Before H.S. Bhalla, J.

SURESH,—*Petitioner*

versus

STATE OF HARYANA,—*Respondent*

CRIMINAL APPEAL NO. 281/SB OF 1992

2nd April, 2007

Indian Penal Code, 1860—Ss.376 & 511–Conviction of appellant under section 376 for rape of a girl of about 12 years—No injury mark present on breast, thigh or anywhere else on the body—Basic ingredient of Section 375 is penetration–Slightest degree of penetration is sufficient to hold accused guilty for offence under section 375 punishable under section 376 IPC—On consideration of evidence in proper perspective though commission of actual rape not established, however, prosecution able to prove charge of attempt to commit rape beyond all reasonable doubt—Appeal partly allowed by reducing sentence of accused to a period of four years from 7 years.

Held, that the prosecutrix was about 12 years of age, therefore, her consent was irrelevant. The appellant had forcibly taken her to his Gumti with the intention of committing sexual intercourse with her. The important ingredient of the offence under Section 375 punishable under Section 376 IPC is penetration which is altogether missing in the instant case. No offence under Section 376 IPC can be made out unless there was penetration to some extent. In absence of penetration to any extent would not bring the offence of the appellant within the four corners of Section 375 of the Indian Penal Code. Therefore, the basic ingredients for proving a charge of rape are the accomplishment of the act with force. The other important ingredient is penetration of the male organ within the labia major or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim completely, partially or slightly would be enough for the purpose of Sections 375 and 376 IPC.

(Para 10)

Further held, that to constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under Section 376 of the Indian Penal Code. I am also conscious of the fact that prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime and her testimony can be acted upon without corroboration. She suffers an injury physically and emotionally and it also affects the dignity of a woman. The entire case is required to be scrutinized in view of what has been observed above taking into consideration the evidence available on the record.

(Para 15)

Further held, that on the evidence on record the conclusion is irresistible that the prosecution has been able to establish the charge of attempt to commit rape beyond all reasonable doubts. Appellant is convicted under Section 376 read with Section 511 of the Indian Penal Code.

(Para 23)

Sanjay Vashishth, Advocate, *for the appellant.*

Deepak Girotra, Assistant Advocate General, Haryana.

JUDGMENT

H.S. BHALLA, J.

(1) This appeal is directed against the judgment dated 14th/15th July, 1992 passed by Additional Sessions Judge, Hisar, whereby he convicted the appellant under Section 376 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for seven years and was ordered to pay a fine of Rs. 2000 ; in default thereof, he was directed to further undergo rigorous imprisonment for a period of six months.

(2) Factual matrix leading to the conviction of the appellant is as follows :–

(3) On 19th February, 1991 at about 3.00 P.M. prosecutrix daughter of Daya Nand resident of Budana, aged 12-13 years, was working in the fields in the area of village Budana, whereas her father Daya Nand was also working at the brick-kiln of Subhash Chander

situated in the area of village Budana at a distance of two killas from the place where prosecutrix was cutting barsin crop. Prior to cutting the barsin crop, prosecutrix had taken the meals of her father at about 12.00 P.M. who was working at the brick-kiln and after serving the meals, prosecutrix started cutting barsin crop in the field and at about 3.00 P.M. accused Suresh found prosecutrix all alone in the field and took prosecutrix in his arms and forcibly put her on the ground and placed his hand on her mouth and also gave a mouth bite on the left cheek of prosecutrix and he opened the *nara* of the *salwar* of prosecutrix with his second hand and thereafter forcibly performed sexual intercourse with prosecutrix without her consent. Prosecutrix raised an alarm, which attracted her father Daya Nand, who was working at the nearby Bhatta and when her father reached near the place of occurrence, accused ran away towards the village on seeing Daya Nand coming to the spot. Daya Nand brought prosecutrix to the Police Station Narnond, where on the statement of prosecutrix, present FIR, Ex.PL, was registered by S.I. Sher Singh. Investigation started. The prosecutrix was taken to Civil Hospital, Hansi, where she was medico-legally examined. The investigating Officer prepared rough site plan, recorded the statement of Daya Nand under section 161 of the Code of Criminal Procedure. Subsequently, accused was arrested and he was got medico-legally examined. On completion of necessary formalities, accused was challaned under sections 376/354 of the Indian Penal Code and sent up for trial.

