THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

D.B. (1)Hon'ble Shri Justice Rajendra Mahajan.
(2)Hon'ble Shri Justice C.V. Sirpurkar.

CRIMINAL APPEAL NO.2494 of 2006

Ramnath S/o Ramprasad Barman aged 37 years, R/o village Bhaiswahi, P.S. Vijayrahavgarh, District Katni (M.P.).

Appellant.

Versus

State of M.P. through P.S. Vijayrahavgarh, District Katni.

Respondent.

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For Appellant : Smt. Durgesh Gupta, learned counsel.

For Respondent : Shri Y.D. Yadav, learned Panel Lawyer /State

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J U D G M E N T

(Pronounced on the 22nd day of June, 2017)

Per: RAJENDRA MAHAJAN, J.

This appeal is directed against the judgment and order dated 22.11.2006 passed by the Third Additional Sessions Judge (FTC) Katni in Sessions Trial No.14 of 2006, by which the appellant-accused stands convicted under Section 376 of the IPC and sentenced to life imprisonment with a fine of Rs.1000/- (one thousand) in default to suffer further imprisonment for six months.

(2) The following are uncontroverted and admitted facts of the case -:

(1) The relation between the appellant and the prosecutrix (PW-3) is the father and the daughter respectively.

(2) At the relevant point of time, the age of the prosecutrix was near-about 14 years.

(3) The prosecutrix's mother had died before the incident in question.

(4) Uma @ Salma (PW-4) and Shakun Bai (PW-5) are Mousi (real sister of the prosecutrix's mother) and Mami (maternal aunt) of the prosecutrix respectively. At the material point of time, they were neighbours in village Bilari.

(5) After the lodgement of the FIR by the prosecutrix, she has been living with Uma.

(3) The prosecution case as unfolded at the trial, in brief, is as follows:-

(3.1) On 21.08.2005, the prosecutrix accompanied by Uma and Shakun Bai made an oral report at Police Station Madhav Nagar of Katni town stating that she is a resident of village Bhaiswahi and she does house chores. Her mother had died

five years ago. She and her two younger brothers live with her father Ramnath, who is the appellant-accused herein, in village Bhaiswahi. Her father used to commit sexual intercourse with her despite her strong protests. He did not allow her to go outside the house. For the said reason, she did not narrate his perverted sexual acts to any person of her acquaintance. As a result of the cohabitation, she became pregnant and she is at present carrying a fetus aged about four months in her womb. On 21.08.2008, her father brought her to the house of Uma at village Bilari for medical treatment as her health is deteriorating on account of pregnancy. In the absence of her father, she related the matter to her Mousi Uma and Mami Shakun Bai. Upon their suggestion, she has come to lodge the report. Upon her oral report, Sub-Inspector C.K. Tiwari (PW-10) recorded an FIR being Ex.P-3 and registered a case against the appellant under Section 376 IPC at Crime No.0 of 2005 as the place of occurrence village Bhaiswahi falls under the territorial jurisdiction of Police Station

Vijayraghavgarh of Katni district.

(3.2) On 22.08.2005, C.K. Tiwari sent the prosecutrix for medico-legal examination to the Government Hospital Katni, where Dr. Sunita Verma (PW-6) examined her and gave a report Ex.P-6 stating that there is a fetus aged about 14 to 16 weeks in the prosecutrix's womb. She also collected smear of her vaginal swab and prepared slides of it for forensic tests.

(3.3) On 22.08.2005, C.K. Tiwari sent the FIR Ex.P-3 and the prosecutrix's medical report Ex.P-6 to Police Station Vijayraghavgarh. On the basis of the FIR, Sub-Inspector Manjeet Singh (PW-11) recorded FIR Ex.P-12 verbatim and registered a case against the appellant at Crime No.150 of 2005.

(3.4) Sub-Inspector Manjeet Singh took over the investigation. He prepared the site plan Ex.P-4, recorded the case diary statements of the witnesses who are conversant with the incident, and arrested the appellant vide arrest memo Ex.P-15. On 23.08.2005, he sent the appellant for medico-legal examination to the Community

Health Center, Vijayraghavgarh, where Dr. R.K. Jharia (PW-2) examined him and gave a report Ex.P-2 stating that the appellant is capable of doing sexual intercourse. He also prepared slides of semen of the appellant.

(3.5) Upon the conclusion of investigation, the police filed a charge-sheet against the appellant for his prosecution under Section 376 IPC.

(4) The learned trial Judge framed the charge against the appellant under Section 376 IPC. He pleaded not guilty to the charge and opted to contest the case. In the examination under Section 313 of the Cr.P.C., the appellant denied all the incriminating evidence and circumstances appearing against him in the case except the admitted facts. His defence, simpliciter, was of false implication by the prosecutrix at the instigation of her Mousi Uma. However, he did not adduce any oral or documentary evidence in support of his defence.

