wearing her she came down by running to her mother and apprised her mother about the pain in her anus as well as vagina. In the Cross examination this witness has stated that in the first floor construction work was going on. Pankaj Bhaiya had taken her in the room at the first floor. There was no gate on the room at first floor where she was taken. When she was standing at her main gate her mother was inside the room at ground floor. She deposed that she wore the same pant which was worn by her on the day of incident. She further deposed that police has not seized or taken her pant. Doctor has taken pant and deposited the same. She had denied that Pankaj Bhaiya had never took her at the first floor or caused injury by his private part to her vagina and anus....."

13. We do not find any fault with the reasoning adopted by the Trial Court in believing the prosecutrix. It is true that there was a delay of one day in reporting the matter to the police. It is, however, well known that an offence of sexual assault, particularly, on a small child is more often than not hidden by the parents to save the prestige of the small child. The Appellant while giving suggestion to PW-1 Mukesh Singh Bisht (the prosecutrixs father) put to him that he (PW-1) had taken loan from Pankajs uncle for the marriage of his brother Rajesh, which he denied. PW-1 further denied that there was any quarrel on the aspect of loan or that the Appellant Pankaj Chaudhary had slapped him on that

count. Of course, a suggestion given that PW-1 had taken loan from ICICI Bank was admitted by him. In his statement under Section 313 Cr.P.C. , the Appellant abandoned his defence of PW-1 obtaining loan from Appellants uncle in connection with PW-1s brother marriage and stated that the quarrel was in respect of the loan taken from the Bank. This shifting defences taken by the Appellant clearly shows that his stand was only a make believe story put up by the Appellant to come out of the predicament in which he was placed. Otherwise too, the defence put forth by the Appellant is improbable and unbelievable. No parents would put the prestige of his/her small daughter at stake to settle score in respect of some small quarrel. In *Satyapal v. State of Haryana*, 2009 (6) SCC 635, the Supreme Court observed that ordinarily the family of a victim of sexual assault would not intend to get a stigma attached to the victim.

14. Thus, we have no doubt about the incident and the assault committed by the Appellant on the prosecutrix.

15. The question for consideration is, as to what was the exact nature of the act committed by the Appellant. Whether it was an offence of rape and carnal intercourse against the order of nature or it was an attempt to rape / or attempt to have a sexual intercourse against the order of nature or it was merely an indecent assault within the meaning of Section 354 IPC.

16. We have carefully perused the statement of the prosecutrix recorded under Section 164 Cr.P.C. by the Metropolitan Magistrate immediately after the incident on 23.10.2007 and the statement recorded in the Court on 16.03.2009 i.e. after a lapse of about two years of the incident. In the statement under Section 164 Cr.P.C., the prosecutrix was categorical that the Appellant had put his finger in her vagina and anus. She informed the Metropolitan Magistrate that on this she started crying and the Appellant extended a threat to kill her. Because hymen of the prosecutrix is intact by itself would not negative the offence of rape as even slightest penetration is sufficient to constitute the offence of rape. (*Madan Gopal Kakkad v. Naval Dubey*, 1992 (3) SCC 204; *State of H.P. v. Gian Chand*, AIR 2001 SC 2075; *Halsburys Statutes of England and Wales*, 4th Edition, Volume 12) but at the same time, the Court has to be satisfied that there was partial

penetration.

17. PW-5 Rakshi Bisht (prosecutrix's mother) deposed that on 21.10.2007 at about 6:00/6:30 P.M. her daughter told her while weeping that she was "feeling pain on her private parts". She opened her pant and noticed "some redness on her private parts" when she insisted, the prosecutrix informed her that the Appellant had opened her pant and then opened his own pant and "committed dirty acts with her". She deposed that her daughter also told her that the Appellant had also threatened her that if she would disclose this thing to anyone, she would be killed.

18. Thus, in the earliest version given by the prosecutrix to her mother as also to the Metropolitan Magistrate, just after two days of the incident, there was no mention that the Appellant had put his private part in or on the prosecutrix's private part.

19. Thus, in view of the PW-5s testimony and the earliest version given by the prosecutrix under Section 164 Cr.P.C., it would be unsafe to rely upon the prosecutrix, who at the time of the incident was a small girl aged about 5-6 years, on the improved version (i.e. the Appellant struck his private part on prosecutrix's private part).

20. In *Raju Pandurang Mahale v. State of Maharashtra & Anr.*, 2004 (4) SCC 371, the Supreme Court very vividly brought out the distinction between an attempt to commit an offence and preparation. The Supreme Court observed:-

"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 he 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 to 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."

21. In the case of Tarkeshwar Sahu v. State of Bihar, (2006) 8 SCC 560, the Supreme Court relied upon a Division Bench judgment of the Bombay High Court in Criminal Appeal No.161/1930 titled „Ahmed Asalt Mirkhan, decided on 12.08.1930, Reported in Law of Crimes at Page 922. In that case the complainant, a milkmaid, aged 12 or 13 years, who was hawking milk, entered the accused's house to deliver milk. The accused got up from the bed on which he was lying and chained the door from inside. He then removed his clothes and the girl's petticoat, picked her up, laid her on the bed, and sat on her chest. He put his hand over her mouth to prevent her from crying and placed his private part against hers. There was no penetration. The girl struggled and cried and so the accused desisted and she got up, unchained the door and went out. It was held that the accused was not guilty of attempt to commit rape but of indecent assault.

22. In the case of Aman Kumar v. State of Haryana, (2004) 4 SCC 379, the Supreme Court observed that in order to find an accused guilty of an attempt with intent to commit a rape, the Court has to be satisfied that the accused, when he laid the prosecutrix, he 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. It was observed that 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.

23. The prosecutrix was found to be having some redness in the vagina as per the MLC Ex.PW-4/A. This could be the result of use of fingers by the Appellant.

24. Digital sex is considered as serious as the offence of rape in some countries. There is a proposal to amend Section 375 IPC by the Government of India. It is proposed to make the definition of „sexual assault much wider which would include the penetration to any extent by a man by an object or part of the body (i.e. the penis) into the vagina or anus or urethra of a woman. Thus, the digital sex i.e. use of finger shall be included in the definition of „sexual assault with severe punishment. For the present, the Appellants act would be covered by the definition of an indecent assault as given in Section 354 IPC i.e. outraging the modesty of a woman.

25. In view of the above discussion, the Appeal filed by the State has to fail and the Appeal preferred by the Appellant has to be partly allowed. The Appellants conviction under Section 376/511 and 377/511 IPC is set aside, instead, he is convicted for the offence punishable under Section 354 IPC. He is sentenced to undergo Rigorous Imprisonment for two years and to pay fine of Rs. 2,000/- or in default of payment of fine to undergo further RI for three months. The conviction and sentence under Section 506 IPC needs no interference, the same is accordingly maintained. It goes without saying that the Appellant shall be given benefit under Section 428 Cr.P.C.

26. The Appeal filed by the State (CRL. A. 813/2011) is dismissed. The Appeal filed by the Appellant Pankaj Chaudhary (CRL. A. 993/2009) is partly allowed to the above extent.