FROM PREPARATION TO ATTEMPT: RE-DRAWING THE LINE IN THE LAW OF ATTEMPTED RAPE

AI Disclosure Statement

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Abstract

On 10 February 2026, a three-judge Bench of the Supreme Court of India, led by Chief Justice Surya Kant, set aside the Allahabad High Court's judgment dated 17 March 2025, which had held that grabbing an eleven-year-old girl's breasts, breaking her pyjama string, and attempting to drag her beneath a culvert amounted only to ‘preparation’, and not an ‘attempt’, to commit rape under Section 376 read with Section 511 of the Indian Penal Code. This comment analyses the Supreme Court's ruling in In Re: Order Dated 17.03.2025 Passed by the High Court of Judicature at Allahabad, examining how the Court restored the preparation-attempt distinction to its settled doctrinal moorings by emphasising the accused's pre-determined mens rea and the fact that only third-party intervention halted the offence. The comment situates this ruling within the broader, long-standing judicial confusion over ‘proximity’ in attempt-to-rape cases, and argues that while the decision corrects an egregious error, it does not fully dismantle the deeper structural problem of courts grading the ‘gravity’ of an act instead of assessing the accused's intent. The comment concludes by evaluating the Court's accompanying direction for judicial sensitisation guidelines as a necessary, if incomplete, step toward doctrinal clarity.

Keywords: Attempt to rape; Section 376/511 IPC; POCSO Act; proximity test; mens rea; judicial sensitisation

I. Introduction

For nearly a year, one line from a High Court order defined public debate on how Indian courts read sexual violence: that grabbing a child's breasts and breaking her pyjama string was, at most, 'preparation' to rape, not an 'attempt'[1]. The Allahabad High Court had reduced charges against two accused, Pawan and Akash, from Section 376 (rape) read with Section 511 (attempt) of the Indian Penal Code ("IPC") and Section 18 of the Protection of Children from Sexual Offences Act, 2012 ("POCSO"), to the lesser offence under Section 354B IPC read with Sections 9 and 10 of POCSO.

The Supreme Court took *suo motu* cognisance of the ruling after Senior Advocate Shobha Gupta, on behalf of the NGO 'We the Women of India', wrote to the Court[2]. A Bench of Justices B.R. Gavai and A.G. Masih first stayed the offending paragraphs in March 2025, describing the High Court's observations as reflecting "a total lack of sensitivity and inhumane approach"[3], and later stayed the judgment in its entirety pending final disposal[4]. On 10 February 2026, a three-judge Bench comprising Chief Justice Surya Kant and Justices Joymalya Bagchi and N.V. Anjaria finally set aside the High Court's order and restored the original summons[5].

This comment examines the Supreme Court's reasoning, situates it within India's persistently unsettled jurisprudence on what separates 'preparation' from 'attempt' in sexual offence cases, and considers what the ruling does, and does not, resolve for future courts.

II. Legal Framework

Indian criminal law contains no free-standing offence of 'attempt to rape'; it is instead constructed by reading the substantive offence of rape under Section 376 IPC (now Section 64 of the Bharatiya Nyaya Sanhita, 2023 ("BNS")), together with the general attempt provision, Section 511 IPC (now

[1] *In re Order Dated 17.03.2025 Passed by the High Court of Judicature at Allahabad*, SMW(Crl) No. 1/2025, 2026 LiveLaw (SC) 168, ¶¶ 3–5 (India) [hereinafter *In re Allahabad HC Order*].
[2] *Id.* ¶ 2.
[3] Order dated Mar. 26, 2025, *In re Order Dated 17.03.2025 Passed by the High Court of Judicature at Allahabad*, SMW(Crl) No. 1/2025 (S.C.).
[4] Order dated Dec. 8, 2025, *In re Order Dated 17.03.2025 Passed by the High Court of Judicature at Allahabad*, SMW(Crl) No. 1/2025 (S.C.), ¶ 5.
[5] *In re Allahabad HC Order*, *supra* note 1, ¶¶ 20–24.

