IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.153 of 2008

==========

Md. Zafre Imam @ Mangla, Son of Sri Qyum Shah, Resident of Village- Kalayanpur Fakir Tola, P.S. Singhwar, District- Darbhanga.

... ... Appellant/s

Versus

The State of Bihar

... ... Respondent/s

==========

Appearance :

For the Appellant/s	:	Mr. Syed Arshad Alam, Advocate
	:	Ms. Anjum Perveen, Advocate
	:	Mr. Kamran Fazal, Advocate
For the Respondent/s	:	Mr. S. N. Prasad, APP

==========

CORAM: HONOURABLE MR. JUSTICE RAMESH CHAND MALVIYA
CAV JUDGMENT

Date: 29-04-2025

Heard Mr. Syed Arshad Alam, Mr. Kamran Fazal and Ms. Anjum Perveen learned counsels for the appellant, and Mr. S. N. Prasad, learned APP for the State.

2. The present appeal has been being filed under Section 374 (2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.') challenging the judgment of conviction and order dated 16.01.2008 passed by Additional Districts and Sessions Judge, Fast Tract Court No. 4, Darbhanga in Sessions Trial No. 218 of 2003 arising out of Singhwara Police Station Case no. 18 of 2002 by which the appellant has been found guilty of the offence punishable under Sections 376/511 of the Indian Penal Code (hereinafter referred to as 'IPC' and have been sentenced to undergo rigorous

imprisonment for ten years.

3. The brief facts of the prosecution story as narrated by the informant, Nasir Shah is that on the night of 21.03.2002 at around 8 PM, his daughter aged 14 years, had gone out of the house to defecate. At that time the accused/appellant Md. Zafre Imam @ Mangala son of Kayum Shah of his village was coming in an inebriated state after drinking *toddy* and on seeing his minor daughter alone, he caught her and tried to rape her forcefully. When his daughter started shouting, the informant's younger son Hashim reached there and then the appellant left her and ran away. After that, his daughter came home and told about the incident to the villagers.

4. On the basis of the *fardbeyan* given by Nasir Shah before the officer in-charge of Singhwara police station an F.I.R was lodged vide Singhwara P.S. case no. 18 of 2002 under Sections 376/511 of the IPC. The police submitted the charge-sheet on 31.07.2002 under Sections 376/511 of the IPC. On the basis of charge-sheet, cognizance was taken by the C.J.M. and the case was committed to District and Sessions Judge, Darbhanga. The trial case was thereafter transferred to the Addl. District and sessions Judge FTC-IV Darbhanga for recording the evidences in the case and passing of the final judgment.

5. During the trial a total of 9 witnesses were examined on behalf of the prosecution namely:

PW-1	Hamidul Shah
PW-2	Noor Alam
PW-3	Mohammad Hasim Shah
PW-4	Mohammad Kasim
PW-5	Firdous Khatoon (Mother of victim)
PW-6	Victim
PW-7	Nasir Shah (informant)
PW-8	Dr. P.K. Shah (Medical officer)
PW-9	Dev Sundar Singh (I.O.)

6. On the other hand, 6 witnesses were examined on behalf of the defence as well namely namely:

DW-1	Yusuf Shah (brother of the informant)
DW-2	Ramvrish Yadav
DW-3	Md. Sadre Alam
DW-4	Vimlesh Chandra Singh
DW-5	Awadhesh Paswan
DW-6	Md. Muaslem

7. PW-1 Hamidul Shah stated in his examination-in-chief that the incident occurred around three years ago. On the date of incident at around 8 PM, he was at his home when he heard the voice of PW-6 (victim) shouting for help. He stated that when he reached the place of occurrence he saw that PW-6 was lying on the weed and that the accused/appellant was on top of her. He further stated that her

salwar was open and that the accused/appellant was attempting to rape her and the victim was crying. He further stated that there were a number of people at the place of occurrence including Noor Alam, Mohammad Qasim Shah, Nasir Shah. He further stated that by the time all the people reached there, the accused/appellant fled away.

