

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE**

CRIMINAL APPEAL NO.1012 OF 2015

Anil Raghunath Dhiwar

Age – 40 years, Occupation-Worker,

R/at – 100 Number Bungalow,

Agawali Chawl, Ghorpadigaon,

Pune.

(Presently in Yerwada Central Prison

Pune.)

... **Appellant**

V/s.

The State of Maharashtra

Through Mundhava Police Station, Pune

... **Respondent**

.....

Mr.Satyavrat Joshi, Advocate for the Appellant.

Mrs.P.P.Bhosale, APP for the Respondent/State.

....

CORAM : ABHAY M. THIPSAY J.

DATED : 2nd April 2016.

ORAL JUDGEMENT :

1. This appeal is directed against the Judgment and Order delivered by the Additional Sessions Judge, Pune convicting the appellant of an offence punishable under Section 376 of the Indian Penal Code (For short 'IPC') and sentencing him to suffer Rigorous Imprisonment for seven years and to pay a fine of Rs.5,000/-. The appellant was also charged of offences punishable

under Section 324 of the IPC, Section 504 of the IPC and Section 506 of the IPC, but of the said offences, he was acquitted.

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

The prosecutrix, who is the daughter of the brother of the appellant's wife, was, at the material time, aged 14 years. On 26/01/2012, she had come to reside with her aunt i.e. wife of the appellant, who used to reside with the appellant, her two sons – Rohan (PW2) Shubham, – and a daughter – Priyanka. In the afternoon, the prosecutrix, after doing the household work, was sleeping on the mezzanine floor of the house. Rohan was also sleeping on a mattress placed on the ground. The prosecutrix, all of a sudden, woke up by feeling pain in her vagina. She notice that her *kurta* had been pushed towards the upper side of the waist and the appellant was sitting on her person. The appellant had inserted his penis into the vagina of the prosecutrix. The prosecutrix shouted and called for Rohan. Rohan woke up and questioned the appellant as to what he was doing. The appellant had immediately got up on the prosecutrix raising shouts and had been sitting on the bed by the side of the cot. The salwar and nicker of the prosecutrix, which had removed, were found by the side of the cot. The prosecutrix tied one pink coloured *chunni* on her waist. She noticed some sticky material on her vagina. The appellant put on his pant. The prosecutrix also put on her salwar

and nicker. A quarrel took place between the appellant and Rohan. The appellant brought one iron sickle and assaulted Rohan, which resulted into causing an injury to the left hand of Rohan. The sickle, with which the appellant assaulted Rohan, fell down, and thereafter, Rohan slapped the appellant. The prosecutrix was sent to the house of one Rahul – cousin of Rohan and after some time, the aunt of the prosecutrix as well as Rohan came there. The matter was then reported to the Ghorpadigaon Police Chowky, where the prosecutrix was accompanied by her aunt. The statement of the prosecutrix was recorded in the presence of two social workers. In the course of investigation, certain articles, including the clothes of the accused and that of the prosecutrix were seized. The appellant was apprehended. The prosecutrix, as well as the appellant, were got medically examined. After completion of investigation, the appellant was prosecuted, who, as aforesaid, was convicted and sentenced.

3. The prosecution examined seven witnesses during the trial. The first witness is prosecutrix herself. The second witness, as aforesaid, is Rohan. The third witness Sonali Kulkarni is a social worker in whose presence the FIR lodged by the prosecutrix was registered. The fourth witness Raj Rajput and the fifth witness Pramod Kolekar are both panchas. Raj Rajput has witnessed the seizure of the clothes of the appellant under a panchnama, while Pramod Kolekar has witnessed the position of

the spot where the offence took place. The sixth witness Chandan Gupta is the medical officer, who has examined the prosecutrix. The seventh witness Mangal Modhve, Assistant Police Inspector, is the one, who had recorded FIR, had carried out further investigation in the matter and had submitted a report under Section 173 of the Code.

4. I have heard Mr.Satyavrat Joshi, the learned counsel for the appellant. I have heard Mrs.P.P.Bhosale, the learned Additional Public Prosecutor for the respondent/State. With their assistance, I have gone through the evidence adduced during the trial. I have carefully gone through the impugned Judgment.

5. In her evidence, the prosecutrix has stated about the incident. According to her, while she was sleeping, she got up by feeling pain into her vagina. She then woke up and saw her nicker and salwar lying by her side and that the appellant had inserted his penis into her vagina. She has then spoken about her having called Rohan (PW2), Rohan coming, questioning the appellant as to what he was doing, his scolding and slapping the appellant, etc. The prosecutrix was extensively cross-examined, but nothing which would discredit her version could be elicited from the cross-examination.

