

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.700 OF 2015

Maroti @ Banaji s/o Anandrao Zalke
Age 22 years, Occu. Agri.,
R/o Gawatwadi, Tq. Hadgaon,
District Nanded

... **APPELLANT**

VERSUS

The State of Maharashtra
(Copy to be served through
the Public Prosecutor,
High Court of Judicature
of Bombay, Bench at Aurangabad)

... **RESPONDENT**

.....
Shri A.B. Shinde, Advocate holding for
Shri A.M. Gaikwad, Advocate for appellant
Shri R.B. Bagul, A.P.P. for respondent/ State
.....

CORAM: A.I.S. CHEEMA, J.

DATED: 20th September, 2016.

Date of reserving judgment : 23rd August, 2016
Date of reserving judgment : 20th September, 2016.

J U D G M E N T :

1. The appellant - original accused has been convicted

by Additional Sessions Judge-1, Nanded in Special (POSCO) Case No.6/2013 under Section 366 of the Indian Penal Code, 1860 (I.P.C. in brief) and has been sentenced to suffer rigorous imprisonment for 10 years and to pay fine of Rs.5000/- and in default to suffer simple imprisonment for six months. He has also been convicted under Section 376(2) of the Indian Penal Code and sentenced to suffer rigorous imprisonment for 10 years and to pay fine of Rs.5000/- and in default to suffer simple imprisonment for six months. The sentences have been directed to run concurrently. The trial Court found the accused guilty also under Section 3 read with 4 of the Protection of Children from Sexual Offences Act, 2012 (Act, in brief), but did not pass separate sentence. Thus the present appeal.

2. In short the case of prosecution is as under :

- (a) On 12.6.2013, the prosecutrix, claiming to be minor of 17 years of age (hereinafter referred as "victim") filed F.I.R. at Police Station, Tamsa, District Nanded, claiming that she had come to Gawatwadi, her native place. It appears that, she was taking education at Patan, District Satara and had in holidays, come to

Gawatwadi, Taluka Hadgaon, District Nanded. The F.I.R. claimed that, on 11.6.2013, at about 11.00 a.m., she was proceeding to the place of her uncle to bring vegetables and was going alone, at which time accused Maroti @ Banaji Anandrao Zalke came from behind and having pressed her mouth, grappled with her in spite of resistance and started dragging her in the house of one Kantabai Zalke. She shouted and he left her and went away. She claimed that, with evil motive, the accused had pressed her mouth and grappled with her and tried to drag her to the house of Kantabai and thus, the complaint.

Offence was registered at Crime No.24/2013 (Exh.17) at about 7.45 a.m. on 12.6.2013.

- (b) The investigation was taken over by Head Constable Wavde, but in a short while after the offence was registered, the victim, who had filed the complaint, entered the chamber of A.S.I. Sanjivan Mirkale (P.W.5) and claimed that she had been actually raped. This led to recording of supplementary statement Exh.18. In such statement, the victim claimed that she is staying at Patan and for summer

vacation, had come to her village where her parents and other family resides and that she had already filed report regarding outraging of modesty. The supplementary statement (Exh.18) refers to the contents of the F.I.R. which she had already filed and added that, at that time, she was in disturbed mental condition and was in frightened state. She then went on to add that on 11.6.2013 at about 11.00 a.m., she was proceeding towards the house of her uncle Tukaram Wagatkar and was going by road and that she was alone. At that time, accused Maruti @ Banaji Zalke, who is of the same village, took advantage of the fact that there was nobody else on the road and came from behind the victim and pressed her mouth and actually dragged her to the house of Kantabai Zalke and having taken her inside the house, he tied her hands and mouth and opened the string of her Salwar and put her on quilt which was on the floor. The F.I.R. then gives details as to the clothes which the accused was wearing and how he pushed down his own pant and underwear and forcibly committed intercourse on her. Victim claimed that she had

resisted when such acts were committed against her and even kicked the accused.