8. PW-2 Noor Alam stated in his examination-in-chief that the incident occurred three years ago at around 8 PM in the night. He stated that he was at his home when he heard noises of shouting and when he went out he saw that the accused/appellant was running away and that PW-6, the victim was crying. He stated when he asked the victim, she stated that the accused/appellant forcefully threw her on the ground and tried to open the string of her *salwar*.

8.i. In his cross-examination he stated that he did not try to stop the accused/appellant when he was running away because he did not know the act done by the accused/appellant until he asked the victim. He further stated that he did not have visit the victim, PW-6 at her home and neither did he maintain communication with her. He stated that when he reached the place of occurrence, 6-7 people were already present there including Hamidul Shah, Md. Qasim, Hasheem including

others. He stated that he was there at the place of occurrence for 10 minutes during which he talked to the victim and she told him about the alleged incident. In Para-10 of his cross-examination he stated that he knew only so much about the incident as much the victim told him.

9. PW-3 Md. Hashim Shah stated in his examination-in-chief that he was the son of the informant and brother of the victim. He stated that the incident occurred about three and a half years ago at around 8 PM. He stated that he was in the *aangan* of his house and his sister (PW-6) had gone for defecate when he heard her shouting. He stated that on hearing her voice, he ran outside towards Ramjani's house and saw that the accused/appellant was fleeing away towards the north direction. He further stated that he saw his sister fell on the leaves and that the strings of her *salwar* were open. He stated that on asking, his sister told him that Jafre Imam, the accused/appellant forcefully tried to open the strings of her *salwar* and attempted to rape her. He further stated that at the time of the incident, his sister was about 14 years old.

9.i. In his cross-examination, PW-3 stated that he was the first person to reach the place of occurrence and after him his brother, his mother and other reached there. He further

stated that some villagers tried to catch the accused/appellant but he fled away. In Para-5 he stated that he did not try to catch the accused/appellant. In Para-7 of his cross-examination he stated that when his sister started shouting, the accused/appellant ran towards the north direction.

10. PW-4 Md. Qasim stated in his examination-in-chief that the informant is his uncle. He stated that the incident occurred about three and a half years ago at around 8 PM. At that time he was on the road near his house when he heard his cousin sister shouting. When he reached that place of occurrence he saw that accused/appellant was on top of his sister. On seeing him, the accused/appellant ran away. When he reached there, Hamidul, Nasir, Noor Alam and others were already present there and thereafter his uncle (informant) also came to the place of occurrence.

10.i. In his cross-examination, PW-4 stated that he reached the place of occurrence before his brothers and uncle reached there. He further stated that he could not catch the accused/appellant when he tried to run away. He further stated that his sister was trembling and crying. In para-3 he further stated that he did not talk to his sister and neither did he raise any alarm at the place of occurrence.

11. PW-5 Firdous Khatoon is the wife of informant and mother of the victim. She stated in her examination-in-chief that the incident occurred about three and a half years ago at around 8 PM. At that time she was at her home and her daughter had gone to defecate. When she was returning Jafre Imam, the accused/appellant forcibly threw her on the weed and with the intention of raping her, forcefully opened the strings of her *salwar*. *Upo*n hearing her daughter scream, Qasim, Nasir and PW-5 herself ran towards the place of occurrence and saw that her daughter was crying. PW-5 further stated that her daughter then told them that Jafre Imam forcibly tried to rape her and then ran away. She stated that she saw the accused/appellant running away. She further stated that at the time of occurrence of the incident, her daughter was 14 years old.

