

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.671 OF 2016

Vijay Jaywant Namdas
Age : 27 years, Occu. :Labour,
Residing at Post : Karunde,
Taluka : Malshiras, Dist.: Solapur. ... **Appellant**

Versus

State of Maharashtra,
Through Natepute Police Station,
Tal. Malshiras, Dist. Solapur. ... **Respondent**

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Mr.Tejas Hilage, learned Advocate Appointed for the Appellant.

Mr.A.R.Kapadnis, APP for the Respondent/State.

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CORAM : A.M.BADAR J.

DATE : RESERVED ON 18th SEPTEMBER 2019.

PRONOUNCED ON 19th SEPTEMBER 2019.

ORAL JUDGMENT :

1 By this Appeal, appellant/convicted accused is challenging the Judgment and Order dated 1st April 2016 passed by the learned Additional Sessions Judge, Malshiras, District Solapur in Special Case No.10 of 2014 thereby convicting the appellant/accused of the offences punishable under Sections 452, 307 and 309 of the Indian Penal Code (hereinafter referred to as 'the IPC' for the sake of brevity). For the offence punishable under

Section 452 of the IPC, he is sentenced to suffer rigorous imprisonment for three years apart from direction to pay fine of Rs.1000/- and in default to undergo further rigorous imprisonment for six months. For the offence punishable under Section 307 of the IPC, he is sentenced to suffer rigorous imprisonment for four years apart from direction to pay fine of Rs.2000/- and in default to undergo further rigorous imprisonment for six months. For the offence punishable under Section 309 of the IPC, he is sentenced to suffer rigorous imprisonment for six months apart from direction to pay fine of Rs.500/- and in default to undergo further rigorous imprisonment for fifteen days. The substantives sentences were directed to run concurrently.

2 Facts in brief leading to the prosecution and resultant conviction of the appellant/convicted accused are thus:

- (a) Victim of the crime in question is Swati Gaikwad. She used to reside with her grand-father P.W.No.4 Shalikram Gaikwad and brother P.W.No.5 Suraj Gaikwad at village Karundegaon in Malshiras Taluka of Solapur District. The victim was taking education in 9th Standard in the School at village Morochi. The incident in question took place on 19/03/2014 at about 9.30 a.m. at the house of the victim i.e. P.W.No.2 Swati Gaikwad. However, since prior to five months of this incident, the appellant/convicted accused used to follow P.W.No.2

Swati Gaikwad by motorcycle when she used to go to her school. Then, after one month, the appellant/convicted accused dare to enter into her house and caught hold her hands. Five to six days thereafter, the appellant/convicted accused again entered in her house and expressed his desire to marry her. P.W.No.2 Swati Gaikwad refused. Then at about 9.30 a.m. of 19/03/2014, when she was all alone in her house, the appellant/convicted accused entered in her house and closed the door of the house. He then uttered that if Swati cannot belong to him then he will not allow her to be of anybody else. With this, the appellant/convicted accused strangled P.W.No.2 Swati Gaikwad by means of *odhani* and she became unconscious. The appellant/convicted accused then attempted to commit suicide by hanging himself by means of *odhani* to the angle of roof of house of P.W.No.2 Swati Gaikwad. Her grand-father P.W.No.4 Shalikram Gaikwad, who returned after collecting his labour charges noticed the appellant/convicted accused hanging by the ceiling and Swati was lying unconscious. He cut the ligature by means of sickle. The appellant/convicted accused ran away. An attempt was made to chase him. P.W.No.4 Shalikram Gaikwad then called his brother Shahaji and Anil. By auto rickshaw of P.W.No.3 Dnyaneshwar Khule, P.W.No.2 Swati Gaikwad was then taken to hospital of P.W.No.8 Dr.Mahadeo More at village Natepute.

(b) On regaining consciousness at the hospital of P.W.No.8 Dr.Mahadeo More, P.W.No.2 Swati Gaikwad lodged the FIR on 19/03/2014 itself, which has resulted in registration of Crime No.48 of 2014 against the appellant/convicted accused at Police Station, Natepute. He came to be arrested and sent to the Rural Hospital, Natepute, where Dr.Mahendra Surwase, Medical Officer examined him. This Medical Officer had also examined P.W.No.2 Swati Gaikwad upon being referred to the Rural Hospital, Natepute by P.W.No.8 Dr.Mahadeo More.

(c) On completion of routine investigation which included inspection of the spot of the incident with P.W.No.1 Vishal Salave, the appellant/convicted accused was charge-sheeted.

