

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.219 OF 2014

Shivaji Maruti Patil,

Age 45 years, Occ. Business,

R/o. Kalkundri, Tal. Ghandgad,

Dist. Kolhapur.

(Kalamb Central Prison)

..Appellant

Versus

State of Maharashtra

..Respondent

....
Mr. Harshad E. Palwe i/b. Viral Kishore Rathod, for the
Appellant.

Ms. Anamika Malhotra, APP, for the State.

....

CORAM : A. R. JOSHI, J.

DATE : 31st JULY, 2015

ORAL JUDGMENT:

1. Heard learned Counsel for the appellant. Also heard learned APP for the State in this appeal challenging the

conviction of the appellant for the offence punishable under Section 376 read with Section 511 of IPC. By the impugned judgment and order dated 10.1.2014 the learned Additional Sessions Judge, Gadhinglaj convicted the appellant for the said offence and sentenced him to suffer RI for five years and to pay fine of Rs.2000/- in default to suffer simple imprisonment for six months. For another offence punishable under Section 506 of IPC, the appellant was convicted and sentenced to suffer RI for two months and to pay fine of Rs.1000/- in default to suffer simple imprisonment for one month. The appellant was however acquitted of the offence punishable under Section 376 of IPC.

2. Admittedly, the State had not preferred any appeal challenging the acquittal for the offence punishable under Section 376 of IPC.

3. The case of the prosecution, in nutshell is that, in the afternoon of 26.10.2012 the prosecutrix (PW-1), a small girl aged about 10 years, had been out of her house and was playing with her friend by name Rutuja. Said friend Rutuja

was also apparently of the same age as that of the victim girl. At about noon time, they went to the grocery shop of the appellant for purchase of some biscuits etc.. That time the appellant asked the victim girl to come inside the shop. Also he asked Rutuja, another girl, to wait outside the shop and to see if anybody is coming or not. After taking the victim girl inside the said shop, according to the case of prosecution, the appellant had behaved indecently with the girl and apparently had a sexual intercourse with her by making her to lie on the table which was measuring about 3 ft. X 2 ½ ft. with height of about 2 feet. According to the case of prosecution and as per the complaint of the victim girl, recorded on the next day, the said incident occurred for about five minutes or so and thereafter the appellant allowed the girl to go out but only with a threat not to disclose the incident to anybody or otherwise he would kill her. According to the case of prosecution the victim girl came out and thereafter met her friend Rutuja and they parted. Rutuja went to her home and the victim girl went to her home and immediately narrated the incident to her mother (PW-9). PW-9 noticed the demeanor of her child and could

perceived that the child was in a disturbed condition and in fact the child was seen confused and feeling giddiness and weakness. She made further inquiry with the child and on which the child disclosed as to what had happened to her. Both of them waited till the father of the victim came home by about 3 p.m.. Thereafter they went to the Grampanchayat office where a meeting was going on of one committee popularly known as "Tanta Mukti Committee". The office bearers of the said committee were made aware of the said incident. On their instructions the appellant was called before them and they reprimanded him. Apparently, the appellant was assaulted by the villagers who by that time gathered and knew regarding the incident. This assault on the appellant is substantiated by the Medical certificate brought before the trial Court regarding the treatment taken by the appellant. The girl was taken to the hospital for medical check-up. In fact the girl was taken on the same evening and she was examined clinically by the attending doctor (PW-11). It is significant to note that as per the examination of the girl, there were no injuries on her private parts and even there was nothing like tear of hymen thus

ruling out commission of any offence attracting punishment under Section 376 of IPC. However, it was opined by the attending doctor to the following effect :

“From the CA report, I am of the opinion that, attempt of sexual intercourse with victim might have taken place.”

4. After above, on the next day, the complaint was lodged with the police as per the narration of the victim girl. Said complaint is at Exhibit-8 before the trial Court. Thereafter spot panchnama was conducted. On the day of lodging of the FIR i.e. on 27.10.2012 the appellant was arrested and the clothes, then on his person, were taken charge of under panchnama. Said clothes were shirt, pant, banian and underpant. Also on the same day the clothes of the girl i.e. her frock and nicker/underpant were produced by the mother of the girl and they were taken charge of under panchnama.

5. During the trial, total 11 prosecution witnesses were examined. Out of them, the important witnesses are prosecutrix (PW-1) then aged about 10 years during the incident and her mother (PW-9). PW-4, 5 and 7 are the office

bearers and members of Tanta Mukti Committee of that village and their evidence is only to the factual position that the parents of the victim girl brought the girl to Grampanchayat office and narrated the incident happened with the girl at the hands of the appellant and thereafter the appellant was called and was manhandled by the mob and subsequently was detained and given in the custody of the police.

6. During the arguments taking shelter of mainly the medical evidence of PW-11, the learned Counsel for the appellant stated that it is not a case admittedly where there was commission of offence punishable under Section 376 of IPC. So also there could not have been any offence for attempt to commit rape. In support of these submissions the ratios propounded in the authorities are cited before the Court.

- [i] 2013 ALL MR (Cri) 2575 [Badrinath @ Bhaiya @ Siddheshwar Sheshrao Bahir V. State of Maharashtra]
- [ii] 2011 CRI. L.J. 1501 [Tukaram Govind Yadav v. State of Maharashtra]
- [iii] 1996 CRI.L.J. 3147 [Ashraf Hussain Shah V. State of Maharashtra]

7. At this juncture it must be mentioned that so far as appreciation of the evidence is concerned, the ratios of any other authorities will not have much significance and each case is required to be disposed of on its own facts.

