

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL APPEAL NO. 362 OF 2012

Lokesh s/o Kisanlal Suryakar
Aged about : 22 year,
R/o :- Ghattemni, Tq. Amgaon,
District :- Gondia

.... APPELLANT

// VERSUS //

The State of Maharashtra,
through Police Station Amgaon,
Tq. Amgaon, District : Gondia

.... RESPONDENT

Shri Amol Mardikar, Advocate for appellant
Shri M.K. Pathan, Additional Public Prosecutor for respondent/State

CORAM : N.B. SURYAWANSHI, J.
JUDGMENT RESERVED ON : 23/06/2021.
JUDGMENT PRONOUNCED ON : 02/07/2021.

ORAL JUDGMENT

1. The appellant assails his conviction under Section 376(2)(f) read with Section 511 of the Indian Penal Code and the sentence of rigorous imprisonment for one year and direction to pay a fine of Rs. 1000/-, in default rigorous imprisonment for one month, in Sessions Trial No. 44/2009, by Additional Sessions Judge, Gondia.

2. The prosecution case in short is that on 05/02/2009 at about 1.30 p.m. the victim girl aged about three years was playing in her house at village Ghattemni. The accused, a neighbour took her to his house on the pretext of giving her biscuits. He then made her sleep on the cot, removed her knicker and committed rape. The victim after returning back to the house narrated the incident to her grandfather. The report of the incident was lodged by father of the victim at Amgaon Police Station which was registered as Crime No. 15/2009 for the offences punishable under Sections 354, 376 (2)(f) of the Indian Penal code. After conducting investigation, charge-sheet came to be filed in the Sessions Court.

3. Charge for the offence punishable under Section 376 (2)(f) of the Indian Penal Code was framed against the accused person. He pleaded not guilty. His defence was of total denial. He claimed that there was a land dispute between his family and the family of the victim. The family of the victim constructed a compound wall on the land belonging to his family and therefore, he was falsely implicated. The Trial Court, after recording evidence convicted the accused. Hence, the present appeal.

4. Heard the learned Advocate for the appellant and the learned Additional Public Prosecutor for the State.

5. The learned Advocate for the appellant by taking me through the evidence on record and submitted that the sole testimony of the victim is not reliable in view of admissions given by her. The C.A. report of the semen found on the knicker of the victim is not produced on record. Thus, the prosecution has failed to show the involvement of the appellant in the alleged crime. The medical report does not support the prosecution case. Medical Officer was not examined in the Trial Court. Therefore, no charge under Section 376 of the IPC was proved by the prosecution. The prosecution has failed to prove the important ingredients of Section 511 of the IPC i.e. attempt and motive on the part of the appellant. He therefore, submitted that the prosecution has failed to prove the offence beyond reasonable doubt therefore the appellant is entitled for acquittal.

6. In the alternate, he submitted that without admitting anything on record, even if the prosecution is believed to be true, at the most offence under Section 354 of the IPC can be

said to be made out. In support of his arguments he relied upon following judgments.

1. State of Rajasthan vs. Shri Chand **(2015) 11 Supreme Court Cases 229.**
2. Aman Kumar and another Vs. State of Haryana **AIR 2004 Supreme Court 1497.**
3. Kailash Madhukar Sandase Vs. State of Maharashtra **2009 ALL MR (Cri) 145.**

7. On the other hand, the learned Additional Public Prosecutor supported the judgment of the Trial Court contending that the prosecution has proved the charge by leading evidence of PW1 - father of the victim, PW2 - victim and PW4 - grandfather of the victim. He further pointed out that though in the cross-examination PW1 and PW4 have admitted that they have not taken the name of the appellant in their police statements, the said admission is of no help to the defence as they have taken the name of the appellant in their statements and the said admission is contrary to the record, and thus does not help the defence. He further submitted that the Trial Court has given cogent reasoning while convicting the appellant and the appellant has failed to make out a case for

acquittal. According to him there is no merit in the appeal and the same may be dismissed.

8. Heard the learned Advocate for the appellant and the learned Additional Public Prosecutor at length. I have gone through the record.