(4) Accused was charge-sheeted under section 376 of the Indian Penal Code, to which he did not plead guilty and claimed trial.

(5) Prosecution, in order to prove its case, examined 11 witnesses namely, Shri O.P. Verma, JMIC, Hansi (PW-1), Shivdhan Singh, Sub Inspector (PW-2), Suresh Kumar (PW-3), Baldev, Statistical Assistant (PW-4), Rajinder Singh (PW-5), Sher Singh, Sub Inspector/ SHO (PW-6), Prosecutrix (PW-7), Daya Nand (PW-8), Dr. R.K. Nandal (PW-9), Dr. Urmil (PW-10) and Om Parkash, Assistant Sub Inspector (PW-11) and closed its evidence.

(6) In his statement recorded under section 313 of the Code of Criminal Procedure, accused denied all the allegations levelled against him and pleaded that he has been falsely implicated in the present case on account of previous enmity. However, no evidence in defence was led.

(7) I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

(8) The prosecutrix, who was aged about 12/13 years, was examined as PW-7 and her father was examined as PW-8. Dr. R.K. Nandal, who medico-legally examined the appellant, stepped into the witness box as PW-9 and another material witness, namely, Dr. Urmil, who medico-legally examined the prosecutrix, was examined as PW-10. The occurrence, in the present case, took place at 3.00 P.M. on 19th February, 1991, while prosecutrix was working in the area of village Budana, whereas her father Daya Nand, was working at a distance of 2 killas from the place of occurrence. As per the prosecution version, after cutting barsin crop at 3.00 P.M. appellant Suresh found the prosecutrix all alone and put her on the ground and thereafter forcible sexual intercourse was performed and tooth bite was given on the left cheek of the prosecutrix. On raising alarm by the prosecutrix, her father was attracted on the scene of the occurrence and when he reached near the place of occurrence, appellant sped away from the spot.

(9) After having gone through the statement of Dr. Urmil (PW-10), who examined prosecutrix,—*vide* Medico-legal report, Ex.PN/1, I find that this witness has categorically deposed that no injury mark was present on the breast, thigh or anywhere else on the body. One teeth bite mark was found on the left side of cheek of the prosecutrix. She has further disclosed that pubic hair were poorly developed, IVth hymen was slightly petalous. No tear nor bleeding was present. She further disclosed that as per FSL report, Ex. PJ, semen was detected on the salwar Ex. P-2. However, no semen was detected on vaginal swab or shirt. She has disclosed that she is unable to say that rape was committed or not. As per the report, Ex. PJ, no spermatozoa was found in the swabs taken from the vagina of the prosecutrix.

(10) Before laying my hands on the statement of the prosecutrix and her father, it is necessary to find out what offence has been committed by the appellant ? Now the moot question which squarely falls for consideration of this Court pertains to the correct and appropriate Sections of the Indian Penal Code under which the appellant is required to be convicted according to the offence he had

committed. The learned trial Court convicted the appellant under Section 376 of the Indian Penal Code. In order to arrive at the correct conclusion, I deem it appropriate to examine the basic ingredients of Section 375 punishable under Section 376 of the Indian penal Code to demonstrate whether the conviction of the appellant under Section 376 of the Indian Penal Code is sustainable.

"375 ***Rape.***—A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions :–

First :– Against her will;

Secondly :—Without her consent

Thirdly :—With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly :—With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly :—With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly :—With or without her consent, when she is under sixteen years of age.