8. In the present matter the only important evidence is

that of PW-1 and PW-9 coupled with the evidence of PW-11 Doctor and it is to be ascertained whether this substantive evidence goes to show commission of any offence and if so which.

9. During the course of arguments it is also submitted on behalf of the appellant that there is certain distinction between commission of an offence and the attempt. It is also argued that preparation for committing an offence is different from attempt to commit an offence. Preparation for committing an offence is in fact established when the preparation is completed and in fact it is the end. Whereas any further act towards the commission of main offence is an attempt and which is the beginning or a step towards the commission of the offence in its entirety.

10. Keeping in mind the above arguments advanced on behalf of the appellant, the substantive evidence of PW-1 and PW-9 is required to be construed. Admittedly, PW-1 was a girl of tender age of 10 years and was playing on the school ground with her friend Rutuja. Admittedly, said another girl Rutuja is

not examined before the trial Court. As such, there is no corroboration to what stated by the victim girl as to Rutuja was asked to wait outside by the appellant when he took the prosecutrix girl inside his shop. Definitely an allowance is required to be given to PW-1 prosecutrix girl of 10 years age when she answered different questions put to her in the cross-examination. According to her substantive evidence, the appellant slept over her person after removing her undergarments and that time he opened the zipper chain of his pant. According to the victim girl she gave one blow on the nose of the accused, but, the accused kept his one hand on her mouth and as such she could not shout. According to the victim girl, the accused slept on her person for about five to ten minutes and he also threatened not to disclose the incident to anybody. According to PW-1, then she met her friend Rutuja outside and both parted. After reaching home PW-1 disclosed the entire incident to her mother.

11. Now the substantive evidence of PW-9 mother goes to show that the PW-1 came back to house at about 12:45 p.m.. That time she noticed that the girl was in confused state of

mind and was feeling giddiness and weakness. That time on enquiry the girl narrated the incident. This evidence of PW-1 and PW-9 is required to be appreciated in juxtaposition of the substantive evidence of Medical Officer (PW-11). Admittedly, the medical evidence ruled out any carnal sexual intercourse and even any injury on the private parts of the girl. During the arguments, it is submitted that if at all there was any attempt on the part of the appellant to commit sexual intercourse, at least there would have been some injuries on the private parts if at all the offence under Section 376 of IPC was unsuccessful. In the present matter it is not so, further argued, considering the evidence of PW-11. Further it is brought to the notice of this Court that though the CA report indicate that there were semen stains found on the undergarments of the appellant and also of the child, there was nothing brought on record that during the seizure of these clothes they were taken in sealed condition. Though, apparently the CA report mention that the CA office received them in sealed condition. On this, it is also brought to the notice of this Court that the clothes of the girl were taken on the next day as produced by her mother. So also

the clothes of the appellant were taken on the next day. Then apparently it is to be presumed that the appellant was wearing the same clothes from the date of the incident i.e. 26.10.2012 till his arrest on the next day. There is a CA report of finding of semen stains on his undergarments. By pointing out this it is strenuously argued on behalf of the appellant that the CA report cannot be accepted and thus leading the Court to accept the offence punishable under Section 511 read with Section 376 of IPC.

12. In the considered view of this Court the substantive evidence of PW-1, PW-9 and PW-11 coupled with the contents of the CA report and the factum that the clothes were recovered on the next day, it cannot be said that there was an attempt to commit sexual intercourse on the girl of ten years age. Under these circumstances, now the question arise whether there was any offence committed by the accused / appellant. In this context again the substantive evidence of PW-1 and PW-9 is of much importance. As the said girl was found in the confused state when she came home back after the incident and narrated the incident to her mother and both of them waited

till father of the girl arrived at home and then they went to Grampanchayat office and disclosed it to PW-4, Pw-5 and PW-7. Definitely there was some act committed against the person of the girl (PW-1) and that was at the hands of the appellant. As such, in the considered view of this Court it is a case in which it was the offence punishable under Section 354 of IPC i.e. assault or criminal force to woman with intent to outrage her modesty. This offence attracts maximum punishment of five years and minimum for one year and also liable to fine. So far as the offence punishable under Section 506 of IPC is concerned, in the considered view of this Court there is nothing to interfere with the finding of the Sessions Court so far as conviction under Section 506 of IPC.

13. In view of the above, there is a need to interfere with the impugned judgment and order on the point of establishment of the offence and in that event the present appeal is required to be partly allowed. Hence, the order :

:: O R D E R ::

[i] Criminal Appeal No.219 of 2014 is partly allowed;

- [ii] The impugned judgment and order dated 10th January, 2014 passed by the Additional Sessions Judge, Gadhinglaj in Sessions Case No.6 of 2013 is set aside so far as para (1) of the operative part of the impugned judgment is concerned. The conviction of the appellant for the offence punishable under Section 376 read with Section 511 of IPC is set aside and instead he is convicted for the offence punishable under Section 354 of IPC and is sentenced to suffer RI for the period which is already undergone.
- [iii] So far as para-2 of the operative part of the impugned judgment is concerned, said conviction under Section 506 of IPC and the sentence for the same shall sustain.
- [iv] The sentence under Section 506 of IPC was earlier directed to run concurrently with the sentence under Section 376 read with Section 511 of IPC and as such now said sentence under Section 506 of IPC is to run concurrently with the sentence awarded now under Section 354 of IPC.
- [v] With above directions, present appeal is disposed of accordingly.

(A. R. JOSHI, J.)