- (c) P.W.5 AS.I. Sanjivan Mirkale added Section 376 to the offence as well as Sections 3 and 4 of the Protection of Children from Sexual Offences Act, 2012. He went to the spot and did panchanama of the concerned house (Exh.34). He seized the quilt which was lying on the ground. The clothes of the victim as well as the accused were seized. The victim and the accused were medically got examined. The investigating officer got collected through doctor the blood samples of pubic hair, semen, nail clippings etc. The articles were sent to Chemical Analyser and C.A. reports were obtained. The certified copy of the school admission register of the victim was collected from her. After investigation, the charge sheet came to be filed. Charge was framed against the accused for offence punishable under Sections 366, 376(1) of the IPC and Section 3 read with Section 4 of the POCSO Act. The accused pleaded not guilty. His defence is of denial. In the cross-examination of witnesses, defence was tried to be put up that the

victim was in one sided love with the accused and when he did not agree, false case has been filed. It was also claimed that, father of victim had dispute with uncle of accused.

- (d) Prosecution examined 6 witnesses in the course of trial and brought on record the necessary documents. The trial Court, after going through the material which was brought on record by the prosecution, found the accused guilty. The trial Court held that, on 11.6.2013 the victim was hardly 17 years 1 month and few days old. For this, the trial Court relied on the evidence of the Head Master of the school (P.W.6) Manohar where the victim had studied, who proved the certified copy of school entry register Exh.41. Trial Court also found that the evidence of victim was reliable in spite of the contradictions and omissions which were pointed out. Initially her family did not support, but still she insisted and went to the police station to file the complaint and after initial hesitation, reported regarding the rape which had been committed. The trial Court did not find that there was any substance in the defence. Trial Court

found that the evidence of the victim was supported by the medical evidence brought on record when P.W.4 Dr. Minakshi was examined and who proved the medical certificate. The doctor had found abrasion over vaginal wall. Trial Court found that P.W.3 Yashoda, the sister of victim had also corroborated her regarding how the victim after the incident, went and told about the incident. As regards the evidence of seizure of quilt and subsequent C.A. report, showing that there was semen of the blood group of accused found on the quilt, the trial Court discarded the evidence as the investigating officer, who seized the quilt had not recorded that there was any spot on the quilt. However, trial Court found that the victim was sufficiently corroborated by medical evidence and the evidence of P.W.2 Panchfulabai and P.W.3 Yashoda. Consequently, the trial Court convicted the accused as mentioned.

3. The learned counsel for the appellant-accused has taken me through the evidence which has been recorded. It

was stated that, as per C.A. report, semen was found on the quilt which had been seized and that it was blood group "A", which is the blood group of accused. However, according to the counsel, the investigating officer had not recorded at the time of seizure of the quilt that there was any stain on the quilt when it was seized. According to the counsel, the victim deserves to be disbelieved as initially she made grievance only under Section 354 of the IPC, but later on, on the same day she went on to claim that she had actually been raped. According to the counsel, the victim was under pressure from the relatives and one of the relative was a police official and because of such pressure, the victim had filed the initial F.I.R. and later on also claimed that she had been raped. It is argued that, the victim was not knowing the accused since before and still no test identification parade was held. Victim claimed that, after the rape she was left tied in the concerned house and that the accused had gone away bolting the door and she had knocked and attracted a passer-by to open the door, but the said person was not examined. The counsel referred to the contradictions and omissions brought in the evidence of the victim to submit that, because of the said contradictions and omissions she should be disbelieved. It is

argued that, rape has not been proved. The ossification test was not done and age of the victim was not determined. In the medical certificate, there was no bleeding found although the hymen was recorded as ruptured. The learned counsel made reference to the following judgments to submit that, in those judgments the accused persons had been acquitted on appreciation of the evidence in those matters. According to the counsel, in present matter also, looking to the evidence benefit of doubt should be given to the accused and he should be acquitted. The judgments referred are in the matters of :-

- (1) Jagdish Balaram Narangikar Vs. State of Maharashtra
2012(3) Bom.C.R. (Cri.) 571
- (2) Baban @ Yeshwant Vithal Katalkar Vs. State of Maharashtra
2007(2) Mh.L.J. (Cri.) 583
- (3) (K. Venkateshwarlu Vs. The State of Andhra Pradesh)
2012 ALL SCR 2328
- (4) K. Venkateshwarlu Vs. The State of Andhra Pradesh
2012 ALL SCR 2328