Explanation :—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception:—Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

"Under Section 375 IPC, six categories indicated above are that the basic ingredients of the offence. In the facts and circumstances of this case, the prosecutrix was about 12 years of age, therefore, her

consent was irrelevant. The appellant had forcibly taken her to his Gumti with the intention of committing sexual intercourse with her. The important ingredient of the offence under Section 375 punishable under Section 376 IPC is penetration which is altogether missing in the instant case. No offence under Section 376 IPC can be made out unless there was penetration to some extent. In absence of penetration to any extent would not bring the offence of the appellant within the four corners of Section 375 of the Indian Penal Code. Therefore, the basic ingredients for proving a charge of rape are the accomplishment of the act with force. The other important ingredient is penetration of the male organ within the labia major or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim completely, partially or slightly would be enough for the purpose of Sections 375 and 376 IPC. The Apex Court had an occasion to deal with the basic ingredients of this offence in the case of **State of U.P.** *versus* **Babul Nath, (1).** In this case, this Court dealt with the basic ingredients of the offence under section 375 in the following words :—

> "8. It may here be noticed that Section 375 of the IPC defines rape and the explanation to Section 375 reads as follows :
>
> "**Explanation** :—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape."
>
> From the Explanation reproduced above it is distinctly clear that ingredients which are essential for proving a charge of rape are the accomplishment of the act with force and resistance. To constitute the offence of rape neither Section 375 of IPC nor the Explanation attached thereto require that there should necessarily be complete penetration of the penis into the private part of the victim/prosecutrix. In other words to constitute the offence of rape it is not at all necessary that there should be complete penetration of the male organ with emission of semen and rupture of hymen. Even partial or slightest penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim would be quite enough for the purpose of

(1) 1995 (1) RCR (Crl.) 100 = (1994) 6 S.C.C. 29

Sections 375 and 376 of IPC. That being so, it is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains. But in the present case before us as noticed above there is more than enough evidence positively showing that there was sexual activity on the victim and she was subjected to sexual assault without which she would not have sustained injuries of the nature found on her private part by the doctor who examined her."

(11) The ingredients of the offence have also been examined by the Kerala High Court in the case of **State of Kerala** *versus* **Kundumkara Govindam, (2).** In the case, the Court observed as under :—

"The crux of the offence under Section 376 IPC is rape and it postulates a sexual intercourse. The word "intercourse" means sexual connection. It may be defined as mutual frequent action by members of independent organization. By a metaphor the word "intercourse" like the word "commerce" is applied to the relation of sexes. In intercourse there is temporary visitation of one organization by a member of the other organization for certain clearly defined and limited objects. The primary object of the visiting organization is to obtain euphoria by means of a detent of the nerves consequent on the sexual crisis. There is no intercourse unless the visiting member is enveloped at least partially by the visited organization, for intercourse connotes reciprocity. In intercourse between thighs the visiting male organ is enveloped at least partially by the organism visited, the thighs; the thighs are kept together and tight."

(12) The word "penetrate", according to Concise Oxford Dictionary means "find access into or through, pass through."

"In order to constitute rape, what Section 375 IPC requires is medical evidence of penetration, and this may occur and the hymen remain intact. In view of the explanation to Section 375, mere penetration of penis in vagina is an offence of rape. Slightest penetration is sufficient for conviction under Section 376 IPC."

(2) 1969 Crl. L.J. 818

"Position of law in England is the same. To constitute the offence of rape, there must be a penetration, **R.v. Hill, (3).** Even the slightest, penetration will be sufficient. Where a penetration was proved, but not of such a depth as to injure the hymen, still it was held to be sufficient to constitute the crime of rape. This priniciple has been laid down in **R.v. M'Rue, (4)** and **R.v. Alien, (5).** In the case of **R.v. Hughes, (6)** and **R.v. Lines, (7),** the Court has taken the view that proof of the rupture of the hymen is unnecessary'. In the case of **R.v. Marsden (8),** the Court has laid down that 'it is now unnecessary to prove actual emission of semen; sexual intercourse is deemed complete upon proof of penetration only."

