REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 729 OF 2003

Pandharinath ..Appellant

Versus

State of Maharashtra ..Respondent

JUDGMENT

Dr. Mukundakam Sharma, J.

1. This appeal arises out of the judgment and order dated 31.01.2003 passed by the Nagpur Bench of the High Court of Bombay, convicting the appellant herein under the provisions of Section 376 of the Indian Penal Code, 1860 (for short 'IPC'). The trial court, after convicting the appellant under Section 376 IPC sentenced him to suffer rigorous imprisonment for five years and to pay a fine of Rs. 1,000/- in default to suffer further rigorous imprisonment for six months. The said sentence was, however, altered by the High Court by awarding a sentence to

undergo rigorous imprisonment for the period of one year and to pay a fine of Rs. 1,000/- and in default to undergo further rigorous imprisonment for a period of six months.

2. Facts briefly stated are as under:

Prosecutrix Shobha Bhaurao Ramteke was a working woman and was working in Battery Company at Vardhman Nagar. According to the allegations made in the First Information Report filed by her, she met the accused-appellant at Boudha Vihar situated at Seminary Hills. At the said meeting, the accused-appellant told her that he is in need of maid servant and she will be paid Rs. 400/- with meals and residence facility. Thereafter, the accused – appellant invited her to attend the Paritrana Path, which was going to be held on 26.08.1992 between 6.00 p.m. to 8.00 p.m. In terms of the aforesaid invitation, the complainant had gone there and at that time one Bhane, sister of accused Nalini, son of accused and one another lady by name Ramteke were present in the house of accused-appellant. However, the function of Puja was postponed for next day, and therefore, all of them were sleeping in the first room. The accused-appellant asked the complainant and lady Ramteke to sleep in kitchen room along with their children. Further allegation made out in the FIR is that at about 2.30 - 3.00

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a.m. the complainant found that somebody is touching her head and hence she gave jerk to the hand. When she again felt that somebody is touching her body she got up. She found that the accused-appellant was sitting near her bed whereupon she shouted. Immediately, the accused-appellant gagged her mouth and lifted the petticoat and removed the underwear of the prosecutrix and committed sexual intercourse. On hearing her cries, Bhante came there and the complainant told the incident to him, upon which Bhante got annoyed and gave a slap on the face of accused-appellant. In the morning, Bhante and the prosecutrix came to the house of the wife of the accused and from there they went to the office of Commissioner of Police. The prosecutrix narrated the incident to the Commissioner of Police. Thereafter she was sent along with the police to the Sakkardara Police Station wherein her statement was recorded and a criminal case was registered. Thereafter, she was sent for medical examination. Subsequently, the accused was arrested and he was sent for medical examination. After completion of the investigation, charge sheet was filed against the accused-appellant under Section 376 of the IPC. In terms of the aforesaid charge sheet, charges were framed against the accused-appellant for committing the offence under Sections 376 IPC. When the charge was explained to the accused, he pleaded not guilty and claimed to be tried.

3. During the course of the trial, 9 witnesses were examined on behalf of the prosecution. Two defence witnesses, namely, Dr. Avinash Wase (D.W. 1) and one Ku. Ranjana (D.W. 2) were also examined. The learned trial court thereafter heard the counsel appearing for the parties and then passed an order of conviction against the appellant holding him guilty of the offence under Section 376 IPC and sentenced him to suffer rigorous imprisonment for five years and to pay a fine of Rs. 1,000/- and in default to suffer rigorous imprisonment for six months.

4. Aggrieved by the said decision of the trial court, an appeal was preferred in the High Court. The High Court by its Judgment and Order dated 31.01.2003 held the appellant guilty under Section 511 of the IPC for the offence of attempt to commit rape and sentenced him to rigorous imprisonment for one year and to pay a fine of Rs. 1,000/-.

5. Being aggrieved by the aforesaid judgment and order of conviction and sentence, the accused-appellant filed the present appeal in this Court by way of special leave. We heard the learned senior counsel appearing for the appellant and have also perused the records available before us.

