

## PUNJAB AND HARYANA HIGH COURT

Sarup Singh

Vs

State of Punjab

(Pritam Pal,J.)

03.12.1963

### JUDGMENT

#### **Pritam Pal,J**

1. Appellant Sarup Singh (22 years) has brought this appeal against judgment and order dated 5.2.2003, whereby he was convicted under Section 376 read with Section 511 of I.P.C and Section 323 of I.P.C. and sentenced to undergo R.I. for 10 years with a fine of Rs.2000/-. In default of payment of fine, he was ordered to undergo further R.I. for two months under Sections 376 read with Section 511 of I.P.C. He was also sentenced to undergo R.I. for one years with a fine of Rs.500/- and in default thereof to undergo further R.I. for one month under section 323 of I.P.C. In nut-shell, the facts culminating to the commencement of this appeal, may be recapitulated thus:- On 9.2.2002, at about 5.10..a.m, prosecutrix Sudesh Kumari, a married lady (35 years), in the company of her husband Ram Pal, had gone to answer the call of nature in the area of village Bhanolanga , Police Station, Sadar Kapurthala. She went to answer the call of nature at a place meant for women folk in the village, whereas her husband Ram Pal went at a place meant for men. After being free, the prosecutrix started coming back towards her house. At that very moment, the accused/appellant caught hold of her from neck and also gagged her mouth. There-upon she grappled with him and during scuffle, she sustained injuries on her right cheek and right leg. The appellant then tried to break open the string of her salwar and made an attempt to commit rape upon her. But she raised an alarm, which attracted her husband Ram Pal to the spot. Her husband also tried to catch hold of the appellant, but he managed to escape. After the said occurrence, the matter was reported to the police at about 1.10.p.m.

Statement Ex.PA of the prosecutrix was recorded by ASI Kewal Singh in the above narration of facts, on the basis of which, formal F.I.R. Ex.PB was recorded at 2.35.p.m.by MHC Ram Lal in Police Station, Sadar Kapurthala. After the registration of the case, ASI Kewal Singh (PW-4), took the investigation of this case in hand. He along-with the prosecutrix and her husband proceeded to the place of occurrence and there he prepared the rough site plan Ex.PD with his correct marginal notes in his hand. On the same day, he also recorded the statement of Ram Pal (PW-3) husband of the prosecutrix. Thereafter, the prosecutrix was got medicolegally examined vide her MLR Ex.PJ in respect of injuries sustained by her during the scuffle. The appellant was arrested in this case on 10.2.2002 vide arrest memo Ex. PF.

Thereafter, he was also got medicolegally examined on 11.2.2002. After completion of formal investigation of this case, report u/s 173 Cr.P.C, was prepared by Lakhwinder Singh, the then S.I/ S.H.O and filed in the Court. The appellant was charge-sheeted for having committed offences punishable under Sections 376 read with Section 511 of IPC and Section 323 of I.P.C. by the learned trial Court vide its order dated 30.5.2002, to which he pleaded not guilty and claimed trial. The prosecution in order to substantiate its case against the appellant examined as many as six witnesses, namely, PW-1 MHC Ram Lal he is a witness to the recording of the FIR Ex.PB; PW-2 Sudesh Kumari, is the prosecutrix in this case; PW-3 Ram Pal is the husband of the prosecutrix; PW-4 ASI Kewal Singh is the Investigating Officer in this case; PW-5 Dr. Gurbachan Singh, he had given his opinion Ex.PH/1 on the application Ex.PH moved by the police regarding fitness of the appellant to perform sexual intercourse and PW-6 Dr. Harinder Kaur, she medicolegally examined the prosecutrix and in that behalf, she proved MLR Ex.PJ. After closure of the prosecution evidence, the appellant was examined in term of Section 313 Cr.P.C., where in he denied all the incriminating evidence appearing against him. When called upon to enter his defence, the appellant examined DW-1 Sukhwinder Singh, whose house is situated nearby the place of occurrence. After appraisal of the evidence brought on record and hearing the learned counsel for the parties, the learned trial Court convicted and sentenced the appellant, as indicated in the opening part of this judgment. This is how feeling aggrieved, the appellant has come up in this appeal.