(13) In the case of **Nirmal Kumar** *versus* **State, (9),** the Court held as under :—

> "Even slightest degree of penetration of the vulva by the penis with or without emission of semen is sufficient to constitute the offence of rape. The accused in this case had committed rape upon a minor girl aged 4 years and he could not explain the reasons regarding congestion of labia majora, labia minora and redness of inner side of labia minor and vaginal mucosa of victim. Stains of semen were also found on the underwear worn by the accused. The conviction of accused held proper."

(14) In view of the law, quoted above, it is well settled that penetration is *sine qua* non for an offence of rape and in order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter to what extent. It is further settled and is clear that slight degree of penetration of the penis in vagina is sufficient to hold accused guilty for the offence under Section 375 IPC punishable under Section 376 IPC.

(3) (1781) 1 East P.C. 439
(4) (1838) 8 C&P 641
(5) (1839) 9 C&P 31
(6) (1841) 2 Mood 190
(7) 1844 (1) C&K 393
(8) (1891) 2 QB 149
(9) 2002 (2) RCR (Crl.) 341 = (2002) Crl. L.J. 3352 (P&H)

(15) Now reverting back to the facts of the case in hand, accused has been charged with Section 376 of the Indian Penal Code only. To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under Section 376 of the Indian Penal Code. I am also conscious of the fact that prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime and her testimony can be acted upon without corroboration. She suffers an injury physically and emotionally and it also affects the dignity of a woman. The entire case is required to be scrutinized in view of what has been observed above taking into consideration the evidence available on the record. Now reverting back to the facts of the case in hand, accused has been charged with under Section 376 of the Indian Penal Code only. Prosecutrix stepped into the witness box as PW-7 and with regard to the act committed by the appellant, she has deposed as under :—

> "...He took me in his arm and threw me on the ground prostrate. Accused put his hand on my mouth and gave me teeth bite on my cheek and on the other, he opened the string of the salwar and then committed sexual intercourse with me forcibly. I raised an alarm. On hearing it, my father came to the spot. Accused ran away on seeing my father..."

(16) The statement of the prosecutrix clearly spells out that rape was committed in the field, but no marks of violation in or around private part of the prosecutrix were found; no injury on thigh, legs, back and breast, nor any nail marks on the body of the accused were found. The presence of semen was found only on clothes of the prosecutrix, but not on her private parts and after having gone through the medical evidence, it is again proved on record that the

evidence of prosecutrix is not supported by medical evidence. The relevant statement of Dr. Urmil (PW-10), who examined the prosecutrix, runs as under :—

> "On 19.2.1991 at 10.20 A.M. I examined Shakuntla daughter of Daya Nand, aged around 12 years, Kumhar, resident of Budana and found the following injuries :—
>
> "1. Teeth bite mark on left side of cheek around the left angle of the mouth blue coloured 3x5 cm in diameter.
>
> 2. No injury mark on breast, thigh or anywhere else of the body.
>
> 3. Public hair were poorly developed, 4th hymen was slightly pateous. No tear nor bleeding was present."............" Posterior vagina swabs, salwar and kameez were sent for chemical examination. (at this stage, a sealed parcel bearing seal of FSL was opened and contents taken out) Salwar, Ex. P-2, and shirt Ex. P.3. of the same which were removed by me from the person of Shankuntla at the time of her examination. I have seen the report of the Chemical Examiner, Ex. PJ. As per report, semen was detected on salwar, Ex. P. 2. I cannot say she was raped or not..........." hymen is thin fold of mucous membranes situated at the orifice of vagina..............." If sexual intercourse is committed by a fully developed stout person forcibly having penis of the length of 17 cm on erection with a virgin the hymen will be lacerated having one or more radiant, tears the edges of which will be red, swollen, and painful and bleed on touching if examined within a day or two after the act. The teras will heal within 5/6 days and after 8 to 10 days will become shrunken and look like small granular tags of tissues. No such thing were found on the person of Shakuntla. I also did not find any tenderness, redness, swelling or laceration on the vulval region,