3. The learned trial Court had framed the charge for the offences punishable under Sections 452, 307, 309, 354(A) of the IPC and for the offences under Sections 7 and 11 punishable under Sections 8 and 12 of the Protection of Children from Sexual Offences Act, 2012. He pleaded not guilty and claimed trial.

4. In order to bring home the guilt to the appellant/convicted accused, the prosecution has examined in all ten witnesses.

5. Defence of the appellant/convicted accused was that of false implication. According to the defence, agricultural land of

the appellant/convicted accused is adjacent to the land of P.W.No.4 Shalikram Gaikwad and both the families are having dispute over this land. On two occasions, there were incident of assault over this issue. Therefore, he is falsely implicated in the crime in question.

6 Upon hearing the parties, the learned trial Court by the impugned Judgment and Order was pleased to convict the appellant/accused for the offences punishable under Sections 452, 307 and 309 of the IPC and accordingly he is sentenced as indicated in the opening paragraph of this Judgment.

7 I heard the learned Advocate appointed to represent appellant/convicted accused at the cost of the State. He argued that though P.W.No.2 Swati Gaikwad has deposed that she became unconscious after strangulating her, P.W.No.3 Dnyaneshwar Khule has deposed that she was conscious throughout till her admission at the hospital of P.W.No.8 Dr.Mahadeo More. It is also argued that P.W.No.4 Shalikram Gaikwad, upon seeing his grand-daughter in unconscious condition adopted strange course of chasing the appellant/convicted accused. His evidence of this chase given to the appellant/convicted accused is not corroborated by other evidence on record. Presence of the appellant/convicted accused on the spot of the incident is not vouched by any other

independent witness. According to the learned Advocate of the appellant/convicted accused, evidence of P.W.No.5 Suraj Gaikwad shows that his statement was recorded by police earlier to lodgment of the FIR by P.W.No.2 Swati Gaikwad and, as such, statement of Swati, which is at Exhibit 16 cannot be said to be the FIR of the crime in question. The original FIR is suppressed by the prosecution and this fact is also reflected from evidence of P.W.No.8 Dr.Mahadeo More.

8 As against this, the learned Additional Public Prosecutor supported the impugned Judgment and Order of conviction and resultant sentence.

9 I have considered the submissions so advanced and also perused the Record and Proceedings including oral as well as documentary evidence on record.

10 Fate of the case of the prosecution is dependent on testimonies of injured witness P.W.No.2 Swati Gaikwad and that of P.W.No.4 Shalikram Gaikwad, who appeared on the scene of the occurrence soon after alleged strangulation of his granddaughter P.W.No.2 Swati Gaikwad and while the appellant/convicted accused was still hanging by *odhani*. Let us, therefore, examine whether both these witnesses are witnesses of truth.

11 Evidence of P.W.No.2 Swati Gaikwad is perfectly in tune with the prosecution case as reflected from her statement recorded at the hospital of P.W.No.8 Dr.Mahadeo More and which is treated as the FIR. She has spoken about one sided love of appellant/convicted accused on her. She disclosed that the appellant/convicted accused used to chase her rickshaw by motorcycle when she used to attend her school at village Morochi. She has spoken about two visits of the appellant/convicted accused to her house and his insistence to her for marriage. So far as the incident in question is concerned, P.W.No.2 Swati Gaikwad has deposed that when she was alone at her house at about 9.30 a.m. of 19/03/2014, the appellant/convicted accused came in her house, closed the door and by uttering that if she cannot belong to him, he will not allow her to be of anybody else and strangulated her by means of *odhani*. P.W.No.2 Swati Gaikwad was unable to testify further as to what happened inside her house thereafter because she became unconscious. As per her version, she regained consciousness at the hospital of P.W.No.8 Dr.Mahadeo More and then her statement was recorded by police. Even in cross-examination, it is elicited from P.W.No.2 Swati Gaikwad that the appellant/convicted accused followed her on many occasions and she made complaint of this fact to her brother. She disclosed that she is not aware as to who has brought her to the hospital. In cross-examination, she further stated that when the appellant/convicted accused came to her, she did not raise any

hue and cry. She candidly denied that there was dispute between family of the appellant/convicted accused and her family.