11.i. In her cross-examination, PW-5 stated that the place of occurrence was ten steps towards the north from her house. She further stated that she could not say how many persons were present at the place of occurrence. In Para-3 she further stated that she did not try to catch the accused/appellant when he was running away. In Para-7 she further stated that she did not see the occurrence with her own eyes. She stated that

she did not see the accused/appellant when he allegedly tried to open the strings of her *salwar* forcefully and neither did she see him throwing her on the floor. She further stated that Noor Alam is her son-in-law by relation and Hamidul Shah (PW-1) is her uncle. Further, in Para-7 she stated that a *Panchayati* took place but the accused/appellant and his father did not obey the decision of the *Panch* and thereafter she filed the case on the advise of the villagers. In Para-10 she stated that after the alleged incident, a panchayat was held where it was advised that the accused/appellant should marry the victim but the accused/appellant refused to do so.

12. PW-6 is the victim in the instant case. She stated in her examination-in-chief that the incident occurred about three and a half years ago at around 8 PM. At that time she had gone to attend call of nature and when she was returning home and reached the door of Ramjani Shah, Jafre Imam, the accused/appellant caught hold of her and pulled her and thereafter threw her on a pile of leaves. She stated that thereafter, the accused with an intention to rape her, closed her mouth forcefully and tried to open the strings of her *salwar*. She stated that he opened the strings of her *salwar* and thereafter climbed on top of her. She stated that she tried to push him away

and after removing his hand from her face she started shouting for help. She further stated on shouting, Qasim, Naseem and her mother came to the place of occurrence and on seeing them, the accused/appellant ran away. She further stated that her mother helped her in getting up from the floor and then Hamidul, Noor Alam also came there and then she told them about the alleged incident.

12.i. In her cross-examination she stated that she was married to her cousin brother about two years ago. She further stated that on the date of incident when she started shouting then firstly Ramjani Shah, his wife, Hamidul, Noor Alam and others arrived at the place of occurrence. On seeing them, the accused/appellant fled away from the place of occurrence. In Para-6 of her cross-examination she stated that the police did her medical examination around one month after the incident. There were no injury marks on her body. In Para-7 she stated that her father had asked the *Panchayati* to resolve the dispute

13. PW-7 Nasir Sah im his examination-in-chief stated that victim is her daughter and incident occurred about three and a half years ago at around 8 PM. At that time, the victim went to attend call of nature. When she was returning

then on the way near Ramjani's Sah house, near Nathuni Sah place the accused forcefully threw the victim on the floor and open the string of the *salwar*. He further stated that her daughter shouted then Qasim, Noor Alam and PW-7 himself reached the place of occurrence and they saw that the accused was running away and his daughter was lying on the weed and the strings of her *salwar* was open. He further stated at the time occurrence her daughter was at about 15 years.

13.i. In para-6 his cross-examination, he stated that he filed the written application about the occurrence on the basis of what his daughter told him. In para-7 he stated that the place of occurrence was about 5-6 steps away from his house. In para-8 he stated that PW-1 was his uncle by relation and PW-2 was maternal brother. In para-9 he stated that there was no marks of injury on the body of his daughter. He further stated that she was wearing white color *salwar* and red *kurti* and he did not remember where the cloths were new or not.

14. PW-8 Dr. PK Das was the medical officer who examined the PW-6 (victim). He stated in his examination-in-chief that on 25.04.2002 at 3 pm one Shahnaj Begam was brought and identified by constable no. 471 namely Shambhu Sharan. He further stated in his findings that no external injury

could be found on the face, chest, etc. Genital examination the labia majora were in apposition covering the pink labia minora. The vagina was intact. The vaginal orifice admitted tip of the little finger with difficulty. No live or broken spermatozoa could be detected in the swab. She was advised X ray examination radio-logical findings. The X ray plate No. 802 of Department of Radiology DMCH, Laherisarai shows as follows:

14.i. The component of the elbow (illegible) were formed fused except the medial epicondyle. The medial epicondyle fuses with shift, 15-16 yrs of the age. All the (illegible) bone including the pisiform have appeared. The head of metacarpal have appeared but not fused which fuses by 15-16 years of her age. Lower ends of Radius & ulna have appeared but not fused. Fusion of this sides takes place at 18 years of her age. The iliac (illegible) have appeared but not fused. This appeared 14-17 years. The head, the greater trochanter and the lesser trochanter of the (illegible) have appeared but not fused.