6. The evidence of Rohan shows that on hearing calls of the prosecutrix he woke up and noticed that the prosecutrix was

sitting on the cot and the appellant – father of Rohan – was also sitting on cot by her side. Rohan has categorically stated that the appellant was wearing only a shirt on his person. Rohan stated that he then pushed the appellant and asked the appellant what was he doing. Rohan also stated about his having slapped his father i.e. the appellant. The appellant tried to assault him by sickle, but Rohan rescued himself. Rohan has further narrated that he called his mother telephonically. The mother came and then they all along with the prosecutrix went to the police station and lodged FIR. Nothing favourable to the appellant could be elicited in the cross-examination of Rohan.

7. The evidence of Sonali Kulkarni (PW3) shows that the First Information Report (Exh.16) was recorded in her presence, and that it bears the signature of this witness. However, what the victim girl i.e. the prosecutrix stated before the police was not asked to this witness. It could have been asked and could have served the purpose of corroborating the statement made by the prosecutrix before the Court by her former statement. But the same having not been done, the evidence of this witness is not significant.

8. The evidence of Raj Rajput (PW4) a panch, shows that on 27/01/2012, the clothes of the appellants were seized by the police in the presence of this witness under a panchnama

(Exh.20). The seizure was done in the police chowky. The clothes, which were produced before the Court and marked as Article 'B', 'C' and 'D', were identified by this witness as the same clothes. This witness had also seen the son of the appellant in the police chowky and that the T-shirt of the son of the appellant – stained with blood – being seized by the police under a panchnama (Exh.21). The shirt, which was produced before the Court (Article 'E'), was identified by this witness, as the same shirt. This witness has also spoken about the police taking charge of the clothes of the victim girl under a panchnama (Exh.22). These clothes were said to have been brought by one person. The clothes produced before the Court (Article 'F', 'G', 'H' and 'I') were identified by this witness as the same clothes, which were taken charge of in his presence. The suggestions that he is a habitual panch witness, and that the panchnamas were already prepared by the police and he merely signed on the ready panchnamas without going through the contents therein, as put to him in the cross-examination, were denied by him as false. The evidence of Pramod Kolekar (PW5) shows that on 27/01/2012, he was called to the spot by the police and on his consenting to act as a panch, he was taken to the house of the appellant. He has described what he saw on the mezzanine floor and wooden ladder. The cotton *rajai* having white stains, nicker and one sickle having blood stains were seized by the police in his presence under a panchnama (Exh.25). The *rajai* (Article 'J'), nicker (Article 'K') and sickle

(Article 'A') produced before the Court were identified by him as the same. In the cross-examination, he was asked as to who had shown the spot to him, whereupon he replied that the same was shown to the police by Rohan (PW2). It was immediately suggested to him that he was deposing falsely about Rohan having showed the spot, which suggestion had been specifically denied by him.

9. In his evidence, Dr.Chandan Gupta stated that he examined the prosecutrix at about 4.30 a.m. on 27/01/2012, and that the prosecutrix gave the history of rape by her uncle Anil Dhiwar – the appellant. Dr.Gupta did not notice any external or internal injuries on the private part of the prosecutrix and opined the case to be of 'attempt of penetrative vaginal sexual intercourse'. His evidence is supported by the certificate (Exh.30) issued by him immediately after examination of the prosecutrix.

10. The last witness Mangal Modhve, the Investigating Officer, stated about the investigation that was carried out by her. She stated, among other things, about having sent the seized articles to Chemical Analyzer for analysis.

11. The Chemical Analyzer's report with respect to the analysis of the articles sent for analysis was tendered in evidence (Ex.35).

12. The appellant took the defence in his examination under Section 313 of the Code that as he used to consume liquor and as quarrels used to take place in his house, his family members had falsely implicated him.

13. Mr.Satyavrat Joshi, the learned counsel for the appellant contended that there are discrepancies in the evidence of the prosecutrix and the evidence of Rohan (PW2). He also submitted that the prosecutrix was not a reliable witness as she, in the cross-examination, categorically stated that the appellant had complete penetration of his penis into her vagina, which was falsified by the medical evidence.

14. I am unable to hold that there are any discrepancies in the evidence of the prosecutrix and/or Rohan (PW2). The argument that Rohan (PW2) had not witnessed anything does not impress me. What Rohan (PW2) has said is that, he woke up because of the calls given to him by the prosecutrix, and that, at that time, he saw that the prosecutrix was sitting on the cot, and that the appellant was also sitting on that cot by her side. This is emphasized to claim that Rohan (PW2) had not seen the appellant doing anything to the prosecutrix. There is no substance in this. The fact that the appellant was sitting on the cot by the side of the prosecutrix when Rohan came, is significant. Rohan also stated that the appellant was wearing *only shirt* on his person. Again,

that Rohan (PW2) slapped the appellant, fits in properly with the prosecution case. Undoubtedly, Rohan (PW2) denied that any injury was caused to him by the appellant, and attributed the injury to his uncle, by saying that it was caused during Rohan's scuffle with his uncle. However, the facts stated by Rohan (PW2) are sufficient to lend full and complete corroboration to the version of the prosecutrix, which is, in itself, satisfactory and reliable.