6. Mrs. Anagha A. Desai, the learned counsel appearing for the appellant vehemently contended, inter alia, that there are serious contradictions in the statement of the prosecution witnesses. It was submitted that there were many other witnesses present at the time of commission of offence at the place of occurrence who were not examined by the prosecution. It was contended that there is failure on the part of prosecution for not examining even the husband of the prosecutrix. It was further submitted that the medical evidence does not support the statement of the prosecutrix that there was a rape on her by the accused although the doctor examined the prosecutrix on very next day.

7. In view of the aforesaid submissions, we have examined the records of the case. The trial court and the High Court have given a concurrent finding that the appellant is guilty. The trial court was of the view that the appellant is liable to convicted under Section 376 IPC. The High Court, however, held the appellant guilty of the offence under Section 376 IPC read with Section 511 of the IPC. There is no dispute to the basic fact that the prosecutrix was a major and not a minor. Even if we accept the contention of the counsel appearing for the appellant that no offence under Section 376 is proved in the instant case on the basis of the evidence on record, it is definitely a case of commission of the offence of

attempting to rape. The prosecutrix has clearly stated in her examination in chief that on waking up she found the accused-appellant sitting near her legs and the accused-appellant removed her under garments and gagged her mouth. Subsequently, the accused-appellant felt sorry for the incident and also apologized for the same. There is no suggestion in the cross-examination on the part of the accused to the aforesaid statement of the prosecutrix that the accused did not remove her cloth. She had categorically stated in her examination-in-chief that the accused had removed her clothes. The accused-appellant had also stated that the prosecutrix should forgive him for his acts against which no suggestion was put to the effect that he did not seek such an apology. If the accused-appellant had removed her clothes and he had not rebutted this statement of the prosecutrix in his examination-in-chief, it is definitely a case of attempt to rape.

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8. It is well settled legal position that if an accused is charged of a major offence but is not found guilty thereunder, he can be convicted of minor offence, if the facts established indicate that such minor offence has been committed. Reference in this regard may be made to the decision of this Court in State of **Maharashtra v. Rajendra Jawanmal Gandhi**, (1997) 8 SCC 386; and **Tarkeshwar Sahu v. State of Bihar**, (2006) 8 SCC 560.

9. It is true that there was no charge under Section 376 read with Section 511 IPC. However, under Section 222 of the CrPC when a person is charged for an offence he may be convicted of an attempt to commit such offence although the attempt is not separately charged. This Court in **Shamnsaheb M. Multtani v. State of Karnataka**, (2001) 2 SCC 577 had an occasion to deal with Section 222 of the CrPC. The Court came to the conclusion that when an accused is charged with a major offence and if the ingredients of major offence are not proved, the accused can be convicted for minor offence, if ingredients of minor offence are available. The Court observed as follows in relevant para:

> *"16.* What is meant by 'a minor offence' for the purpose of Section 222 of the Code? Although the said expression is not defined in the Code it can be discerned from the context that the test of minor offence is not merely that the prescribed punishment is less than the major offence. The two illustrations provided in the section would bring the above point home well. Only if the two offences are cognate offences, wherein the main ingredients are common, the one punishable among them with a lesser sentence can be regarded as minor offence vis-à-vis the other offence."

10. So, if it appears to the Court that Section 376 IPC is not applicable but a lesser offence under 376 read with 511 IPC is made out, the court is not prevented from taking recourse to and punishing the accused for the

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commission of such lesser offence. The attempt to commit rape is lesser offence than that of rape, and there is no bar of converting the act of the accused from Section 376 to Section 511.

11. In view of the aforesaid discussion, we find no reason to differ with the findings arrived at by the High Court.

12. We find no ground in this appeal, accordingly, it is dismissed.

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[Dr. Mukundakam Sharma]

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[Dr. B.S. Chauhan]

New Delhi,
July 6, 2009

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