12 As seen from evidence of P.W.No.4 Shalikram Gaikwad after 9.30 a.m. of 19/03/2014 he returned to his house by collecting labour charges from his employer. He noticed both front doors of the house were closed from inside. He testified that he pushed open one of the doors and saw the appellant/convicted accused was hanging by ceiling by means of *odhani* and his granddaughter was lying in unconscious condition nearby. P.W.No.4 Shalikram Gaikwad stated that he was frightened by looking at the scene in his house. By means of sickle then he cut the *odhani* by which the appellant/convicted accused was hanging to the ceiling. As deposed by P.W.No.4 Shalikram Gaikwad, then the appellant/convicted accused ran away with piece of ligature in his neck and he started chasing the appellant/convicted accused. Thereafter, as stated by P.W.No.4 Shalikram Gaikwad, he went to his brother Shahaji and Anil. They brought auto rickshaw and by that auto rickshaw, they all had taken P.W.No.2 Swati Gaikwad to the hospital of P.W.No.8 Dr.Mahadeo More at village Natepute. This witness also denied that there was quarrel between P.W.No.2 Swati Gaikwad and her brother P.W.No.5 Suraj Gaikwad.

13 Cross-examination of both these witnesses could not create any dent in their testimonies. Both these witnesses have duly identified the piece of *odhani* produced by the prosecution

before the Court after its seizure from the spot of the incident. The appellant/convicted accused was duly identified by both of them while in the dock. Evidence of both these witnesses makes it clear that P.W.No.2 Swati Gaikwad initially strangled by means of *odhani* by the appellant/convicted accused and then he attempted to commit suicide by hanging by means of that *odhani*. Let us, therefore, examine the medical evidence to that effect.

14 P.W.No.8 Dr.Mahadeo More runs the hospital named and styled as 'More Hospital' at village Natepute. He testified that on 19/03/2014, he examined P.W.No.2 Swati Gaikwad and found that there was transverse ligature mark on the front of her neck extending more to the right side at the level of thyroid cartilage. Size of that ligature mark, as stated by P.W.No.8 Dr.Mahadeo More, was 13 cm. x 1 cm. At right side, it was extending to 10 cm. whereas on left side it was extending to 3 cm. P.W.No.8 Dr.Mahadeo More opined that this ligature mark can be caused by strangulation by means of *odhani* and it was caused within 24 hours. Evidence of this Medical Practitioner corroborates from contemporaneous Medico Legal Certificate at Exhibit 44. He testified that after initial treatment, he referred P.W.No.2 Swati Gaikwad to the Rural Hospital of Natepute. In opinion of this Medical Practitioner, if some more force was applied, then P.W.No.2 Swati Gaikwad might have died. In cross-examination, it was suggested to him that the injuries can be self-inflicted. But

this suggestion is denied by P.W.No.8 Dr.Mahadeo More. He also stated that even if the injured was not medically treated, there was no danger to the life of P.W.No.2 Swati Gaikwad.

15 P.W.No.9 Dr.Mahendra Surwase was working as Medical Officer with the Rural Hospital, Natepute. Upon being referred to him, he examined P.W.No.2 Swati Gaikwad on 19/03/2014 itself and had noticed ligature mark over her thyroid cartilage of size 13 cm x 1 cm. caused by *odhani*. He opined that it was caused within 24 hours. P.W.No.9 Dr.Mahendra Surwase then referred P.W.No.2 Swati Gaikwad to Civil Hospital, Solapur, but it is seen from evidence on record that she was not taken to that hospital by her relatives.

16 The appellant/convicted accused was also examined by P.W.No.9 Dr.Mahendra Surwase, upon being referred by police. P.W.No.9 Dr.Mahendra Surwase found the appellant/convicted accused having ligature mark over thyroid cartilage of size 1 cm x 4 cm caused by *odhani* and that injury was found to be caused within 24 hours. There is absolutely nothing in cross-examination of P.W.No.8 Dr.Mahadeo More and P.W.No.9 Dr.Mahendra Surwase to doubt their testimonies. Thus, evidence of both these medical experts fully corroborates the version of P.W.No.2 Swati Gaikwad regarding her strangulation by the the appellant/convicted accused. Evidence of P.W.No.9 Dr.Mahendra Surwase is also corroborating version of P.W.No.4 Shalikram Gaikwad to the

effect that he noticed the appellant/convicted accused hanging by means of *odhani* to the ceiling of his house.

17 Now, let us examine the situation prevalent on the spot came on record through evidence of P.W.No.1 Vishal Salave and that of Investigating Officer. Duly proved spot panchanama at Exhibit 13 recorded on the day of the incident i.e. on 19/03/2014 is corroborating the version of P.W.No.1 Vishal Salave, panch witness. This panch witness deposed that he visited the house of P.W.No.4 Shalikram Gaikwad in presence of panch witness and noticed that *odhani* of blackish colour was hanging to the iron bar of the roof of that house and one end of that *odhani* was found torn. This version of the spot panch which is gaining corroboration from contemporaneous spot panchanama (Exhibit 13) corroborates the evidence of P.W.No.4 Shalikram Gaikwad.