9. In support of its case the prosecution has examined six witnesses. PW1, father of the victim, PW - 2 the victim and PW4 - grandfather of the victim are examined to prove the incident. PW1 has deposed that at the time of the incident the victim was three years old. The appellant is his neighbour. The incident took place on 05/02/2009. On that day he and his wife were in the field and his father was at home. One Nilesh Thakare came to the field about 2.00 P.M. and told him that he was immediately called at the house by his father. He and his wife therefore, went home. At that time victim was at home. The victim informed him that the appellant spoiled her knicker. She disclosed that the appellant took her to his house to give biscuits and laid her on the cot, removed her knicker and made her knicker dirty by doing something. He gave slaps to the appellant, the appellant admitted his guilt. There were

stains of semen on the knicker of the victim. Thereafter he took the victim to the Police Patil and Police Patil prepared the report as per his say and the same was lodged at Amgaon Police Station. He proved report (Exh.10) and printed F.I.R. (Exh. 11). He identified the knicker of the victim and panchanama of seizure of the same (Exh.12).

10. In the cross-examination he stated that Amgaon is about eighteen kilometers away from his village. He lodged the report at 7.00 p.m. Half an hour time is required to reach Amgaon on motorcycle and he went to lodge a report by motorcycle. He admitted that on the same day the knicker was seized by the police and police had come to their village in the night. He admitted that there are houses around his house and he is doing tailoring work. The uncle of appellant namely Babulal also does tailoring work. He had constructed one room adjacent to the house of accused one year before the incident. He admitted that in his statement it is not mentioned that the appellant took the victim to his house to give her biscuits.

11. PW2, the victim was examined when she was five years old. No questions appear to have been asked to her to

ascertain whether she understands the sanctity of deposition and or whether she was in a position to understand the questions and was able to answer them.

In her deposition PW2 has stated that the name of appellant is Lokesh Kaka. She was playing in her house. The appellant came there. He took her to his house and laid her on the cot. He removed her knicker and he did something. She didn't have any pain. She narrated the incident to her grandfather. She identified her knicker, article – 3.

In the cross-examination she admitted that she was playing with Bhautik s/o Babulal Surekar and while playing with Bhautik she removed her knicker. She further admitted that when police enquired from her, her grandfather narrated the incident to the police. She denied the suggestions that no such incident had taken place. She admitted that her father told her how to depose in the Court. She denied that she was deposing false.

12. PW4, grandfather of the victim deposed that incident took place on 05/02/2009 at about 1.00 p.m. He was in his

house and victim was playing in the house. The appellant who is neighbour came to their house and called victim to his house. After some time the victim came home weeping. She told him that the appellant told her that he would give biscuits and laid her on the cot and removed her knicker. He saw the knicker of victim by removing it and found semen stains on her knicker. At that time, the appellant came to their house from back door and asked the victim that he would change her knicker. He made the appellant sit in his house and asked one Nilesh to call the victim's father and mother. The victim's father asked victim about the incident and she had narrated the incident to him. Father of the victim asked the appellant as to why he did so and gave two slaps to the appellant. Thereafter, the victim, alongwith her father went to Police Station and lodged report.

13. In the cross-examination no material supporting the defence could be brought out on record. He has admitted that he had constructed his house before lodging the report in the year 2007. He however denied the suggestion that uncle of the appellant had raised objection to the construction of the wall. He denied that he was constructing the wall on the land of

appellant's uncle. He denied the other suggestions given by the defence.

14. PW5, Nilesh Bhivram Thakre who conveyed the message of PW4 to PW1, has not supported the prosecution and was cross examined by the learned Additional Public Prosecutor. However nothing supporting the prosecution could be brought on record in his cross-examination. In the cross-examination by the appellant he stated that at the time of the incident there was a rush of people in front of the victim's house. He admitted that he belongs to the caste of the victim's father.

15. PW6 is the Investigating Officer who narrated the steps taken during the course of investigation and brought on record the seizure panchanama of sample of the semen of the appellant Exh.21. He forwarded the seized articles i.e. clothes of the appellant and victim to the forensic laboratory and he proved C.A. report Exh.23.

16. In the cross-examination he denied that he did not record the statement of victim and her statement was recorded

as per say of her grandfather. He admitted that in the statement of the victim and her father, name of the appellant is not mentioned. He denied the other suggestions that clothes of appellant were not seized by him.

17. On careful evaluation of evidence of prosecution, it is clear that the prosecution has failed to prove that there was any attempt to commit rape on the part of the appellant. The basic ingredients of Section 511 of the IPC i.e. intention to commit the offence and preparation to commit it and attempt to commit it, are not proved by the prosecution. Taking into consideration the admissions of the victim that while she was playing with Bhautik, she had removed her knicker, it is difficult to accept the prosecution case that the appellant attempted to commit rape. There is no corroborative medical evidence, so also there is no C.A. report brought on record by the prosecution to prove that appellant's semen stains were found on the victim's knicker. In that view it is difficult to accept the prosecution case that the appellant attempted to commit rape on the victim.