Section 62 BNS). Where the victim is a child, Section 18 of POCSO separately criminalises an attempt to commit any offence under the Act[6].

The governing test for attempt in Indian law was articulated in *Abhayanand Mishra v. State of Bihar*, which held that an attempt occurs when, having made preparations and formed the requisite intention, the accused does an act towards the commission of the offence, an act that need not be the penultimate act, but must occur "during the course of committing that offence"[7]. Applied to sexual offences, this general test has fractured into competing sub-tests. Some courts insist on evidence of attempted penetration, treating penetration as the *sine qua non* of rape and therefore of its attempt[8]; others ask whether the accused intended to gratify his desire "despite all odds or resistance," effectively making the victim's resistance the fulcrum of liability[9]. Both formulations pre-date, and sit uneasily with, the Criminal Law (Amendment) Act, 2013, which broadened the definition of rape under Section 375 (now Section 63 BNS) to include non-vaginal and non-penetrative acts, thereby collapsing the old assumption that penetration alone marks the boundary of the completed offence.

III. Judicial Interpretation: From Allahabad to the Supreme Court

The Allahabad High Court's order proceeded from the correct general proposition, that preparation and attempt are analytically distinct stages, but applied it in a manner the Supreme Court would later call "patently erroneous"[10]. The High Court reasoned that since there was "no allegation that the accused tried to commit penetrative sexual assault," the case had not gone beyond preparation, and reclassified the offence as one of assault with intent to disrobe[11]. In effect, the High Court imported the penetration-centric penultimate-act test discussed above, even though the prosecution's case involved forcibly disrobing a child and dragging her towards a secluded culvert, conduct halted only by the intervention of passers-by drawn by her screams.

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[6] Protection of Children from Sexual Offences Act, No. 32 of 2012, § 18 (India).
[7] *Abhayanand Mishra v. State of Bihar*, AIR 1961 SC 1698 (India).
[8] *See, e.g., Damodar Behera v. State of Orissa*, 1990 CriLJ 2178 (Ori.).
[9] *State of Punjab v. Major Singh*, AIR 1967 SC 63 (India); *Tarkeshwar Sahu v. State of Bihar*, (2006) 8 SCC 560 (India).
[10] *In re Allahabad HC Order*, *supra* note 1, ¶ 19.
[11] *Id.* ¶ 6 (quoting the impugned order dated Mar. 17, 2025, Criminal Revision No. 1449/2024 (Allahabad H.C.)).

The Supreme Court's correction turned on mens rea rather than on the physical proximity of the acts to penetration. Relying on its own earlier articulation in *State of Madhya Pradesh v. Mahendra alias Golu*, authored by Surya Kant J., now Chief Justice, the Bench held that an attempt is simply the "execution of mens rea after preparation"[12]. On the facts, the Court found that the accused had "proceeded with a pre-determined intent" to commit rape, and that the only reason the offence was not completed was the intervention of third parties, a fact the High Court itself had recorded[13]. That reasoning is significant: it treats an external interruption of the crime, rather than the accused's own restraint, as decisive evidence that the conduct had already crossed from preparation into attempt.

This is doctrinally sound and consistent with the general law of attempts, but it leaves unresolved the deeper inconsistency identified in scholarly commentary on parallel High Court rulings. Courts continue to oscillate between at least three unstated tests: attempted penetration, resistance "despite all odds," and an unarticulated assessment of how 'grave' the accused's conduct was[14]. By resolving the present case narrowly on the strength of the accused's pre-determined intent and the fortuity of third-party intervention, the Supreme Court corrected the immediate injustice without laying down a generalisable test that lower courts can apply consistently to disrobing cases that lack such dramatic facts.

