

Anand

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO.205 OF 2013
WITH
CRIMINAL APPLICATION NO.819 OF 2016
IN
CRIMINAL APPEAL NO.205 OF 2013**

SUNIL SHANTARAM WADKAR] .Appellant
Age:35 yrs, Occu:Service]
R/o. Satyam Building, 7th floor,]
Room No.134, Sant Kakya Marg,]
Dharavi,]
Mumbai – 400 017.]
]
(presently lodged at Kolhapur]
Central Prison, Kalamba,Kolhapur)]

Vs.

THE STATE OF MAHARASHTRA] .Respondent
]
(vide Sessions Case No.97 of 2012]
arising out of C.R.No.180 of 2011]
registered at Shahunagar Police]
Station, Mumbai)]

Ms.Shubhada Khot, Advocate, for the Appellant
Mrs.P.P.Shinde, APP, for the Respondent – State

CORAM : REVATI MOHITE DERE, J.

DATE : 18.07.2016

ORAL JUDGMENT

. By this Appeal, the Appellant has impugned the Judgment and Order dated 06.02.2013 passed by the learned Ad-hoc Additional Sessions Judge, C.R.No.1, Sewree, Mumbai in Sessions Case No.97 of 2012, convicting him for the offence punishable under Section 376 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for 7 years and to pay fine of Rs.2,000/-, in default to suffer further rigorous imprisonment for six months.

2. Few facts as are necessary to deal with the Appeal are as under :-

The prosecutrix (PW.1), aged about 17 years, was residing at the relevant time with her grandmother (PW.3), her younger sister, maternal uncle, aunt etc. at the Matunga Labour Camp, Mumbai. The Appellant is related to the prosecutrix, inasmuch as, the prosecutrix's

maternal aunt – Swapnali (PW.2) was married to the Appellant. The Appellant alongwith his wife Swapnali (PW.2) and their two children were residing in the same vicinity, about five minutes away, from the residence of the prosecutrix. The Appellant was working with a Company and was doing night shift duty. The Appellant's wife – Swapnali was also working as a maid servant and used to go for work for a few hours in the morning and in the afternoon. According to the prosecutrix, on 13.09.2011 at about 1.30 p.m. when she went to fetch water from the house of the Appellant, the Appellant held her and thereafter committed sexual assault on her. After the said incident, the prosecutrix went home and on being questioned by her grandmother, disclosed the said incident of sexual assault on her. Thereafter, Swapnali (PW.2) came to her mother's (PW.3) house and learnt of the said incident from her mother (PW.3) and the prosecutrix (PW.1). Thereafter,

on the next day, a complaint was lodged with the Shahunagar Police Station, Mumbai, by the prosecutrix, which was registered vide C.R.No.180 of 2010, alleging an offence punishable under Section 376 of the Indian Penal Code against the Appellant. After investigation, charge-sheet was filed and the case, being Sessions triable was committed to the Court of Sessions.

3. The Appellant pleaded not guilty and claimed to be tried. The defence of the Appellant was of total denial and false implication. According to the Appellant, on account of some dispute, he has been falsely implicated in the said case.

4. The prosecution in support of its case examined as many as six witnesses. (PW.1) – the prosecutrix, aged 7 years at the relevant time; (PW.2) – Swapnali Sunil Wadkar, wife of the

Appellant and aunt of the prosecutrix; (PW.3) - Sharada Shivram Suvare, grandmother of the prosecutrix; (PW.4) - Hanumant R. Isaqi Nadar, Panch to the scene of the offence Panchanama, as well as to the seizure Panchanama of prosecutrix's and Appellant's clothes; (PW.5) - PSI Yashwant Kalu Mahanagare, the investigating officer, attached to the Shahunagar Police Station and (PW.6) - Dr.Kiran Sambhaji Kalyankar, Medical officer, Nagpada Police Hospital, who examined the prosecutrix.

5. After hearing the parties, the learned Ad-hoc Additional Sessions Judge was pleased to convict and sentence the Appellant as aforestated in para 1. Hence, this Appeal.