(5) The learned trial Judge having marshalled, analyzed and evaluated the evidence on record has held the appellant guilty of raping the prosecutrix several times. Having held so, he convicted the appellant under Section 376 IPC and sentenced thereunder as noted in para 1 of this judgment.

(6) Feeling aggrieved by and dissatisfied with the impugned judgment, the appellant has filed the appeal before this court.

(7) Learned counsel for the appellant after referring extensively to the contents of the FIR Ex.P-3 lodged by the prosecutrix herself, her case diary statement Ex.D-1 and her deposition, submitted that the prosecutrix has improved her court statement on the material points to a great extent. This improvements erode the credibility and trustworthiness of her testimony. She further submitted that as per the provision of Section 53-A Cr.P.C. in the course of investigation, the DNA samples of the prosecutrix, her fetus and the appellant ought to have been taken to get the DNA profiling done to ascertain whether the appellant was biological father of the fetus who was in the womb of the prosecutrix. She further submitted that the compliance of Section 53-A Cr.P.C. is mandatory, therefore, non-compliance of the provision of the Section supports the defence of the appellant that he had never had sexual intercourse with the prosecutrix and he has been falsely implicated in the case. She further submitted that Dr. Sunita Verma (PW-6) and Dr.R.K. Jharia (PW-2) have deposed that they had prepared slides of smear of the prosecutrix and semen of the appellant respectively for forensic tests, but

there is no evidence on record whether the prosecution had sent the slides to the forensic science laboratory for the tests and whether the same sent the report(s) in this respect. Moreover, the evidence of Investigating Officer Manjeet Singh (PW-11) is completely silent on the point. She further submitted that Uma (PW-4) and Shakun Bai (PW-5) have deposed what they were told by the prosecutrix, therefore, they are hearsay witnesses. As such, their testimonies have no evidentiary value. Upon the aforesaid submissions, she submitted that the prosecution has failed to prove its case beyond reasonable doubt. Therefore, the impugned judgment is liable to be set aside.

(8) In the alternative, learned counsel for the appellant submitted that the appellant has been in jail in the case since 22.08.2005, the date of his arrest. Thus, the appellant has by now suffered imprisonment of near-about 12 years. The appellant has no previous conviction nor has he criminal antecedents. Upon the aforesaid facts, she prayed that the appellant's jail sentence be reduced to the period he had already undergone. In this respect, she placed reliance upon a decision of this court rendered in Criminal Appeal No.1775 of 2000 titled Omkar Vs. State of M.P. the date of judgment 07.05.2009 (oral).

(9) Per contra, learned Panel Lawyer submitted that as per the FIR, case diary statement of the prosecutrix and her court statement, the appellant committed rape upon her not once but several times. That is why she has given the evidence in detail as to the place, manner and conduct of the appellant at the time of committing rape by him upon her. As per record, the prosecutrix is of rural background and she is an illiterate girl, therefore, it cannot be expected from her to record the FIR and the case diary statement elaborately on her own. Moreover, the FIR and the case diary statements are not the encyclopedia. Therefore, recording evidence in detail by the prosecutrix does not amount to improvement. He submitted that the provision of Section 53-A Cr.P.C. came into effect w.e.f. 23.06.2006, whereas the incident of the present case was of the year 2005. Therefore, holding of the DNA tests was not mandatory on the part of the prosecution in the case. He further submitted that the prosecutrix lodged the FIR when she was carrying the pregnancy of near-about four months old. In the circumstances, the forensic examinations of the smear of vagina of the prosecutrix and the semen of the appellant have no bearing upon the case even remotely. On the quantum of sentence, he submitted that the prosecutrix has found solace from her father/the

appellant after she had lost her mother at the age of about 10 years. In the circumstances, the sexual exploitation of the prosecutrix by the appellant is the most abominable act. Therefore, the learned trial Judge has rightly awarded the sentence of life imprisonment to the appellant. Upon these submissions, he supported the impugned judgment of conviction and order of sentence and prayed for dismissal of the appeal.

(10) We have earnestly considered the rival submissions made across the Bar and perused the entire material before us together with the impugned judgment.

(11) Prosecutrix (PW-3) has testified that she had lost her mother near-about five years prior to the incident. She and her two younger brothers lived with her father-appellant in village Bhaiswahi. Near-about a year before the lodgement of the FIR Ex.P-3 by her, the appellant used to come at night after consuming liquor and Ganja. Thereafter, he stripped her naked and undressed himself. He forcibly committed sexual intercourse with her. Whenever, she complained to him regarding pain in her private parts, he applied oil on her thighs. As a result of sexual intercourse, she became pregnant and started vomiting. She had also lost her appetite. Seeing that, he took her to a doctor for treatment.

