

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1029 OF 2011

(modified as per order dt.29/1/2016 in APPA 136/16)

Namdeo Kashiram Mukane .. Appellant
Versus
The State of Maharashtra & Anr .. Respondents

Mr.Aniket Vagal, Advocate for the appellant.

Mr.D.P. Adsule, APP for the Respondent State.

CORAM : ABHAY M. THIPSAY, J.

DATED : 24th AUGUST, 2015

ORAL JUDGMENT :

1 This Appeal is directed against the judgment and order dated 29th July 2010 passed by the Addl. Sessions Judge, Mangaon in Sessions Case No15/2008, convicting the appellant who was the sole accused in the said case, of offences punishable under section 376 of the IPC, and section 397 of the IPC. The learned Addl. Sessions Judge sentenced the appellant to suffer RI for 10(ten) years and to pay a fine of Rs.5,000/- in default to suffer SI for 1(one) year with respect to the offence punishable under section 376 of the IPC and to suffer RI for 7(seven) years and to pay a fine of Rs.500/- in default to suffer SI for 3(three) months with respect to the offence punishable under section 397 of the IPC. Being aggrieved by his conviction and the sentences imposed upon him, the appellant has filed the present Appeal.

2 I have heard Mr.Aniket Vagal, learned counsel for the appellant. I have heard Mr.D.P. Adsule, learned APP for the State.

3 The learned counsel for the appellant conceded that he would not question the correctness and legality of the conviction of the appellant, so far as the offence punishable under section 397 of the IPC is concerned. He submitted that the charge of an offence punishable under section 376 of the IPC, however, was not proved and that he would confine his arguments only with respect to the said offence. In view of this concession made by the learned counsel for the appellant, I have not meticulously examined the entire evidence adduced by the prosecution during the trial. However, inspite of such concession, I have examined the evidence of the victim (PW 1), the evidence of Dr. Shivaji Gaikwad (PW 3) and the evidence of Dr.Geeta Kadam(PW 5) carefully. I have also carefully gone through the entire judgment delivered by the learned Addl. Sessions Judge.

4 The incident i.e. that the appellant caught the prosecutrix, assaulted her, caused injuries to her and robbed her of her property, cannot be doubted at all. In view of the concession made by the learned counsel for the appellant, it is not necessary to discuss this aspect any further.

5 However, so far as the offence of rape is concerned, there is substance in the contentions made by the learned counsel for the appellant. According to the prosecutrix, the appellant caught her near one field, made her fall on ground, tore her clothes, sat on her and inflicted blows on her forehead with a

stone. The prosecutrix then lost consciousness. When she regained the consciousness, she noticed that the clothes which she was wearing, were disturbed. She felt pain in the private parts. She, therefore, inferred that the appellant had raped her after she had fallen unconscious.

6 It is therefore, necessary to examine whether there was any medical evidence to support the theory of a completed act of rape. The evidence of Dr.Geeta Kadam shows that she could not find any evidence to support the theory of rape. In fact, she did not notice any external or internal injuries on the private parts of the prosecutrix.

7 Since the prosecutrix had lost consciousness, and since that the appellant had committed rape, was only an inference drawn by her, it was necessary to have her inference supported by some other evidence, particularly, medical evidence to conclude that the appellant had indeed raped her. Only because the clothes on the body of the prosecutrix were not at proper place when she regained consciousness and only because she felt some pain in the private parts, it is not possible to conclude that the appellant must have committed rape on her.

8 The appellant, however, appears to have made an attempt to commit rape. Since there is no satisfactory evidence of a completed act of rape, it would be safer to hold the appellant guilty only of an offence punishable under section 376 of the IPC read with section 511 of the IPC.

9 However, inspite of this, whether the sentence imposed upon the appellant should be reduced, needs serious consideration.

10 Before discussing this, it must be recorded that the conviction recorded for an offence punishable under section 397 of the IPC, simplicitor, as done by the learned trial Judge, is not correct. Section 397 of the IPC does not create any substantive offence. It is complementary to sections 392 and 395. It merely regulates the punishment in respect of offences punishable under section 392 IPC, 394 IPC or section 395 IPC by providing a minimum term of imprisonment when the offender would use a deadly weapon, cause grievous hurt, etc. in the commission of the aforesaid offences.

11 Thus, the conviction recorded by the learned Judge, simplicitor, for the offence punishable under section 397 IPC is not correct, and it should have been in respect of an offence punishable under section 394 of the IPC read with section 397 of the IPC. This error in the operative part of the judgment needs to be corrected.

12 In respect of the offence punishable under section 394 IPC read with section 397 IPC, the learned trial Judge could have awarded a sentence of more than 7 years, but for some reason, he had chosen to impose only the minimum prescribed by the statute for the said offence.

13 Even if the appellant is held to be guilty only of an offence of attempt to commit rape, still a sentence of Rigorous Imprisonment for a period of 10 years can be imposed upon him. It is for this reason that the sentence imposed upon the appellant would not be automatically reduced because in his conviction from the offence punishable under section 376 of the IPC, simplicitor into that of an offence punishable under section 376 of the IPC r/w section 511 of the IPC.

14 However, the learned counsel for the appellant submitted that a lenient view of the matter be taken by reducing the substantive sentence imposed upon the appellant and by enhancing the amount of fine suitably which would be paid to the prosecutrix/victim as compensation. It is submitted that the appellant is a married person and has to look after his family and his mother.

15 Considering all the relevant aspects of the matter, the Appeal is partly allowed.

16 The conviction of the appellant with respect to the offence punishable under section 376 of the IPC and the sentence imposed therefor, is set aside. Instead, the appellant is convicted of an offence punishable under section 376 of the IPC read with section 511 of the IPC and sentenced to suffer RI for 7(seven) years and to pay a fine of Rs.30,000/-. In default of payment of fine, the appellant shall undergo Simple Imprisonment for a period of 4(four) months. If the amount is recovered, the same shall be paid as compensation to the victim/prosecutrix.

17 The conviction of the appellant with respect to the offence punishable under section 397 of the IPC should be read as in respect of “an offence punishable under section 394 of the IPC read with section 397 of the IPC”. The sentence imposed by the learned Addl. Sessions Judge with respect to the said offence is maintained.

18 The amount of fine, if any, deposited by the appellant as per the impugned judgment and order, be adjusted towards the amount of fine that the appellant is now required to pay.

19 Save and except as aforesaid, no other order in this Appeal, which stands disposed of in terms of the aforesaid order.

(ABHAY M.THIPSAY, J)