

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

CRIMINAL APPEAL NO. 666 OF 2016

Samji s/o Isarya Gavit,
Age 51 years, R/o. Amlan,
Tq. Navapur, Dist. Nandurbar.

.... **Appellant**
(Orig. Accused).

VERSUS.

The State of Maharashtra,
Through Police Station Officer,
Police Station, Nawapur, Tq.
Nawapur, Dist. Nandurbar

... **Respondent**

...

Advocate for Applicant : Mr. C.R. Deshpande.
APP for Respondent : Mr. Y.G. Gujrathi.

CORAM : K. L. WADANE, J.
RESERVED ON : 23rd OCTOBER, 2018.
PRONOUNCED ON : 26th OCTOBER, 2018.

JUDGMENT :

1. The appellant preferred this appeal against his conviction recorded by the Sessions Judge in Sessions Case No. 16 of 2015 for the offence punishable under section 376(2) of the Indian Penal Code and sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs. 1000/-, in default to suffer simple imprisonment for three months. He is also convicted for the offence punishable under section 313 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs. 500/-, in default to

suffer simple imprisonment for two months. He is also convicted for the offence punishable under section 5(j) (ii) (l) and (n) read with section 6 of the Protection of Children from Sexual offences Act, 2012 and sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs. 1000/-, in default to suffer simple imprisonment for three months. The sentences imposed shall run concurrently.

2. Heard Mr. Deshpande, learned counsel for appellant and Mr. Gujrathi, learned APP for the respondent/State.

3. Brief facts of the case may be stated as follows :

P.W. 1 prosecutrix is the daughter of the appellant/accused. She resided with appellant/accused and other family members at village Amlan Tq. Navapur, District Nandurbar, prior to 20.03.2014. It is alleged by the prosecutrix that when she was taking education in 7th standard, the appellant/accused committed rape on her from time to time and due to which she remained pregnant. Then the appellant/accused forcibly administered rudimentary medicines and due to which there was abortion. The appellant/accused threatened the prosecutrix that she should not disclose the said fact to anybody. Getting rid of the situation and the circumstances lastly prosecutrix left the house of the accused/appellant on 20.03.2014 and had taken

shelter of her maternal aunt P.W. 3 namely Mina Diwanji Gavit. When the prosecutrix was residing with P.W. 3 Mina she disclosed the incident in detail to P.W. 3 Mina.

4. On 24.04.2014 appellant/accused lodged missing report of the prosecutrix and subsequently on 09.05.2015 the appellant/accused filed a complaint in the police station about the kidnapping of P.W. 1 prosecutrix, on which the P.W. 1 prosecutrix was called in the police station where P.W. 1 prosecutrix as well as P.W. 3 Mina have stated that the P.W. 1 prosecutrix was not kidnapped by anybody and therefore the complaint of kidnapping was withdrawn by the appellant/accused.

5. On 22.07.2014 the appellant/accused filed a Writ Petition before this Court for the custody of the prosecutrix. The prosecutrix was called in the police station and after verifying that at the relevant time she was minor and a child, therefore, initially she was referred to Child Welfare Committee at Nandurbar and after about one month after attaining the age of 18 years, she was referred to Government Hospital Dhule. When the prosecutrix was staying at Dhule she made an application that she wants to reside with her maternal aunt i.e. P.W. 3 Mina and since then the prosecutrix is residing there.

6. In order to establish the charges levelled against the

appellant/accused the prosecution has examined in all seven witnesses i.e. (1) P.W. 1 prosecutrix, (2) P.W. 2 Ishwar Dhamane, Chairman of Child Welfare Committee, P.W. 3 Mina Diwanji Gavit (maternal aunt of prosecutrix), P.W. 4 Dr. Shila Bokare and P.W. 6 Dr. Nilesh Deoraj, who were medically examined the prosecutrix on the point of sexual assault and whether there was abortion as stated by P.W. 1 prosecutrix. P.W. 5 Ramesh Varhade, investigating officer of incident of kidnapping and P.W. 7 Govind Gadhari, retired P.S.I., investigating officer.

7. Besides the oral evidence of aforesaid witnesses the prosecution has relied upon the birth certificate of P.W. 1 prosecutrix at Exh. 36, medical certificates (Exh. 62 and 65). After recording the evidence, the statement of the accused under section 313 of the Code of Criminal Procedure was recorded. No defence evidence is adduced on behalf of the appellant/accused.

8. From the line of cross-examination and from the statement of the appellant/accused recorded under section 313 of the Code of Criminal Procedure it appears that the defence of the appellant/accused is of two folds that is on the instigation of P.W. 3 Mina, P.W. 1 prosecutrix lodged the complaint for monetary gain and secondly one Danial kidnapped the P.W. 1 prosecutrix and to save Danial, P.W. 3 instigated P.W. 1 prosecutrix to file complaint against the

appellant/accused.

9. From the record it appears that at the relevant time of incident i.e. four to five years prior to 20.03.2014 the prosecutrix was below 18 years of age, because her date of birth appears to be 18.10.1996. The allegations made by the prosecutrix are against her own father, therefore this Court has to see whether there was any reason for the prosecutrix to lodge a false complaint with the allegations of rape committed by the appellant/accused from time to time. To examine this material and important aspect the evidence of P.W. 1 prosecutrix and P.W. 3 Mina is most important.