6. Ms. Khot, learned counsel for the Appellant assailed the impugned Judgment and Order on several counts. She submitted that the alleged incident of rape, according to the

prosecutrix took place on 13.09.2011, whereas the history given to (PW.6) -Dr.Kalyankar by the prosecutrix is different. She submitted that according to the history given by the prosecutrix to the Doctor (PW.6), the Appellant was forcing her to have repeated sexual contact upto 13.09.2011. According to Ms Khot, the substantive evidence of the prosecutrix shows that she was sexually assaulted only on 13.09.2011, which evidence is inconsistent with the history given to the Doctor, as well as the medical evidence, showing age of hymen tear – as old healed. She further submitted that because of the dispute between the Appellant and the grandmother (PW.3) and between the Appellant and his wife – Swapnali (PW.2), the Appellant has been falsely implicated in the said case. She further submitted that considering the evidence on record, even the possibility of consent cannot be ruled out. She further submitted that the C.A.Report does not support the case of the

prosecution, inasmuch as, nothing incriminating was found on the clothes of the prosecutrix/the Appellant, so as to connect the Appellant with the offence.

7. Mrs.Shinde, learned APP supported the Judgment and Order, convicting the Appellant for the offence punishable under Section 376 of the Indian Penal Code and submitted that no interference was warranted in the same. According to the learned APP, the evidence of the prosecutrix (PW.1) is consistent with the evidence of Swapnali (PW.2) - aunt of the prosecutrix and wife of the Appellant and Sharada Suvare (PW.3) - grandmother of the prosecutrix. She submitted that immediately on the very next day, the aforesaid complaint was lodged as against the Appellant. She further submitted that the evidence of the prosecutrix is also consistent with the medical evidence that has come on record. Learned APP also

submitted that the spot panchnama shows that broken pieces of bangles were found on the spot, which goes to show that the alleged incident had taken place and the said fact also corroborates the prosecution case.

8. Heard learned counsel for the Appellant and the learned APP for the Respondent – State. With their assistance, I have perused the entire evidence and all relevant documents on record.

9. The prosecutrix (PW.1) at the relevant time was about 17 years of age. She has deposed in her evidence, that her mother expired 16 years ago and that she was residing with her grandmother (PW.3) and other relatives, at the Matunga Labour Camp, Mumbai. She has stated that Swapnali (PW.2), her mother's sister was residing in the neighbourhood and that the Appellant was her husband. She has further deposed that Swapnali (PW.2) was working as a

maid servant in some houses and hence was required to be out, in the afternoon. She has stated that she would help Swapnali in her domestic work. She has further stated that as the Appellant was doing night shift duty in the Company, he would be in the house during the day.

10. According to the prosecutrix, when she went to Swapnali (PW.2) and Appellant's house to fill water on 13.09.2011 at about 1.30 p.m., the Appellant was alone at home. She has stated that the Appellant held her hand, embraced her and thereafter, committed forcible sexual intercourse on her. She has stated that she resisted him, however, he did not stop. She has stated that when she pulled her hand, her bangles broke. She has further stated that when she went home, her grandmother (PW.3) asked her, why she was late and how her bangles had broken. She has stated that initially, she did not

disclose the said incident, as the Appellant had threatened her with dire consequences, however, later she disclosed the incident to her grandmother (PW.3). She has stated that they went to the police station on the next day and lodged a complaint against the Appellant. The said FIR is at Exh.10. According to the prosecutrix, she was sent to the Nagpada Police Hospital for her medical examination. She has identified her clothes, which were worn by her on the day of the incident as well as the clothes worn by the Appellant.

11. In her cross-examination, the prosecutrix has admitted that there was a tap dispute between the Appellant and her grandmother; that the distance between her house and that of the Appellant was five minutes and that she would visit Swapnali's house, since her marriage with the Appellant i.e. for about 8-10 years; and that she used to fill water in

Swapnali's house for about two years prior to the incident. It has come in the cross-examination that since one year prior to the incident, the Appellant was eyeing her inappropriately and that she had not disclosed the said fact to anybody; and that despite this, she was visiting the Appellant's house to fill water. The prosecutrix has also admitted that she had sustained no injuries though her bangles had broken in the said incident; and that she had cried for help. The prosecutrix has denied the suggestion, that two years prior to the incident, she had eloped with a person from that area and that the Appellant had rescued her from the custody of the said person and hence, she was angry with the Appellant. The prosecutrix has denied the suggestion that she was falsely deposing against the Appellant and that no such incident had taken place. She has also denied the suggestion that at the behest of her grandmother, she had lodged a false complaint as

there was dispute between the Appellant and her grandmother.