Opinion- This girl is aged between 14-15 years. There was no positive finding to suggest commission of (illegible) forceful sexual intercourse with her. The medical report is prepared by him and been marked as exhibit 1.

15. The learned counsel appearing on behalf

of the appellant submitted that the impugned judgment of conviction and order of sentence are not sustainable in the eye of law or on facts. Learned trial Court has not applied its judicial mind and erroneously passed the judgment of conviction and order of sentence from the perusal of the evidences adduced on behalf of the prosecution it is crystal clear that the statement of the victim revealed that the accused/appellant had only opened the strings of the victim's *salwar*. In order to fall under the ambit of 'attempt to rape' the accused and the victim should have at least been undressed to the extent that had there been no impediment, the accused/appellant would have committed the offence of rape. He relied on the decision of ***Madanlal v. State of J&K*,*(1997) 7 SCC 677*** where it was held that there is a difference between preparation to commit rape and attempt to commit rape. He submitted that mere preparation to commit the offence is not punishable under the Penal Code. The Apex Court stated the following principal in ***Madanlal (supra)***:

> *"12. The difference between preparation and an attempt to commit an offence consists chiefly in the greater degree of determination and what is necessary to prove for an offence of 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 lie flat on the ground undresses himself and then forcibly rubs his erected penis on the private parts of the girl but fails to penetrate the same into the vagina and on such rubbing ejaculates himself then it is difficult for us to hold that it was a case of merely assault under Section 354 IPC and not an attempt to commit rape under Section 376 read with Section 511 IPC...”*

15.i. Learned counsel further submitted that out of the 9 witnesses examined by the prosecution, majority of them are hearsay witnesses. He further submitted that 4 prosecution witnesses are in close relations of the informant. He further submitted that the IO was not examined in the present case and hence the same is fatal to the prosecution case. Learned counsel further submitted that DW-1 who is the brother of the informant and DW-2 who is an independent witness had categorically said in their examination that Nasir Shah (Informant) wanted to marry his daughter (victim) to the accused/appellant Zafre Imam but his parents refused the marriage proposed hence this false and fabricated case has been lodged against the appellant.

15.ii. Learned counsel submitted that the entire case was based on previous enmity between the parties. He submitted that the medical report submitted by the examining

doctor (PW-8) revealed that there were no injury marks on the body of the victim and there were no signs of use of force on the body of the victim girl and her hymen was intact. He submitted that the deposition of the doctor clearly showed that no rape or even attempt to rape was done on the victim girl.

15.iii. Learned counsel for the appellant further submitted that there are no eye witnesses to the alleged offence and all the prosecution witnesses gave their statement based on what PW-6 (victim) told them. He further submitted that the statement of the victim revealed a mere preparation to commit the offence of rape and there was no overt attempt to do the same as before the appellant could make his attempt, the brother of the victim arrived at the place of occurrence. He thus submitted that the conviction of the appellant under Section 376 read with Section 511 of the IPC as awarded by the trial Court is not correct and thus liable to be set aside.

16. On the other hand, learned APP for the State has vehemently opposed the present appeal filed on behalf of the appellant. Learned APP submitted that the statement of the victim clearly reveals that there was an overt attempt by the appellant to commit the offence of rape. He further submitted the victim's statement is supported by the statement of PW-

(brother of the victim) who saw the accused/appellant on top of his sister. Learned APP thus defended the impugned judgment of conviction and the order of sentence by submitting that there was no illegality or infirmity in the impugned judgment and order of sentence, because the prosecution had proved its case against the appellant beyond all reasonable doubts. In view of the aforesaid statements and the evidence on record, learned trial Court had rightly convicted the appellant and the present appeal should not be entertained.

17. At this stage, I would like to appreciate the relevant extract of the entire evidence led by the prosecution and the defence before the Trial Court. I have thoroughly perused the materials on record and aforesaid judgments referred by the counsel for the appellant as well as given thoughtful consideration to the submissions advanced by both the parties.

