

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.695 OF 1995

AKBAR AHMED NIZAMUDDIN ANSARI)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Javed Hussein a/w. Mr.Sangram S. Lotankar i/b.
Mr.D.N.Hungund, Advocate for the Appellant.

Mrs.S.Gajare-Dhumal, APP for the Respondent - State.

CORAM : ABHAY M. THIPSAY, J.

DATE : 25th AUGUST 2015.

ORAL JUDGMENT :

1 This appeal is directed against the judgment and order dated 30th October 1995, passed by the Additional Sessions Judge, Bombay, in Sessions Case No.1315 of 1992, convicting the appellant who was the sole accused in the said case of offences punishable under Section 376 of the IPC and Section 506 (Part II)

of the IPC. The learned Additional Sessions Judge sentenced the appellant to suffer Rigorous Imprisonment for 10 years with respect to offence punishable under Section 376 of the IPC and to suffer Rigorous Imprisonment for 7 years with respect to offence punishable under Section 506 of the IPC. The learned Additional Sessions Judge directed that the sentences would run concurrently. Being aggrieved by the order of his conviction and sentences imposed by the learned Additional Sessions Judge, the appellant has approached this court by filing the present appeal.

2 I have heard Mr.Javed Hussein, the learned counsel for the appellant. I have heard Mrs.S.Gajare-Dhumal, the learned APP for the State. I have been taken through the evidence adduced during the trial. I have carefully gone through the impugned judgment.

3 The alleged incident had taken place on 10th September 1992. The prosecutrix / victim (name not mentioned to prevent disclosure of identity) at the material time, was aged 10

years. The prosecution case was that at about 4.30 p.m. on that day, the prosecutrix had gone to the grocery shop by name Yasin Bakery for buying sugar. That, at that time, the appellant, who was working as a servant in the said shop, called the prosecutrix inside the shop. When she entered inside, the appellant caught hold of her and had forcible sexual intercourse with her. The appellant, after the act was over, threatened the prosecutrix that she should not disclose the incident to her parents or else he would kill her. When the prosecutrix came home, she was weeping and when her mother asked her as to what had happened, she narrated the incident. The matter was then reported to the police and investigated into. The appellant came to be prosecuted and convicted and sentenced, as aforesaid.

In view of what transpired during the hearing of the appeal, I do not wish to discuss the evidence adduced during the trial in details. I have gone through the evidence of the prosecutrix (PW4), that of her father Sharad (PW1) and that of her mother Geeta (PW2). The learned counsel for the appellant fairly conceded that it was not possible to hold that no incident, as alleged by the prosecutrix,

had taken place, and that, an imaginary allegation was leveled against the appellant. He, therefore, submitted that, the question that he would raise is only with respect to the offence that was proved to have been committed by the appellant. In this regard, he took me through the medical evidence and the scientific evidence secured on the basis of the Chemical Analysis of certain articles which included the clothes of the victim and that of the appellant.

4 Baburao Damawale (PW5), the Medical Officer attached to Nagpada Police Station, at the material time, is the one who had carried out the medical examination of the victim after the incident. It was carried out at about 10.45 p.m. on the same day. He had given a certificate of the findings recorded by him as a result of the medical examination. The said certificate was also tendered in evidence and marked as Exhibit 12. This certificate shows, inter alia, that the hymen of the prosecutrix was intact. He noticed the following injuries on the private part of the prosecutrix :

“a) a bruising (contusion) over right lebia majora and minora, medical aspect, lower part, red in colour, tender, oblique, measuring 1.5 x 0.5 cm.
b) a laceration (tear) was seen over fourchette, at 6 O’Clock position, vertical, bleeds on touch, red in colour, 0.5 cm. in length.”

This is in conformity with the contents of the Medical Certificate Exhibit 12 issued by the witness. In the cross-examination of this witness, it was revealed that no external injury was noticed on the back portion of the head, back side or buttocks etc., of the victim.

5 Dr.Damawale had also carried out medical examination of the body of the appellant. He opined that the appellant was potent and was capable of performing sexual intercourse. He did not find any external injury on the body of the appellant.

6 I have carefully considered the account of the incident as given by the prosecutrix. It is not possible to reconcile her version of the happenings with what was observed in the medical examination of her body and also that of the appellant's body.

7 In the cross-examination, on a suggestion to that effect, Dr.Damawale accepted that the injuries on the fourchette of the victim were possible by nails. It was also suggested to him that if a person commits sexual intercourse with a girl of about 9 to 11 years, he would have injury on his male organ, but this was replied to by Dr.Damawale by saying that it was 'not necessary.'

8 The Chemical Analyser's report do indicate that some stains of blood were found on the clothes of the victim. The group of the blood is said to be "B". However, it is not clear as to whether the blood group of the victim was "B". The blood group of the appellant was found to be "B" but it is nobody's case that the appellant had sustained any injuries during the incident.

9 In the light of the fact that the account of the incident as given by the prosecutrix, not only does not get any support from the medical evidence, but rather throws a doubt on the aspect as to whether the appellant did, indeed, rape the

prosecutrix, the learned counsel for the appellant drew my attention to the evidence of Dr.Damawale, to the effect that, in his opinion, there had been a '*forcible attempt of penetration.*' Based on this evidence, and the other observations made by Dr.Damawale as a result of the medical examination of the prosecutrix and the appellant, the learned counsel for the appellant contended that it was extremely doubtful whether there had been a penetration of the male organ, which was necessary to constitute the offence of rape.

10 After carefully considering the entire evidence, I find that it was rather unsafe to hold the appellant guilty of an offence punishable under Section 376 of the IPC. The possibility of the act of the appellant amounting only to an 'attempt to commit rape', cannot be ruled out. In the circumstances, it would be safer to convict the appellant only of an attempt to commit rape, instead of for rape. The learned APP also submits that in view of the evidence on record, it would be appropriate to do so.

11 In view of this, the conviction of the appellant with respect to the offence punishable under Section 376 of the IPC, as recorded by the learned Additional Sessions Judge is altered to that of an offence punishable under Section 376 of the IPC read with Section 511 of the IPC.

12 In view of this, the substantive sentence imposed upon the appellant is reduced to Rigorous Imprisonment for a period of 7 years.

13 The conviction of the appellant with respect to the offence punishable under Section 506 (Part II) of the IPC and the sentence imposed therefor is maintained,

14 Subject to this modification, the appeal stands dismissed.

(ABHAY M. THIPSAY, J.)