18 Minor inconsistencies in the case of prosecution were sought to be pressed in service by the defence. P.W.No.3 Dnyaneshwar Khule had taken P.W.No.2 Swati Gaikwad to the hospital of P.W.No.8 Dr.Mahadeo More. He has stated in his cross-examination that till her admission, P.W.No.2 Swati Gaikwad was talking. However, even if it is assumed that she was in a position to talk, that aspect could not cast a shadow of doubt on prosecution case. Ultimately, she lodged the FIR on the very same day. It is also sought to be pointed out that prior to lodging of the FIR, statement of P.W.No.5 Suraj Gaikwad brother of

P.W.No.2 Swati Gaikwad was recorded by police and, therefore, that statement ought to have been treated as the FIR. Contents of that so-called statement are not elicited from cross-examination of P.W.No.5 Suraj Gaikwad. Version of this witness shows that he had not noticed the incident, rather he was at his work place when incident took place. He got information from phone to the effect that P.W.No.2 Swati Gaikwad is unconscious and is being taken to the hospital. He, therefore, rushed and met the persons who were taking P.W.No.2 Swati Gaikwad to the hospital at village Moruchi. P.W.No.5 Suraj Gaikwad deposed that his grand-father then told him that the appellant/convicted accused attempted to commit suicide and P.W.No.2 Swati Gaikwad is unconscious. He stated that till 2.00 p.m. P.W.No.2 Swati Gaikwad was unconscious. This evidence makes it clear that P.W.No.5 Suraj Gaikwad was not aware about anything regarding the incident. In cross-examination, he admitted that his statement was recorded by police at the hospital of P.W.No.8 Dr.Mahadeo More prior to recording the FIR of P.W.No.2 Swati Gaikwad. It is not brought on record from cross-examination of P.W.No.5 Suraj Gaikwad that he had communicated to the police by his statement that some cognizable offence took place. Hence, the statement in cross-examination of P.W.No.5 Suraj Gaikwad cannot be used to infer that statement of P.W.No.5 Suraj Gaikwad recorded by police could be the FIR of the crime in question. P.W.No.8 Dr.Mahadeo More deposed that history of the incident was given to him by

P.W.No.5 Suraj Gaikwad and that history was regarding forcible administration of poison to P.W.No.2 Swati Gaikwad, forcible attempt to have physical contact with her as well as strangulation. Here also it needs to be noted that P.W.No.5 Suraj Gaikwad was not knowing anything in respect of the incident and, therefore, whatever was stated by him by way of imagination cannot create doubt in prosecution case based on trustworthy evidence of P.W.No.2 Swati Gaikwad and P.W.No.3 Dnyaneshwar Khule.

19 It is faintly argued that considering nature of injuries suffered by the victim, the offence cannot travel to one punishable under Section 307 of the Indian Penal Code. In support of this contention, material in cross-examination of PW8 Dr.Mahadeo More to the effect that even if ligature marks were not treated medically, there was no danger to life of PW2 Swati is pressed in service. However, this argument needs to be rejected. The appellant/convicted accused used odhni (scarf) and strangled victim Swati. She became unconscious on the spot. Her neck was having ligature mark of size 13 cm x 1 cm caused by odhni. Thus, it was an attempt to constrict the neck of the victim by means of odhni by the appellant/convicted accused. He was having intention to cause her death, if his utterances prior to commission of the act are taken into account. Neither the appellant/convicted accused was deprived of the power of self control due to grave or sudden provocation nor this act of strangulating PW2 Swati was

committed by him without premeditation in a sudden fight, in a heat of passion or a sudden quarrel. If the appellant/convicted accused was successful in killing PW2 Swati by this act of strangulating her, he would have certainly made himself liable for the offence punishable under Section 302 of the Indian Penal Code. Hence, it cannot be said that the learned trial court erred in convicting the appellant/convicted accused of the offence punishable under Section 307 of the Indian Penal Code. The question was not that of medical treatment of ligature mark but consequences of constricting the neck by applying such force as to cause ligature mark of size of 13 cm x 1 cm around the neck of the victim PW2 Swati.

19 In the result, no infirmity can be found in the impugned Judgment and Order of conviction and resultant sentence.

20 The Appeal is, therefore, devoid of merits and the same is dismissed.

(A.M.BADAR, J.)