I have heard learned counsel for the parties and with their assistance have gone through the record carefully. The main plank of the argument of learned counsel for the appellant is that the prosecution story as put-forth, is highly doubtful inasmuch as, according to the prosecutrix Sudesh Kumari (PW-2), she alongwith her husband Ram Pal (PW-3) had gone to answer the call of nature in the early morning on the date of occurrence. When she was intercepted by the appellant, her husband was sitting at a distance of about 60/70' from the place of occurrence. The moment, she was caught hold of by the appellant, she raised hue and cry, which attracted her husband, but in the meantime, he (appellant) managed to escape. It was then also argued that during the scuffle between the appellant and the prosecutrix, she had sustained some scratches on her mouth and legs. After making the reference of the testimony of PW-2 Sudesh Kumari and PW-3 Ram Pal, the learned counsel submitted that none of the star witnesses stated that string of salwar was broken open or any of the garments worn by the prosecutrix or the appellant was torn off during the scuffle between the two. At the fag end of his arguments, the learned counsel submitted that if the statement of the prosecutrix, which is vague one, is read as a whole, then the same leads no where in the direction of holding the appellant guilty for commission of an offence punishable under Section 376 read with Section 511 of the I.P.C. At the most, taking the case of the prosecution on its face value, then only a case punishable under Section 354 of I.P.C. can be said to have been made out. On the other hand, learned Assistant Advocate General, appearing on behalf of the State of Punjab, has supported the judgment of conviction and the order of sentence under Sections 376 read with Section 511 of I.P.C and 323 of I.P.C passed by the learned trial Court. After hearing the learned counsel for the parties and perusing the entire evidence as well as the impugned judgment and the order this Court is of the view that there is some substance in the arguments put-forth on behalf of the appellant so far as making out of a case under Section 354 I.P.C. instead of Section. 376/511 I.P.C. is concerned. According to Sudesh Kumari, the prosecutrix, who is a star witness in this case, the appellant had wrapped himself in a shawl, but his mouth was open. He had gagged her mouth with one hand and with another hand, he had caught hold of her neck. He first gave a push to her. There upon, she

thought that he was a thief. She deposed that the accused/appellant had tried to break open the string of her salwar, but she resisted. She further testified that the appellant was not allowed to open the string of her salwar. Ultimately, she raised hue and cry. In the scuffle, she also sustained scratches on her cheek and legs. She further stated that her salwar was not torn by the appellant. During the said occurrence, her husband had also reached at the spot, but the appellant ran away. She then also stated that before lodging the FIR, the matter was also taken to the panchayat of the village. In her cross examination, she stated that her husband was also answering the call of nature at a distance of 60/70' from the place of occurrence. The Haveli (residential house) of one Inder Singh is at a distance of 25/30 karms from the place of occurrence. Further, she also admitted that there is a house of Sukhwinder Singh (DW-1) nearby the place of occurrence. In her cross examination, she was also confronted with many material points of her statement Ex.PA. Similarly, other material witness, namely, Ram Pal husband of the prosecutrix was also confronted with many other material points of his statement Ex. DA including the factum of trying to make an attempt to commit rape upon his wife, whereas no such statement was made by him u/s 161 Cr.P.C. before the police. Thus, a close scrutiny of the evidence consisted in the statements of the aforesaid two material witnesses, goes a long way to establish that there was a scuffle between the appellant and the prosecutrix and she also sustained simple abrasions on her cheek and legs during the course of said occurrence. It is also apparent that in this case, the appellant tried to break open the string of her salwar, but he could not succeed as the prosecutrix had put resistance. It is also established that the appellant did not lay himself on the body of the prosecutrix. Ultimately, when she raised hue and cry, the appellant fled away from the spot before being caught hold of by her husband, who was sitting just at a distance of 60/70' from the place of occurrence. The distinction between an attempt to commit rape and to commit indecent assault is sometimes very meagre. For the former, there should be some action on the part of the accused which would show that he is just going to have sexual connection with the prosecutrix. For an offence of an attempt to commit rape, the prosecution must establish that it has gone beyond the stage of preparation. The difference between mere preparation and actual attempt to commit an offence consists chiefly in the greater degree of determination. Taking into consideration all the given facts and circumstances of this case, as discussed above, and the improvements/embellishments made by the witnesses while appearing in the Court, I have no hesitation to hold that no case punishable under Section 376 read with Section 511 of I.P.C., is made out against the appellant, but at the same time, he is held to have assaulted and used criminal force upon the prosecutrix intending to outrage her modesty. Thus, he is convicted under Section 354 I.P.C. instead of Section 376 read with Section 511 of I.P.C. Thus the conviction of the appellant u/s 376 read with Section 511 of I.P.C. is hereby altered to one under Section 354 of I.P.C. The appellant is stated to have already undergone approximately three years of sentence, thus, he is sentenced to the period already undergone by him and with a fine of Rs.2000/- and in default of payment of fine, he shall further undergo R.I for two months u/s 354 of I.P.C. Rest of the conviction and the sentence recorded u/s 323 of I.P.C, are maintained.

In the result, this appeal is partly allowed, to the extent as indicated above.

Sept 09,2005 ( PRITAM PAL )

RR JUDGE