18. The learned Advocate for the appellant was justified in placing reliance in Amankumar and another (supra), wherein

the Apex Court held :

8. The plea relating to applicability of Section 376 read with Section 511, IPC needs careful consideration. In every crime, there is first, intention to commit, secondly preparation to commit it, thirdly, attempt to commit it. If the third stage, that is, attempt is successful, then the crime is complete. If the attempt fails the crime is not complete, but law punishes the person attempting the act. Section 511 is a general provision dealing with attempts to commit offences not made punishable by other specific sections. It makes punishable all attempts to commit offences punishable with imprisonment and not only those punishable with death. An attempt is made punishable, because every attempt, although it falls short of success, must create alarm, which by itself is an injury, and the moral guilt of the offender is the same as if he had succeeded. Moral guilt must be united to injury in order to justify punishment. As the injury is not as great as if the act had been committed, only half the punishment is awarded.

9. A culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence, if it fails due to reasons beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence can be said to begin when the preparations are complete and the culprit commences to do

something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. The word 'attempt' is not itself defined, and must, therefore, be taken in its ordinary meaning. This is exactly what the provisions of Section 511 require. An attempt to commit a crime is to be distinguished from an intention to commit it; and from preparation made for its commission. Mere intention to commit an offence, not followed by any act, cannot constitute an offence. The will is not to be taken for the deed unless there be some external act which shows that progress has been made in the direction of it, or towards maturing and effecting it. Intention is the direction of conduct towards the object chosen upon considering the motives which suggest the choice. Preparation consists in devising or arranging the means or measures necessary for the commission of the offence. It differs widely from attempt which is the direct movement towards the commission after preparations are made. Preparation to commit an offence is punishable only when the preparation is to commit offences under Section 122 (waging war against the Government of India) and Section 399 (preparation to commit dacoity). The dividing line between a mere preparation and an attempt is sometimes thin and has to be decided on the facts of each case. There is a greater degree of determination in attempt as compared with

preparation.

10. An attempt to commit an offence is an act, or a series of acts, which leads inevitably to the commission of the offence, unless something, which the doer of the act neither foresaw nor intended, happens to prevent this. An attempt may be described to be an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt consists in it the intent to commit a crime, falling short of, its actual commission. It may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted. The illustrations given in Section 511 clearly shows the legislative intention to make a difference between the cases of a mere preparation and an attempt.

19. Applying the above ratio to the case in hand, there is no material on record to show that the appellant had any intention to commit rape, he made preparation to commit it and he attempted to commit it. In that view, the conviction of the appellant under Section 376 (2) (f) r/w 511 of the IPC is unsustainable in the facts of the present case, in absence of the prosecution bringing on record corroborative medical evidence, forensic evidence to support the conviction.

20. The evidence on record, however, indicates that the victim was taken by the appellant to his house and he did something to her due to which she came home weeping and disclosed to her grandfather, PW4 that the appellant had spoiled her knicker. PW4 had seen the appellant taking the victim to his house. After the victim returned from the house of appellant, she was weeping. Upon removing her knicker, he found semen stains on it. At that time, the appellant came to their house from the backdoor and asked the victim to change her knicker. The victim has also disclosed to PW1, her father that the appellant had spoiled her knicker.

21. Thus, taking into consideration the evidence of PW1, PW2 and PW4, it is clear that the appellant has outraged the modesty of the victim. Prompt registration of the F.I.R. also corroborates the prosecution case. Thus, the prosecution has established that the appellant has outraged the modesty of the victim. Hence, the appellant is liable to be convicted under Section 354 of the Indian Penal Code.

22. The appellant was of 22 years at the relevant time and the appellant has undergone imprisonment from 06/02/2009 to

02/05/2009 i.e about three months. In the facts of the present case, following order would meet the ends of justice;

- (i) Criminal Appeal No. 362 of 2012 is partly allowed.
- (ii) The impugned order passed by the Additional Sessions Judge, Gondia in Sessions Trial No. 44 of 2009, thereby convicting the appellant for offences punishable under Sections 376(2)(f) r/w 511 of the Indian Penal Code is hereby quashed and set aside and the appellant is acquitted of the said charge.
- (iii) The appellant is convicted for offence punishable under Section 354 of the Indian Penal Code and is sentenced to the period already undergone.
- (iv) The appellant is directed to pay a fine of Rs.1,000/- in default of payment of fine the appellant to suffer rigorous imprisonment for one month.

JUDGE

J.Pethe..