IV. Implications for Future Jurisprudence

Beyond the specific holding, the Bench went further and directed the National Judicial Academy to constitute a committee to draft guidelines, "rooted in Indian social fabric," to sensitise judges dealing with sexual offence cases[15]. This institutional response acknowledges that the Allahabad ruling was not an isolated interpretive slip but symptomatic of persistent assumptions about how a 'genuine' sexual offence is supposed to look, assumptions long documented in criminological

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[12] *State of Madhya Pradesh v. Mahendra alias Golu*, (2022) 12 SCC 442, ¶ 13 (India); *In re Allahabad HC Order*, *supra* note 1, ¶ 21.

[13] *In re Allahabad HC Order*, *supra* note 1, ¶ 22.

[14] *Cf. Sittu v. State of Rajasthan*, 2016 SCC OnLine Raj 2233 (holding disrobing coupled with an attempt to penetrate sufficient for attempted rape) *with Damodar Behera v. State of Orissa*, 1990 CriLJ 2178 (Ori.) (holding disrobing alone insufficient); *see also* Rajasthan High Court's Ruling on Attempt to Rape: An Analysis, Law Sch. Pol'y Rev. [AUTHOR, DATE], [URL] (last visited [DATE]) (archived at perma.cc/[…] or on file with author) (discussing the resulting inconsistency between 'proximity to penetration' and 'gravity of conduct' tests).

[15] *In re Allahabad HC Order*, *supra* note 1, ¶¶ 27–30.

literature: that force, resistance, and visible injury are markers of a real assault, and that their absence signals a lesser wrong[16]. The High Court's demand for evidence of an attempt to penetrate, despite the 2013 amendment's rejection of penetration as the sole marker of rape, is a doctrinal echo of that same assumption.

The ruling's practical reach is nonetheless bounded by two gaps that guidelines alone cannot close. First, the Indian Penal Code, and now the BNS, still has no free-standing offence of non-penetrative sexual assault for adult victims equivalent to Sections 9–10 of POCSO for children, a gap the Justice Verma Committee had flagged as early as 2013[17]. In its absence, the Section 354/376 boundary will keep forcing courts to characterise disrobing and similar acts as either indecent assault or attempted rape, with no calibrated middle offence, and the sentencing gap between the two, one year's imprisonment against a minimum of ten years, gives every incentive to litigate that boundary aggressively. Second, the Supreme Court's own test, pre-determined intent evidenced by an external interruption, will be easiest to apply exactly where the facts are most extreme, as they were here, and hardest to apply in the more numerous cases where an accused desists without any dramatic intervening rescue. Lower courts will still need a workable account of what conduct, short of an external interruption, demonstrates that mens rea has moved from intention to execution.

V. Conclusion

The Supreme Court's intervention in *In Re: Order Dated 17.03.2025 Passed by the High Court of Judicature at Allahabad* corrects a ruling that had, on any fair reading of the facts, mischaracterised a pre-determined and forcibly interrupted assault as mere preparation. By anchoring the preparation-attempt distinction in the accused's mens rea rather than in the physical proximity of the act to penetration, the Court brought the law of attempted rape into closer alignment with both the general law of attempts and the post-2013 statutory definition of rape. Yet the judgment is best read as a correction of an outlier, not a comprehensive re-statement of doctrine. Until the

[16] *See* Patricia Weiser Easteal, *Rape, Violence Prevention Today*, No. 1 (Austl. Inst. of Criminology, Oct. 1992) (documenting how myths equating rape with physical force and victim resistance continue to shape criminal-justice responses to sexual assault).

[17] *See* Report of the Committee on Amendments to Criminal Law ¶ 62 (2013) (India) (recommending a broad offence of ‘sexual assault’ covering non-penetrative but non-consensual touching).

legislature creates an intermediate offence for non-penetrative sexual assault against adults, and until appellate courts articulate a consistent, intent-focused test that does not depend on the accident of whether a rescue occurred, disrobing cases will continue to test the limits of judicial discretion, and, as this case shows, of judicial sensitivity.