

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.44 OF 2014

Sharad Krishna Kadam .. Appellant

Versus

The State of Maharashtra .. Respondent

Mr.Abhijeet A. Desai with Ms.Vrushali Maindad and Mr.Mahadji U. Phalke, Advocates for the appellant.

Mrs.M.R.Tidke, APP for the Respondent State.

CORAM : ABHAY M. THIPSAY, J.

DATED : 16th OCTOBER, 2015

ORAL JUDGMENT :-

1 This Appeal preferred by the appellant from Jail, challenges the judgment and order dated 11th February 2013 delivered by the Addl. Sessions Judge, Khed, District Ratnagiri, convicting the appellant of offences punishable under Section 376 of the IPC and 323 of the IPC. The learned Addl. Sessions Judge sentenced the appellant to suffer Rigorous Imprisonment (RI) for 10 years, and to pay a fine of Rs.10,000/- in default to suffer RI for 6(six) months in respect of the offence punishable under Section 376 of the IPC, and to suffer RI for 6(months) and to pay a

fine of Rs.1,000/- in default to suffer RI for 1(one) month with respect to the offence punishable under Section 323 of the IPC. The appellant was also charged of offence punishable under Section 506 of the IPC, but the learned Addl. Sessions Judge acquitted him of the said offence.

2 The prosecution case, as put forth before the trial Court in brief, be stated thus :

 The First Informant Smt Sahajade Sikandar Arkate and her husband were, at the material time, residing at Farid Apartment, Chiplun. The First Informant is a teacher and her husband is doing some private service. On 24th February 2010, both of them were not in the house. The minor daughter of the First Informant (name not mentioned to avoid disclosure of identity), aged 6 years was in the house. Her brother Ayan and her grand mother i.e. mother-in-law of the First Informant were also in the house. At that time, the appellant, who used to deliver milk in the building where the First Informant used to reside, came there, met the victim and her brother Ayan. The appellant gave a bottle of milk to the brother of the victim and asked him to hold the same. He then took the victim on the terrace of the building, and committed rape on her. When the victim started

crying, he threatened her not to disclose the incident to anyone. He came down, collected the milk bottle from Ayan - brother of the victim, and left. The victim had pain in her private parts and was crying. The victim narrated the incident to her grand-mother. At about 12.30 p.m, the First Informant returned from school and learnt about the incident from her mother-in-law, and got it confirmed from the victim. The victim was then taken to Dr.Rehmat Jabale (PW 3) who examined her, and opined that there was an attempt to rape the victim. The matter was then reported to the police on the basis of which a case in respect of the offences punishable under Section 376 of the IPC, 323 of the IPC and 506 of the IPC, was registered against the appellant. On completion of the investigation, a charge-sheet was filed against the appellant who was prosecuted and convicted, as aforesaid.

2 The prosecution examined 11(eleven) witnesses during the trial. The first witness is the First Informant Smt Sahajade – the mother of the victim. The second witness is the victim herself. Dr. Rehmat (PW 3), Dr. Rashmi (PW 6) and Dr. Kanchan (PW 9) are the Doctors who had medically examined the victim after the incident. Dr. Vijay (PW 8) is the Doctor who had medically examined the appellant. Suresh (PW 4) and Abdul

Kadir (PW 5) are panchas. Suresh (PW 4) is supposed to have acted as a panch in respect of the arrest of the appellant, and the seizure of the clothes on his person, but he did not support the prosecution case. Abdul Kadir (PW 5) is a panch in respect of spot panchnama. In his presence, the stains on a tile supposed to be of semen, were collected from the place where the rape was said to have been committed. Ramesh (PW 7) is also a panch in respect of the seizure of the clothes of the appellant, but he also turned hostile. Nisha (PW 10) Assistant Police Inspector attached to Chiplun Police Station, at the material time, is the one who had recorded the statement of the victim. Jagdish (PW 11) is the Investigating Officer in the matter.

3 I have heard Mr.Abhijit Desai, the learned counsel for the appellant, appointed as such under the Free Legal Aid Scheme. I have heard Mrs.M.R.Tidke, learned APP for the State. The learned counsel for the appellant has taken me through the entire evidence and also the impugned judgment.

4 Mr.Abhijit Desai, the learned counsel contended that the impugned judgment and order of conviction is not in accordance with law, and that the appellant was entitled to be

acquitted. According to him, the identity of the appellant as the culprit was not satisfactorily established. He also contended that the medical evidence fell short of proving that an offence of rape had been committed. According to the learned counsel, at best, there could be only an 'attempt to commit rape'.

5 I have carefully considered the matter.

6 It is true that in this case, no Test Identification Parade was held. The learned counsel for the appellant emphatically submitted that it was absolutely necessary on the part of the Investigating Agency to have held a Test Identification Parade for establishing the identity of the appellant.

7 Indeed, the name of the appellant has not been disclosed as such in the First Information Report which came to be lodged by Smt.Sahajade (PW1) after getting necessary information from the victim. However, the evidence reveals that it is not the case of the prosecution that the appellant was not known to the victim. It is an admitted position that the appellant used to deliver milk in the same building, and to one Safina Parkar, who was staying opposite the tenement of the First Informant. In fact, that

the appellant used to deliver milk in the said building, has not been disputed by the learned counsel for the appellant also. His contention, however, is that this description of the appellant as '*doodhwale mama*' was not sufficient to fix the identity of the appellant as the culprit.