18. Having deeply studied and scrutinized the FIR, statement of the witnesses and material on record, the main question for consideration is whether the offence proved to have been committed by the appellant amounts to “attempt” to commit rape within the meaning of Section 376(2)(f) read with Section 511 of the IPC or was it a mere “preparation” which led to outraging the modesty of the victim? In the case of ***State of***

M.P. v. Mahendra, (2022) 12 SCC 442 the Apex Court noted the difference between 'preparation' and 'attempt' as understood in criminal jurisprudence. The Apex Court held:

> "*13. There is a visible distinction between "preparation" and "attempt" to commit an offence and it all depends on the statutory edict coupled with the nature of evidence produced in a case. The stage of "preparation" consists of deliberation, devising or arranging the means or measures, which would be necessary for the commission of the offence. Whereas, an "attempt" to commit the offence, starts immediately after the completion of preparation. "Attempt" is the execution of mens rea after preparation. "Attempt" starts where "preparation" comes to an end, though it falls short of actual commission of the crime.*
>
> *14. However, if the attributes are unambiguously beyond the stage of preparation, then the misdemeanors shall qualify to be termed as an "attempt" to commit the principal offence and such "attempt" in itself is a punishable offence in view of Section 511 IPC.* ***The "preparation" or "attempt" to commit the offence will be predominantly determined on evaluation of the act and conduct of an accused; and as to whether or not the incident tantamount to transgressing the thin space between "preparation" and "attempt"****. If no overt act is attributed to the accused to commit the offence and only elementary exercise was undertaken and if such preparatory acts cause a strong inference of the likelihood of commission of*

> *the actual offence, the accused will be guilty of preparation to commit the crime, which may or may not be punishable, depending upon the intent and import of the penal laws."*

19. The trial court had convicted the appellant under Sections 376/511 of the IPC. In order to arrive at the correct conclusion, I deem it appropriate to examine the basic ingredients of Section 375 of the IPC punishable under Section 376 of the IPC to demonstrate whether the conviction of the appellant under Sections 376/511 of the IPC 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."

20. Section 511 of the IPC on the other hand is a general provision dealing with attempts to commit offences which are not made punishable by other specific sections of the Code. It reads as follows:

"511. Punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment.—Whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both."

21. The Apex Court explained the difference

between “attempt” and “preparation” in a rape case in the case of ***Koppula Venkat Rao v. State of A.P., (2004) 3 SCC 602:***

> *“10. An attempt to commit an offence is an act, or a series of acts, which leads inevitably to the commission of the offence, unless something, which the doer of the act neither foresaw nor intended, happens to prevent this. An attempt may be described to be an act done in part-execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt consists in it the intent to commit a crime, falling short of, its actual commission or consummation/completion. It may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted. The illustrations given in Section 511 clearly show the legislative intention to make a difference between the cases of a mere preparation and an attempt.*
>
> *11. In order to find an accused guilty of an attempt with intent to commit 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."
(emphasis supplied)

22. On perusal of the facts of the instant case it is observed that the accused/appellant took the victim near Ramjani Shah's house and threw her on the ground and opened the strings of her *salwar*. Following this, the victim started shouting and thereafter her brother and other villagers came to the place of occurrence. In order to convict the accused under Section 376 for the offence of rape as defined in Section 375 of the IPC, it is necessary to prove that there was penetration by the accused. However, in the present case, there is no dispute over the fact that there was no penetration. As far as attempt to commit rape is concerned, this Court, whether that the act of the accused falls short of the definition of attempt to rape? The facts of the case does not show any attempt by the accused to undress himself or to undress the victim girl. In a similar case of ***Tarkeshwar Sahu v. State of Bihar (Now Jharkhand), (2006) 8 SCC 560***, the Apex Court held as follows:

"What to talk about the penetration, there has not been any attempt of penetration to the slightest degree. The appellant had neither undressed himself nor even asked the prosecutrix to undress so there was no question of penetration. In the absence of any attempt to penetrate, the conviction

under Sections 376/511 IPC is wholly illegal and unsustainable."