4. Per contra, the learned A.P.P. supported the reasonings recorded by the trial Court and stated that, rape has been proved. According to him, there is absolutely no

reason why P.W.1 the victim should depose against the accused. The victim is, to some extent, corroborated by her aunt P.W.2 and sister P.W.3. It is argued that, even if the victim was not acquainted as such with the accused, she had seen the accused before and there was no question of confusion regarding identity. It is stated that, it is unlikely that rape victim would ever forget the face of her rapist. The victim, when she went to the police station, was mentally upset and in the supplementary statement Exh.18, she recorded that, as she was mentally upset and was frightened, she earlier reported only regarding outraging of modesty and now was giving further supplementary statement. The learned A.P.P. submitted that, at the concerned time, the victim was hardly 17 years of age and such girl can be under tremendous pressure if she has to file an F.I.R. for such offence. Looking to her mental condition, the evidence regarding the report and supplementary statement needs to be appreciated and the contradictions and omissions proved on such basis should be ignored. Referring to the evidence of doctor (P.W.4) it is stated that, the doctor deposed that forcible intercourse was not ruled out.

5. I have gone through the evidence brought on record by the prosecution. The victim, who deposed as P.W.1, stated that, on 11.6.2013, at about 11.00 a.m., she was proceeding towards the house of her uncle to bring vegetables. She deposed that, she was alone and at that time, there was nobody on the road. At that time, the accused came from behind and she says, he pressed her mouth and tied her Odhni to the mouth and dragged her in the house of Kantabai Zalke. She deposed that, the accused dragged her to a room and tied her hands. He put her on a quilt and the evidence is then given as to how the accused removed her cloths and his own and committed forcible intercourse on her. She deposed that, the act of the accused was unbearable for her and she even kicked him. Her evidence shows that, after committing sexual intercourse, the accused left her in that position and ran away. After some movements, she was able to untie her hands and she put on her clothes. She found the door closed from outside and knocked from inside and also shouted. One unknown person opened the door (See Marathi portion). The evidence is that, thereafter she went to the place of her maternal uncle and after some time her mother came there. She claimed that,

she told the incident to her mother, but it was told by the mother and wife of maternal uncle not to tell the incident to anybody as there will be problem in the marriage. She deposed that, she insisted that the matter should be told to her father. The father came at about 7.00 p.m. and the incident was told to the father. It appears that, she went to the police station on next day i.e. 12.6.2013 and initially narrated only half the incident and later on by way of supplementary statement, reported that she had been raped. The documents are proved at Exh.17 and Exh.18 by her.

6. P.W.1, the victim is corroborated to some extent by P.W.2 Panchfulabai, the aunt, who claims that the victim had come to her house crying and that she was in a frightened condition. She claimed that, because of this, she took the victim to her house. After evidence to this extent, this witness turned hostile and did not support the prosecution. It has to be remembered that, the prosecutrix - victim had already deposed that when she had gone to the place of the aunt, in addition to her mother, initially the aunt also wanted the victim not to tell about the incident to anybody. May be because of this, this P.W.2 Panchfulabai did not want to

depose further.

7. The evidence of the victim gets further support from P.W.3 Yashoda, her sister. P.W.3 Yashoda deposed that, on the day of the incident, the victim had proceeded towards the house of her uncle Tukaram but did not return for considerable time and later on came along with P.W.2 Panchfulabai at about 2.00- 3.00 p.m. P.W.3 has deposed that, at that time, the victim was crying and when enquired, she told about the incident. Thus, the victim is corroborated by her sister P.W.3 that soon after the incident she did inform about the same to her sister. The further evidence of this witness P.W.3 Yashoda that the victim had taken and pointed out the house of the accused, may be ignored, the same being proved as omission.

8. I have gone through the cross-examination of the victim. Unnecessarily lengthy cross-examination of the victim was conducted. Unnecessary particulars and details regarding the village, roads and where they lived, slope etc. were brought on record. Looking to the evidence of the victim as well as the cross-examination of the investigating officer

A.S.I. Janjivan (P.W.5), what appears is that, the trial Court did not, in any manner, control the cross-examination so as to avoid harassment to witnesses and irrelevant details being brought on record. Coming back to the relevant parts of cross-examination of the victim, she accepted that, one Shankar Ukhade of their village is in the police. She accepted that he is her relative. What was the relation is not on record. In the cross-examination of P.W.3 Yashoda, it has come on record that, at the time of lodging of complaint in Police Station, this Shankar Deoba was with them. P.W.3 Yashoda, however had added in her cross-examination that, this Shankar Deoba came in the Police Station when the statement of victim was being recorded. Thus, although the learned counsel for the accused is trying to say that because there was a Police who was relative the offence was registered, I do not find that there is any substance. It does not appeal that a young girl like the victim would falsely allege rape only because she has a relative, who happens to be in the Police Department. The evidence on record rather shows that the relatives of the victim were hesitant to file the report. The victim still appears to have chosen that she wanted to file a report and in the background of such non-support from