hymen, vagina, or any private part of the body......" I agree that presence of spermatozoa is sure test to determine if sexual intercourse was committed or not. Presence of spermatozoa is to be noted inside vagina or in the swabs taken from the vagina. As per the report of Chemical Examiner, Ex. PJ, no spermatozoa was found in swabs taken by me from the vagina of Shakuntla....." Except for the presence of semen on the salwar of Shakuntla, there was no other sign to be subjected to intercourse." The teeth bite of Shankuntla could not be possible on 19th February, 1991 at 3.00 P.M.

(17) It is true that ordinarily a young girl would not put her character at stake by way of false implication, but at the same time, each case has to be determined as per its own peculiar facts. In view of the settled law, it is abundantly clear that slightest degree of penetration is sufficient to hold accused guilty for the offence under Section 375 punishable under Section 376 of the Indian Penal Code.

(18) The word "attempt" in Section 511 has been used in a very large sense. A person commits the offence of attempt to commit a particular offence when (i) he intends to commit that particular offence, (ii) he, having made preparation and with the intention to commit the offence does an act towards its commission.

(19) In order to find out 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, and only desire 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 assault are often magnified into attempts at rape. In order to come to a conclusion that the conduct of the accused was indicative of the determination to gratify his passion at all events, and in spite of all resistance, materials must exist. As already discussed above, 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. When the evidence of the prosecutrix is considered in the proper perspective, it is clear that the commission of actual rape has not been established. However, the evidence is sufficient to prove that attempt to commit rape was made.

(20) In **Madan Lal** *versus* **State of Jammu and Kashmir, (10),** wherein it was held as under :—

> "The difference between preparation and an attempt to commit an offence consist chiefly in the greater degree of determination and what is necessary to prove an offence for an attempt to commit rape has been committed is that the accused has gone beyond the stage of preparation. If an accused strips a girl naked and then making her flat on the ground undressed penis on the private part of the girl but fails to penetrate the same into vagina and on such rubbing ejaculates himself, then it cannot be said that it was a case of merely assault under Section 354, I.P.C., and not an attempt to commit under Section 376 read with 511, I.P.C.

(21) In the case of **Abhayanand Mishra** *versus* **State of Bihar, (11),** the Hon'ble Supreme Court has held as under :—

> "There is a thin line between the preparation for and an attempt to commit an offence. Undoubtedly, 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, therefore, 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 one commission of the offence. The moment he commences to do an act with the

(10) 1998 (Crl.L.J.) 667 (S.C.)
(11) AIR 1961 S.C. 1698

necessary intention, he commences his attempt to commit the offence. The Supreme Court has further held about the construction of section 511, IPC as under :—

> "A person commits the offence of 'attempt to commit a particular offence' when (i) he intends to commit that particular offence; and (ii) he, having made preparations and with the intention to commit the offence, does an act towards its commission; such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence."

(22) Now reverting back to the facts of the present case in the light of what has been discussed above with regard to attempt to rape, it is crystal clear that the appellant caught hold of the prosecutrix; put his hand on her mouth and gave teeth bite on her cheek and on the other hand, he opened the string of the salwar and then committed sexual intercourse with her forcibly. Prosecutrix raised an alarm. On hearing it, her father came to the sport. Accused ran away on seeing her father.

(23) In my view on the evidence on record the conclusion is irresistible that the prosecution has been able to establish the charge of attempt to commit rape beyond all reasonable doubts. Appellant is convicted under Section 376 read with Section 511 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for a period of four years and to pay a fine of Rs. 2,000; in default thereof, he is further sentenced to undergo rigorous imprisonment for six months.

(24) With the aforesaid reduction in sentence, appeal is partly allowed.

(25) The bail bonds stands cancelled and the appellant is directed to surrender for serving the remaining period of sentence, failing which appropriate steps be taken for arresting the accused and put him in to custody for serving the sentence.

R.N.R.