10. On perusal of oral evidence of P.W. 1 prosecutrix it appears that at the time of incident P.W. 1 was studying in 7th standard. While she was studying in 7th standard her father raped her. Her father used to beat her and used to say that if she disclosed about his act to anybody he would kill her. It also appears from the further evidence of P.W. 1 prosecutrix that she disclosed this fact to her mother. When her mother tried to give understanding to the accused at that time he threatened her to kill. She further deposed that because of the act of her father she became pregnant. Her father forcibly gave her rudimentary medicines to make her to abort and accordingly she got aborted. Thereafter also again her father committed rape on her.

11. On perusal of further evidence it appears that P.W. 1 prosecutrix left the house of appellant/accused and went to the house of maternal aunt P.W. 3 Mina at village Bedki.

12. It reveals from the record that pursuant to the complaint of kidnapping presented by the appellant/accused the prosecutrix was called in the police station and after recording her statement police satisfied that her custody was to be handed over to P.W. 3 Mina. The reason for that appearing in the oral evidence of P.W. 1 is that as her father was torturing her and was committing rape on her therefore she refused to go along with her father.

13. It further reveals from the record that subsequently prosecutrix went to the police station to lodge the complaint however her complaint was not taken, therefore, she approached to the Superintendent of Police at Nandurbar. Thereafter the complaint of the prosecutrix was recorded on 09.12.2014.

14. I have carefully gone through the cross-examination of the prosecutrix from which it appears that nothing has been admitted by the prosecutrix to disbelieve her version as to the sexual assault by the father/accused. There are some suggestions to her but those suggestions are denied and some minor contradictions and omissions

are brought on record, however, those are not sufficient to discard the entire case of the prosecution.

15. It is to be noted that the P.W. 1 prosecutrix is residing in tribal area, she hardly studied upto 7th standard, therefore looking to the status and the fact that she was residing in a rural area of Navapur Taluka, some omissions and contractions are bound to occur in the statement of the prosecutrix. However, by any stretch of imagination, I do not find any reason as to why the prosecutrix, being a daughter, has deposed against the father. Apart from the evidence of the prosecutrix there is evidence of P.W. 3 Mina in the form of corroboration and there is evidence of P.W. 4 Dr. Shila and P.W. 6 Dr. Nilesh as to the sexual assault.

16. On scrutiny of oral evidence of P.W. 3 Mina it reveals that in the month of March 2014 complainant came to her house at Bedki and disclosed that her father committed sexual intercourse with her and because of which she became pregnant. She further told that her father gave her rudimentary medicines to abort and because of which she does aborted. Victim disclosed the act of her father to her brother and mother however they did not help her and on the contrary they beat her.

17. From the aforesaid evidence it appears that P.W. 1 prosecutrix left the house of her father and when there was an opportunity to disclose the incident, she disclosed it to her maternal aunt P.W. 3 Mina.

18. From the record it appears that the accused was committing sexual intercourse with the prosecutrix repeatedly and prosecutrix was staying in the house of the accused and it is further come in the evidence that the accused was threatening the prosecutrix to kill, in such circumstances, it would not be expected from the prosecutrix to disclose the heinous act committed by her father/accused and there is explanation from the prosecutrix that she did not disclose the incident to anybody so as to avoid the defamation and this explanation is invited by the defence counsel in the cross-examination in para No. 6 which reads as follows :

"It is true to say that in my complaint at Exh. 20 I had stated that till date I did not lodge the report against my father about his act as I and he would get defame."

The apparent reason for non disclosure of the incident is to avoid defamation in the society and second reason appears to be that the prosecutrix was in the custody of accused and depending upon him. It was not possible for her to take shelter of other relatives, therefore,

probable she did not disclose anything to anybody.

19. On perusal of further evidence of P.W. 3 Mina, she deposed about the filing of missing report, thereupon the prosecutrix and P.W. 3 Mina went to the police station. She further deposed that the prosecutrix was initially sent to Child Welfare Committee and after attaining the age of 18 years she sent to Government Hospital Dhule.

20. So the evidence of P.W. 3 Mina is in the form of corroboration to the evidence of P.W. 1 prosecutrix. Number of suggestions were given to P.W. 3 Mina, however all the suggestions were denied. One of the suggestion was that P.W. 3 cooked up this false case in order to gain in terms of money. However, I do not find any reason for the same because P.W. 3 Mina resides in a different village and no reasons are brought on record to suggest that those were the reasons for P.W. 3 to lodge false complaint against the appellant/accused.

21. P.W. 4 Dr. Shila examined the prosecutrix on 09.12.2014 and on examination she found that hymen of the victim was not intact. From the same it can be inferred that the victim was subjected to sexual intercourse.

22. P.W. 6 Dr. Nilesh is examined so as to know whether there was abortion of the victim or not. Dr. Nilesh opined that no finding can be

given about the abortion as the same was done before five years.

23. The findings recorded by P.W. 5 Dr. Nilesh is due to lapse of considerable time between examination and the abortion done. In such circumstances Dr. Nilesh is unable to find the symptoms of previous abortion. However, that does not mean that there was no abortion.

24. Looking to the evidence on record it appears that the evidence of P.W. 1 prosecutrix and P.W. 3 Mina appears to be most probable and reasonable. There are no reasons to disbelieve their oral version on the background that the offence of rape has been committed by the father himself.

25. In view of the above and looking to the cross-examination of the witnesses, I do not find any reason to disbelieve the evidence of P.W. 1 prosecutrix, P.W. 3 Mina, P.W. 4 Dr. Shila and P.W. 6 Dr. Nilesh, consequently there is no substance in the appeal, therefore, it is liable to be dismissed, accordingly it is dismissed.

26. Criminal Appeal is disposed of.

(K. L. WADANE, J.)

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