relatives, she rather appears to have initially limited her complaint to outraging modesty, but then went on to give the information regarding the rape, which had been committed. Her evidence is that, initially she narrated half incident to police and the reason for this was that, the accused had given her threat to kill. She also added that, she was in frightened condition. Although in the supplementary statement Exh.18 she did not claim that the accused had given threat, however, Exh.18 does show that she had stated that initially she did not tell whole the incident as she was in frightened condition and that her mental condition was disturbed. In evidence, the victim deposed that, after filing the report Exh.17, she felt that the accused would do the same incident with other girl and, therefore, she narrated the whole incident to police in her supplementary statement. Looking to the evidence, it appears to be inspiring confidence. It is possible that, a young girl like the victim may be fully confused after she meets with such incident and may have had mental turmoil if or not she should report the matter at all or if or not she should report the whole matter.

9. In the cross-examination of the victim, some

contradictions and omissions regarding details have been brought on record by some time referring to the F.I.R. Exh.17 and some time referring to Exh.18, the supplementary statement. The trial Court has dealt with these contradictions and omissions and observed that the F.I.R. was not supposed to be an encyclopedia and unless the contradictions and omissions go to the root of the matter to falsify the credibility of the victim, the victim cannot be falsified and cannot be said to be unreliable. The trial Court did not find that the contradictions and omissions as referred to by the accused were of such nature so as to doubt her credibility. Having gone through the reasons recorded by the trial Court and the contradictions and omissions referred in the cross-examination of the victim, I also do not find that they are material as far as regards the actual incident of outraging modesty of the victim as well as committing rape on her is concerned.

10. It has been argued that, the victim claimed that the accused, after the incident, had left her tied in the room and when she managed to come out and knocked the door from inside, an unknown person had opened the door from

outside. The argument is that, such unknown person is not examined. I do not find that, it will be material, as the evidence on record shows that the victim initially confided only in her mother and sister after the incident and there was hesitation in reporting the matter. It is unlikely that the victim will straightway tell such incident to an unknown person opening the door.

11. The evidence of victim regarding the rape which was committed gets support from the evidence of P.W.4 Dr. Minakshi. Her evidence shows that, on 12.6.2014 at about 7.40 p.m., the victim was brought to her and she had examined the victim. The doctor has proved the medical certificate Exh.32. Initially she kept the opinion reserved, but after seeing the C.A. report, opined that the possibility of forcible sexual intercourse in this matter was not ruled out. In the cross-examination of this doctor, she was asked with reference to the medical certificate and deposed that she did not observe any internal injury since there was abrasion to the vagina. She accepted that, the abrasion to vagina can be caused by finger nail also. Exh.32 medical certificate shows that, hymen of the victim was ruptured. The document also

recorded that, vaginal wall had abrasion. The victim, when she was taken to this doctor on 12.6.2013, had given history of the incident when she did record that on 11.6.2013 when she was going to the house of her uncle, the accused had dragged her in a room at about 11.20 a.m. and forced upon her sexually and that she was unable to cry for help as the accused had closed her mouth by handkerchief. Thus, the conduct of the victim shows that, once she had filed the F.I.R. and recorded her supplementary statement, on same day she told same incident to the doctor also.

12. The victim is getting corroboration from the medical evidence as brought on record and which has been discussed above.

13. It has been argued that, there was contradiction regarding the manner in which the mouth of victim was gagged when she was dragged from the road inside the house. It is argued that, it is claimed that, the accused tied her mouth with Odhni and somewhere it is stated that she was gagged with the help of handkerchief. I do not find that the material with which she was gagged would be important. The

fact remains that, in the F.I.R. as well as the supplementary statement (Exh.17 and Exh.18) she did mention that the accused, after he came from behind, held her from her mouth and dragged her to the house of Kantabai Zalke. Rest would be matter of details, as to how she was gagged.

14. The arguments regarding seizure of quilt and subsequent finding of semen of accused in C.A. report does not deserve discussion looking to the fact that the trial Court has itself not found that part of the case of prosecution as established. I find that, even without the said material there is sufficient evidence which shows that the victim deserves to be believed. She had no reason to depose against the accused.