8 He pointed out that the evidence indicated that there were other persons who also used to deliver milk in the same building. He also pointed out that the evidence indicated that ordinarily, the victim would be in her school when the appellant would come to deliver milk to Safana Parkar, and from this, he submitted that the possibility of the victim knowing the appellant was remote.

9 Undoubtedly, there is substance in these contentions advanced by the learned counsel for the appellant, which require careful consideration. It does appear that there were others who also used to deliver milk in the same building, and it also appears that usually at the time when the appellant is said to come for delivering milk, the victim used to be in her school.

10 However, in my opinion, that does not mean that the victim was not acquainted with the appellant, or that the appellant was not known to her. Not knowing the name of the appellant is immaterial, as it is evident that the appellant was known to the victim as '*doodhwale mama*'. The identity of the offender was immediately disclosed to the police as '*doodhwale mama*', and the appellant was immediately apprehended. It is therefore, clear that there was no confusion in the mind of anyone concerned as to who was the person who is described as '*doodhwale mama*'. There is nothing to show that the others who used to deliver milk in the same building were – or any of them was – also known or called as '*doodhwale mama*'.

11 Under these circumstances, it cannot be said that the offender was unknown, and that, it was absolutely essential for the Investigating Agency to have held a Test Identification Parade.

12 In the Court, the victim has identified the appellant as the '*offender*'. She has also said that he was the person who was known to her as '*doodhwale mama*'. In my opinion, therefore, the identity of the appellant as '*doodhwale mama*' who had allegedly

committed the offence in question had been satisfactorily established. I have gone through the reasoning of the Addl. Sessions Judge in that regard, as is reflected in the judgment, and I find no error or infirmity therein.

13 It is true that the brother of the victim Ayan and the grand-mother of the victim have not been examined. It is also true that it would have been better had they been examined. However, it may be observed that there is no particular standard of proof that is required in criminal trial. In the instant case, since the appellant has been named – although as '*doodhwale mama*' – in the FIR itself, and since the reference to '*doodhwale mama*' was to the appellant cannot be doubted, the failure to examine the grand-mother and her brother, is not fatal.

14 The other point raised by the learned counsel for the appellant, however, needs to be accepted. I have carefully gone through the evidence of the Doctors. The victim was first examined by Dr. Rehamat Jabale (PW 3). It was on 20th April 2010 itself. Dr.Jabale in her evidence mentioned that she had examined the victim, and had found that she was unable to walk, and was complaining about pain in the stomach. The victim was

also having pain while urination. *Dr.Jabale, however, said that on examination, she found that there had been **an attempt to rape** the victim.* Dr.Jabale had issued a certificate in respect of the medical examination of the victim on the next date i.e. 21st April 2010, and this certificate was tendered in evidence (Exhibit-28). However, there is nothing in this certificate also which would establish that the victim had been raped.

15 Dr. Rashmi (PW 6) examined the victim on 21st April 2010. In her evidence, she did not mention as to whether, in her opinion, the victim had been raped.

16 Dr. Kanchan (PW 9) had also examined the victim on 21st April 2010. In her evidence, she had said about having examined the victim, and coming to a conclusion that there had been an attempt to rape. The Inspector of Police, Chiplun Police Station had written a letter to her specifically asking 'whether the victim had been raped'. This query was answered by this witness by saying that 'an attempt to commit rape on the victim had been made'.

17 I have carefully examined the evidence of the victim. The victim who was of 6 years at the time of the incident, and of 9 years when she gave the evidence, has, in her evidence, stated thus :

“the appellant put his private part into my private part”.

Even in the marathi deposition, the words used are 'private part'. In my opinion, it is not very clear from these words, as to what the victim, who was a girl of tender years, wanted to convey.

18 I have also considered the evidence of Dr.Vijay Chavan who had on 24th October 2010 examined the appellant. The medical examination of the appellant did not reveal that there were any injuries on his private part. Ordinarily, in a case like this, where the victim was of tender years, there would have been some injury to the male organ, in case of penetration thereof in the private parts of the victim.

19 After considering the matter from all the angles, and keeping in mind that the Medical Officers who had examined the victim were not ready to opine that rape had been committed on victim, and were only of an opinion that an attempt to commit rape

had been made, it was not safe to hold that a completed act of rape had taken place. When there is a doubt in that regard, which arises from the prosecution evidence itself, the doubt should be resolved in favour of the appellant, by giving him the benefit thereof. I am, therefore, inclined to accept the contention advanced by the learned counsel for the appellant that the offence could only be of an attempt to commit rape, and the appellant could not have been held guilty of the offence of rape.

20 Thus, in my opinion, though the identity of the appellant as the culprit cannot be doubted, and though the same was satisfactorily proved during the trial, the offence committed by the appellant appears to be only of an attempt to commit rape, and not of rape. The conviction of the appellant is, therefore, required to be altered accordingly. Consequent upon this, the sentence imposed upon the appellant, needs to be reduced appropriately.

21 The Appeal is partly allowed.

22 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 ICP read with Section 511 of the IPC, and is sentenced to suffer Rigorous Imprisonment (RI) for 7(seven) years, and to pay a fine of Rs.10,000/- in default to suffer RI for 6(six) months.

23 The conviction of the appellant with respect to the offence punishable under Section 323 of the IPC and the sentence imposed therefor is maintained.

24 The Appeal is disposed of in the aforesaid terms.

(ABHAY M. THIPSAY, J)

CERTIFICATE

***Certified to be true and correct copy of the original signed
Judgment/Order.***