After her clinical examination, the doctor told him that she was carrying pregnancy of about four months. Since he had no money to have her abortion, he approached her Mousi Uma to get money from her on credit. At that time, he told Uma that she had pregnancy with someone and to get her pregnancy terminated, money is required. Uma asked him to keep her present before her. Later, he took her to village Bilari, the native place of Uma. One evening, she and Uma went outside to attend the call of nature. At that time, Uma enquired from her as to how she had become pregnant. Thereupon, she narrated her that it was her father/the appellant who had pregnanted her committing forcibly sexual intercourse upon her several times. Thereafter, she lodged the FIR Ex.P-3 with the police accompanied by Uma and Mami Shakun Bai. We find that the prosecutrix has stated in the FIR and her case diary statement that the appellant used to commit sexual intercourse upon her in their house, whereas she has stated in her evidence that the appellant ravished her in a hut situated in an agricultural field. In our opinion, this contradiction is of minor nature. We find that the prosecutrix has not given details of the instances of rape in the FIR and her case diary statement. As per record, the proseuctrix is of rural background and that she is totally illiterate girl,

therefore, it cannot be expected from her to give details of the ordeals she had gone through when she was every time subjected to rape by the appellant on his own unless and until the police officials, who recorded the FIR and the case diary statement of her, asked her in minute details. In this backdrop, in our considered view, giving evidence in detail regarding instances of rape by the prosecutrix does not amount to improvement in her evidence. Our said view is fortified by a decision of the Supreme Court rendered in the case of M.G. Eshwarappa and others Vs. State of Karnataka, (2017) 4 S.C.C. 558.

(12) We have also found some contradictions and inconsistencies in the contents of the FIR, case diary statement of the prosecutrix and her deposition but they are of very minor nature having no bearing on the case.

(13) It is pertinent to mention at this place that in para 15 of the cross-examination of the prosecutrix, the defence has put some suggestions with an objective to elicit evidence from her in their favour to shake the reliability of her evidence. The suggestions are that she had pregnancy with someone else not by her father-appellant, that he had opposed the marriage of her Mousi Uma with a muslim man, as a result the relation between Uma and her father are

verymuch strained, that she had in fact a tumour in her stomach but upon the instigation of Uma she had lodged the false report against her father. The prosecutrix has categorically denied all the aforestated suggestions.

(14) In our considered view, where a minor girl has testified that her father raped her at the time when she was in his company, the strong evidence in favour of the father is required to disbelieve her testimony. The underlying premise is that such accusation is in the nature of rarest of rare because no girl would level such charge in normal course against her own father. Mere extracting out some minor contradictions and inconsistencies in the cross-examination of the girl will not be sufficed to discredit the veracity of her evidence. From this point of view, we have perused the evidence appearing in the cross-examination of the prosecutrix and we find that nothing material evidence has come out to cast a doubt upon the truthfulness of her testimony leaving alone the discarding of it as unreliable.

(emphasis is ours)

(15) In view of the preceded close scrutiny of the evidence of the prosecutrix, we hold that the testimony of the

prosecutrix inspires full confidence.

(16) From the perusal of the depositions of Uma (PW-4) and Shakun Bai (PW-5), we find that they have corroborated the evidence given by the prosecutrix in material particulars except some minor inconsistencies and contradictions here and there. We also find that the defence has failed to elicit in their cross-examination any evidence in their favour to discredit their evidence. As both the witnesses are close relatives of the prosecutrix and that she had lost her mother long back before the incident, therefore, it is natural that she confided in them as to the person who was behind her pregnancy. In this fact situation, we hold that their evidence is admissible in terms of Section 6 of the Evidence Act, after rejecting the contention raised by the learned counsel for the appellant that the evidence of both the witnesses falls under the category of hearsay evidence. We, therefore, hold that their testimonies are reliable and lend full support to the evidence of the prosecutrix.

(17) Dr. Sunita Verma (PW-6) has deposed that she had done medico-legal examination of the prosecutrix on 22.08.2005 at the District Hospital Katni. She had found that the prosecutrix was carrying pregnancy of 14 to 16 weeks. In respect she gave report Ex.P-6. She has also deposed that on

13.09.2005, the prosecutrix was brought by one Uma (PW-4) for treatment. At that time, she and her colleague Dr. Anita Singh (not examined) medically examined her and found that she was heavily bleeding with short intervals via her vagina, her uterus was half-opened, her blood pressure was 100-140 and hemoglobin level in blood was 9.4. In the circumstances, the termination of pregnancy of the prosecutrix was necessary to save her life, for which they got permission from the then Civil Surgeon of the Hospital Dr. Baronia (not examined). She has also deposed that upon her advice Dr. Joystana (PW-1) had submitted obstetric sonography report Ex.P-1 of the prosecutrix. On the basis of the report, she terminated the pregnancy of the prosecutrix after admitting her in the hospital. Upon the perusal of the cross-examinations of both the witnesses, we find that nothing has come out to disbelieve their evidence. Consequently, their evidence is wholly reliable. Thus, it is medically proved that the prosecutrix had pregnancy at the relevant point of time.