15. The evidence of victim read with the F.I.R. is that, at the concerned time she was 17 years old. There is evidence of P.W.6 Head Master Manohar who stepped into the witness box with original record of school regarding admission of the victim in the Zilla Parishad Primary School Gawatwadi. On the basis of school record, he deposed that, in the school record the date of birth of the victim was recorded as

20.4.1996. He proved the certified copy of Exh.41 in this regard. In the cross-examination, this witness accepted that, although in the register the word "Hindu" was not mentioned the said had been mentioned in the certified copy. This does not relate to the entry regarding the age which is material for the present. No other error in the certified copy was pointed out except the adding of word "Hindu". Material is the register which was brought, on the basis of which the evidence was given. Thus, from the school record, what is proved is that, in ordinary course of business and events, in the school record, the date of birth recorded was of 20.4.1996. The evidence of P.W.6 Manohar is that, it was true that they do not admit wards in their school without birth certificate. The victim denied in cross-examination that her parents had stated date of birth in the school on approximate basis. She stated that, it was her uncle who was educated and there was entry of her birth in the Grampanchayat Office. No doubt, this evidence from the Grampanchayat is not brought. Material is that, the victim who was taking education was sure regarding her age and is getting corroborated from the school record. The entry in primary school has its own value. Under Rule 12 of the Juvenile Justice (Care and

Protection of Children) Rules, 2007, sub-section 3(a), after matriculation the material evidence to decide date of birth is certificate from the school first attended. No doubt the said rule relates to determining age of child or juvenile in conflict with law. The Hon'ble Supreme Court, in the matter of **Jarnail Singh Vs. State of Haryana** reported in **(2013) 7 Supreme Court cases 263**, applied the same even while dealing with the question relating to determination of age of prosecutrix. In the present matter, looking to the evidence from the primary school record, there is no doubt that the victim, at the concerned time, was less than 18 years of age. Apart from this, in the present matter, the accused has been basically charged with offence under Section 366 of the Indian Penal Code, which interalia deals with kidnapping or abduction of woman with intention that she may be compelled to or forced to illicit intercourse. For this Section, age may be relevant for kidnapping, but for abduction, the same would not be material. Even if there was any doubt regarding the age of the victim and if she was to be treated as adult, the facts would still show abduction under Section 366 of the IPC as the evidence is that, the victim by force was compelled to go from the road inside the house which would amount to

abduction under Section 362 of the IPC if she was treated as adult. Even regarding Section 376 of the IPC, in the present matter, the question of age would be irrelevant as it is not a case of consensual sex.

16. In the arguments of the learned counsel for the appellant-accused, that test identification parade should have been held as the victim was not knowing accused from before, has no substance. This is contradictory as the defence otherwise taken is that the victim had one-sided love for the accused. The suggestions on that count have been denied by the victim. In statement under Section 313 of the Code of Criminal Procedure, the accused claimed that, the father of victim had dispute with his uncle and so false case is filed. This defence also has got no basis. Apart from this, what the victim deposed (see para 8 of her evidence) is that, before the incident, she was not acquainted with the accused or his family. However, the cross-examiner himself brought it further on record that she had indeed seen accused prior to the incident. It has to be remembered that, the victim was resident of Gawatwadi, her native place and used to come to that village and the accused was also resident of that village.

If the victim had seen the accused even prior to the incident, it would not be difficult for her to locate the name of the accused. By the time she went to the police station and file the F.I.R., she had verified the name and the F.I.R. was filed with name of the accused. Thus, looking to the facts of the present matter, even if the victim was not acquainted as such with the accused, she had seen him in the village and when she was made to suffer the incident of rape, she would naturally have no confusion regarding identity. The A.P.P. rightly submitted that, it is unlikely that the victim of rape would forget the face of her rapist.

17. I have gone through the three rulings relied on by the learned counsel for the appellant. I have gone through the facts which were involved in those matters. The concerned rulings are based on their own facts and the decisions rendered are on the basis of facts involved in those matters. I do not think that the accused can derive any benefit from those matters to claim that he also deserves to be acquitted.

18. For the above reasons, I do not find that there is

any substance in this appeal.

19. The appeal is dismissed.

(A.I.S. CHEEMA, J.)