23. However, looking at the gravity of the offence and the statements of the victim and the prosecution witness, this Court is clearly of the view that the appellant had forcibly taken the victim to the place next to Ramjani Shah's house to outrage her modesty but before he could do anything, on raising an alarm by the victim, the father of the victim and other villagers had assembled there and she was rescued. In the instant case, the accused has been charged with Sections 376/511 of the IPC only.

24. In the absence of charge under any other section, the next question which arises is whether the accused should be acquitted; or whether he should be convicted for committing any other offence pertaining to forcibly outraging the modesty of a girl. In a situation like this, this Court would like to invoke Section 222 of the Code of Criminal Procedure, which provides that in a case where the accused is charged with a major offence and the said charge is not proved, the accused may be convicted of the minor offence, though he was not charged with it. Section 222 Cr.P.C reads as under:

"222. When offence proved included in offence charged.—(1) When a person is charged with an offence consisting of

several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.
(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.
(3) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.
(4) Nothing in this section shall be deemed to authorise a conviction of any minor offence where the conditions requisite for the initiation of proceedings in respect of that minor offence have not been satisfied."

25. A three-Judge Bench of Supreme Court in ***Shamnsaheb M. Multtani v. State of Karnataka, (2001) 2 SCC 577*** came to the conclusion that when an accused is charged with a major offence and if the ingredients of major offence are not proved, the accused can be convicted for minor offence, if ingredients of minor offence are available. The relevant paragraphs read as under:

"16. What is meant by 'a minor offence' for the purpose of Section 222 of the Code? Although the said expression is not defined in the Code it can be discerned from the context that the test of minor offence is not merely that the prescribed punishment is

> *less than the major offence. The two illustrations provided in the section would bring the above point home well. Only if the two offences are cognate offences, wherein the main ingredients are common, the one punishable among them with a lesser sentence can be regarded as minor offence vis-à-vis the other offence."*

26. At this stage, it becomes imperative to examine the legal position whether the offence of the appellant falls within the four corners of other provisions incorporated in the Penal Code relating to outraging the modesty of a woman/girl under Section 354 of the IPC. Section 354 of the IPC reads as under:

> *"354. Assault or criminal force to woman with intent to outrage her modesty.— Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."*

26.i. The High Court of Delhi in ***Jai Chand v. State [1996 Cri LJ 2039 (Del)]*** observed as under:

> *"The accused in another case had forcibly laid the prosecutrix on the bed and broken her pyjama's string but made no attempt to undress himself and when the prosecutrix pushed him away, he did not make efforts to grab her again. It was held that it was not*

an attempt to rape but only outraging of the modesty of a woman and conviction under Section 354 was proper."

26.ii. In ***Raja v. State of Rajasthan [1998 Cri LJ 1608 (Raj)]*** Rajasthan High Court stated as under:

"The accused took the minor to a solitary place but could not commit rape. The conviction of the accused was altered from Sections 376/511 to one under Section 354."

26.iii. The Jharkhand High Court in ***Bisheshwar Murmu v. State of Bihar [2004 Cri LJ 326 (Jhar)]*** stated as under:

"The evidence showed that the accused caught hold of the hand of the informant/victim and when one of the prosecution witnesses came there hearing alarm of the victim, offence under Sections 376/511 was not made out and conviction was converted into one under Section 354 for outraging the modesty of the victim."