15. Moreover, the evidence of the prosecutrix and Rohan (PW2) is corroborated by the Chemical Analyzer's Report (Exh.35), which shows that semen was detected on the nicker of the prosecutrix, and that blood was found on the shirt and underwear of the appellant.

16. The only question that needs to be seriously considered is whether the appellant should be held guilty of having committed rape, or he should be held guilty of an 'attempt to commit rape'. The learned counsel for the appellant contended that in view of the medical evidence, the appellant could be held guilty only of an attempt to commit rape. This contention was raised before the trial Court, but the same did not appeal to it.

17. I have carefully considered the matter from this angle. Undoubtedly, the prosecutrix states about there having been a

complete or at least sufficient penetration. The medical evidence, however, does not support such a theory. The hymen of the prosecutrix was found intact. There were no external or internal injuries on any part of the body of the prosecutrix. Hymenal inflammation was noticed, but in the examination-in-chief itself Dr.Gupta (PW6) has stated about the same being possible due to an 'attempt to have vaginal sexual intercourse'. In the cross-examination, he admitted that the type of inflammation noticed by him on examination of the prosecutrix was possible due to menstruation also. In fact, the evidence of Dr.Gupta is consistent with the opinion expressed by him in his medical certificate, which is to the effect that the case was 'suggestive of attempted penetrative vaginal sexual intercourse'.

18. The prosecutrix was a girl of 14 years and penetration of male organ into her vaginal was likely to cause some injuries to the male organ. However, the evidence in that regard is silent. Apparently, the result of the medical examination of the appellant, if at all it was carried out, was not placed before the Court.

19. It is true that even in a completed offence of rape, complete or significant penetration of male organ is not necessary, and even slight penetration would be sufficient to constitute rape. The prosecutrix does say, in this case, that there had been a penetration, but evidently the theory of a complete or full

penetration, as said by the prosecutrix, is wrong. The prosecutrix, who is a child, cannot be relied upon in this regard, so as to determine whether penetration had, in fact, taken place only on the basis of what she says, and though the medical evidence fails to support such a theory.

20. The learned Additional Sessions Judge observed that complete penetration would not be necessary to constitute the offence of rape, and that the offence of rape is possible of being committed without causing any injury to the genitals. She also observed that non-rupture of the hymen is not a conclusive factor to determine this aspect. Though these observations of the learned Additional Sessions Judge are proper and reveal the correct legal position, the fact remains that whether penetration had, indeed, taken place, would be a question of fact to be decided on the basis of entire evidence before the Court. The learned Judge accepted the theory of penetration having been there, basically, on the basis of presence of blood on the nicker of the victim girl. There is substance in the contention advanced by the learned counsel for the appellant that this could also be due to menstruation.

21. After carefully considering the matter, the possibility of there being only an attempt of committing rape is greater than the possibility of a completed offence of rape having been committed.

When such doubt about the particular aspect of the matter is felt, the benefit of such doubt, even while drawing inferences, must go to the accused.

22. Though, the appreciation of the evidence, as done by the learned Additional Sessions Judge, is proper and suffers from no infirmities, the conclusion arrived at on the basis of the evidence, that there must have been penetration sufficient to constitute the offence of rape, appears to be unwarranted. As aforesaid, the testimony of the prosecutrix, who spoke about a complete, or at any rate, sufficient penetration, was not believable, and when this was the case, that 'there *could have been* slight penetration', was not sufficient to hold the same as proved.

23. In my opinion, it would be safer to hold the appellant guilty only of an attempt to commit rape i.e. of an offence punishable under Section 376 of the IPC read with Section 511 of the IPC.

24. The appeal is partly allowed.

25. The conviction of the appellant is altered from that of an offence punishable under Section 376 of the IPC to the offence punishable under Section 376 of the IPC read with Section 511 of the IPC.

26. Consequent to the alteration of the offence in respect of which the conviction is recorded, the substantive sentence imposed upon the appellant is reduced to Rigorous Imprisonment for five years.

27. The amount of fine imposed upon the appellant by the trial Court is not interfered with.

28. The appeal is partly allowed in the aforesaid terms and only to the aforesaid extent.

(ABHAY M. THIPSAY J.)