(18) Dr. R.K. Jharia (PW-2) has testified that on 23.08.2005, he examined the appellant and found him capable of performing sexual intercourse. He has proved his medical report Ex.P-2. In his cross-examination, only one irrelevant question is asked by the defence. On the basis of his

evidence we, therefore, hold that the appellant was physically capable of performing sexual intercourse at the material point of time.

(19) The provision of Section 53-A Cr.P.C. was inserted in the Cr.P.C. w.e.f. 23.06.2006, whereas the incident of the present case is of the year 2005. Therefore, it was not mandatory for the prosecution to get the DNA profiling of the prosecutrix, her fetus and the appellant to ascertain that the appellant was the father of the fetus. In Sunil Vs. State of M.P., (2017) 4 S.C.C. 393, the Supreme Court has held that the conviction of the accused under Section 376 IPC is also possible on the basis of other available evidence, in case of non-holding of the DNA test or failure to prove DNA test report. In the light of the aforesaid ratio, we hold that non-holding of DNA test will not affect the prosecution case adversely.

(20) In the light of the aforesaid close scrutiny of the evidence on record, we hold that the learned trial Judge has rightly held the appellant guilty for sexually exploiting her daughter/the prosecutrix.

(21) The next question before us is whether any lenience in sentence is called for?

(22) At this stage, it is pertinent to quote first the angst and anguish voiced by the Supreme Court in the case of Siriya @ Shri Lal Vs. State of M.P. [2009 (1) M.P.L.J. (Cri.) 98], wherein the father was held guilty for raping her minor daughter by the trial court and this High court.

> Para 1:-
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> "There can never be more shocking, depraved and heinous crime than when the father is charged of having raped his own daughter. He not only delicts the law but, it is a betrayal of trust. The father is the fortress and refuge of his daughter in whom the daughter reposes trust to protect her. Charged of raping his own daughter under his refuge and fortress is worse than the gamekeeper becoming a poacher and treasury guard becoming a robber."

> Para 5:-
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> "**...**The father is supposed to protect the dignity and honour of his daughter. This is a fundamental facet of human life. If the protector becomes the violator, the offence assumes a greater degree of vulnerability. The sanctity of father and daughter relationship gets polluted. It becomes an unpardonable act. It is not only a loathsome sin, but also abhorrent**...**"

On the basis of the aforesaid, the apex court has upheld the life sentence awarded to the accused-appellant by the learned trial Judge and affirmed by this High court, stating that no sympathy or lenience is called for.

(23) This court had expressed almost similar sentiments in para 12 of the decision rendered in the case of Anand Vs.

State of M.P. 2013 (1) MPWN 94. In that case, this court upheld the father guilty of committing rape upon her eight years old daughter and affirmed the life imprisonment awarded by the trial court to him stating that no lenience is given in such type of cases. Recently, the Rajasthan High Court in the case of Shiv Lal Uka Ji Vs. State of Rajasthan, 2017 Cr.L.J. 1359 upheld the life imprisonment under Section 376(1) IPC awarded to the accused for having raped her minor daughter.

(24) In the case of Omkar Vs. State of M.P. (supra) this court has reduced the life imprisonment awarded to the appellant-accused under Section 376 IPC to rigorous imprisonment for 10 years. But the facts of the case are entirely different. Therefore, the ratio of said case is not applicable in the present case.

(25) In the case of Sevaka Perumal etc. Vs. State of Tamil Nadu, 1991 (3) SCC 471, the Supreme Court had considered the impact of imposition of inadequate sentence and observed as under :-

> Para 8:-
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> "Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice delivery system to undermine the public confidence in the efficacy of law and society could not long endure under such

> serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc."

In the light of aforesaid authorities and the facts and circumstances of the present case, we find that the learned trial Judge has rightly awarded life imprisonment to the appellant. Therefore, we reject the prayer for granting lenience in sentence as prayed for by learned counsel for the appellant.

(26) For the forgoing reasons and discussions, we arrive at the ultimate conclusion that this appeal is devoid of merits and substance. We, therefore, dismiss this appeal, affirming the conviction and sentence imposed upon the appellant by the learned trial Judge vide the impugned judgment.

(Rajendra Mahajan)
Judge

(C.V. Sirpurkar)
Judge

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