26.iv. The Orissa High Court in ***Keshab Padhan v. State of Orissa [1976 Cutt LR (Cri) 236]*** stated as under:

"The test of outrage of modesty is whether a reasonable man will think that the act of the offender was intended to or was known to be likely to outrage the modesty of the woman. In the instant case, the girl was 15 years of age and in the midnight while she was coming back with her mother the sudden appearance of the petitioner from a

> *lane and dragging her towards that side sufficiently established the ingredients of Section 354."*

26.v. In ***Rameshwar v. State of Haryana [1984 Cri LJ 786 (P&H)]*** the Punjab & Haryana High Court observed as follows:

> *"Whether a certain act amounts to an attempt to commit a particular offence is a question of fact, dependant on the nature of the offence and the steps necessary to take in order to commit it. The difference between mere preparation and actual attempt to commit an offence consists chiefly in the greater degree of determination. For an offence of an attempt to commit rape, the prosecution must establish that it has gone beyond the stage of preparation."*

27. On evaluation of the entire evidence and documents on record, it has been proved beyond shadow of all reasonable doubt that on the night of 21.03.2002 at around 8 PM, victim aged about 14 years, had gone out of the house to defecate. At that time the accused/appellant Md. Zafre Imam @ Mangala son of Kayum Shah of his village was coming in an inebriated state after drinking *toddy* and on seeing victim alone, he caught her and tried to rape her forcefully. When victim started shouting, the informant's younger son Hashim reached there and then the appellant left her and ran away. So

considering above mentioned judgments and the fact that the accused/appellant forcefully took the victim and threw her on the weed and thereafter opened the strings of her *salwar* has been stated by the victim and the same is corroborated by the statements of the other prosecution witnesses and even admitted by the appellant, the appellant is clearly guilty of the offence punishable under Section 354 of the IPC.

28. The submission of the counsel for the appellant that the non-examination of the Investigating Officer is fatal to the present case is not sustainable as the facts necessary to prove the offence under Section 354 of the IPC have been successfully established. In the case of ***Behari Prasad v. State of Bihar, (1996) 2 SCC 317*** it was held as follows:

> *"...We may also indicate here that it will not be correct to contend that if an Investigating Officer is not examined in a case, such case should fail on the ground that the accused were deprived of the opportunity to effectively cross-examine the witnesses for the prosecution and to bring out contradictions in their statements before the police. A case of prejudice likely to be suffered by an accused must depend on the facts of the case and no universal strait-jacket formula should be laid down that non-examination of Investigating Officer per se vitiates a criminal trial."*

29. It is established law that where the substantive evidence is available on record then mere non-availability of corroborative evidence will not weaken the case of prosecution and the present case has been proved beyond shadow of all reasonable doubt by the substantive evidence. On the point of contradiction, the entire evidence of prosecution witness examined as PW's, it was mere attempt for obtaining contradictions PW-1 and PW-3 and even if they had found contradiction in the statement of the said PW's on regard to statement given before IO then also they would have not created any suspicion on the prosecution case.

30. Hence, the judgment of conviction and order of sentence dated 16.01.2008 passed by learned Additional Districts and Sessions Judge, Fast Tract Court No. 4, Darbhanga in Sessions Trial No. 218 of 2003 arising out of Singhwara Police Station Case no. 18 of 2002, is hereby modified to the extent that appellant is acquitted from the charge under Sections 376/511 of the IPC and the appellant is convicted for the offence punishable under Section 354 of the IPC.

31. The Hon'ble Apex Court, in the case of ***State of U.P. vs Tribhuwan, (2018) 1 SCC 90*** has laid down that, time spent in custody by a convicted person, both as an under-trial

and as a convicted person, may be considered as jail sentence awarded to him and he may get the advantage of set-off under Section 428 of Cr.P.C.

32. As the appellant has struggled for a long time during the trial procedure and the conviction of the appellant is modified but given the long pendency of the trial and the order suffered by the appellant and there are no adverse report against the appellant about his conduct otherwise the same would have been brought to our notice by learned counsel for the State, so sentence of the appellant is justified to period undergone as one year and the appellant stands discharged of the liabilities of his bail bonds, if any.

33. Accordingly, this appeal is partly allowed.

(Ramesh Chand Malviya, J)

Anand Kr.

AFR/NAFR	AFR
CAV DATE	24.04.2025
Uploading Date	29.04.2025
Transmission Date	29.04.2025