12. (PW.2) Swapnali Wadkar, aunt of the prosecutrix (PW.1) and wife of the Appellant has supported the prosecution case. According to the said witness, the prosecutrix is her niece and is residing about five minutes walking distance from her marital home. She has stated that at the time of the incident, the Appellant i.e. her husband was working with one Company at Panvel and was doing night shift. She has further stated that she was working as a maid servant, as there were financial issues and that her working hours were from 8.00 a.m. to 11.00 a.m. and thereafter, from 1.30 p.m. to 4.30 p.m.. She has stated that she used to tell the prosecutrix to fill water in her house in her absence. She has stated that on 13.09.2011, the Appellant was at home, as he had come back from his night shift duty. She has stated that on her return

back from work at about 3.30 p.m., she went to her mother's house and saw that her mother (PW.3) and the prosecutrix were weeping. On questioning them, her mother is stated to have disclosed to her, that the Appellant had sexually assaulted the prosecutrix. She has stated that the prosecutrix's hair and clothes were disheveled. She has further stated that on learning of the said incident, she went home and questioned the Appellant (husband) who was sleeping. She has stated that the Appellant confessed that he had made a mistake and had misbehaved with the prosecutrix. She has further stated that the prosecutrix lodged a complaint against the Appellant on the next day, as they were concerned about her marital life and her two children.

13. In the cross-examination, several suggestions were made to the said witness, i.e. Swapnali (PW.2), however, the same were denied

by her. The said witness denied the suggestion that there was a quarrel between her mother (PW.3) and the Appellant since 2002 and that there was a dispute even between her and the Appellant. Nothing material has come in the cross-examination of the said witness, so as to disbelieve the said witness.

14. Sharada (PW.3), the grandmother of the prosecutrix has also corroborated the evidence of (PW.1) and (PW.2) with respect to the incident of 13.09.2011. According to Sharada (PW.3), on 13.09.2011, the prosecutrix had gone to the house of Swapnali (PW.2) to fill water and that when she returned home, she found that her hair and clothes were disheveled and that her bangles were broken. She has deposed that after a lot of pursuation, the prosecutrix disclosed to her, that the Appellant had sexually assaulted her. She has further stated that soon thereafter, Swapnali (PW.2) came to

their house, pursuant to which, they disclosed the said incident to her, who then went home and questioned the Appellant. She has stated that the Appellant confessed to Swapnali and asked her to pardon him. She has stated that on the next day, she went with the prosecutrix to the police station, who lodged a complaint against the Appellant. According to Sharada (PW.3), she handed over the prosecutrix's clothes to the police. She has also identified the same.

15. In the cross-examination, several suggestions were made to the said witness to show that there was a dispute between her and the Appellant, pursuant to which, the Appellant was falsely implicated in the said case. However, the said suggestions were denied by the said witness. Nothing substantial has come in the cross-examination of the said witness so as to discredit her testimony.

16. PW.4-Hanumant Nadar is the panch witness in whose presence the Appellant's clothes were produced.

17. PW.5-is PSI Yashwant Mahanagare, the investigating officer, who registered the aforesaid C.R. on the complaint filed by the prosecutrix, being Exh.10 and who carried out the investigation and filed a charge-sheet as against the Appellant.

18. Dr.Kiran Kalyankar (PW.6), Medical officer, who was attached to the Nagpada Police Hospital at the relevant time, has deposed that on 14.09.2011, the prosecutrix was brought for medical examination and that he had examined the prosecutrix in the presence of female staff and had recorded the history in her own words. He has stated that the prosecutrix had disclosed to him that the Appellant, a close relative and neighbour had raped her about a year ago, when

she had been to his house to fetch water. She has also stated to have disclosed, that thereafter, the said person has been forcing her to have sexual intercourse, by blackmailing her and that she was last raped by the Appellant on 13.09.2011. The Medical Certificate is exhibited vide Exh.21. In the Ossification test, this witness found the victim girl's age to be between 17 to 18 years. The said witness has denied the suggestion that history mentioned in the Certificate (Exh.21) was given to him by the police and not by the prosecutrix.

19. A perusal of the evidence on record and more particularly, the evidence of the prosecutrix (PW.1); Swapnali (PW.2) - aunt of the prosecutrix and wife of the Appellant; and Sharada (PW.3) - grandmother of the prosecutrix, shows that their evidence is consistent with each other, on all material particulars. The incident occurred on 13.09.2011 at about 3.00

p.m., when the prosecutrix went to her aunt's house to fill water; that the Appellant was present in the house; that the Appellant had forcible sexual intercourse with the prosecutrix; that when she returned home and disclosed the said incident to her grandmother (PW.3); thereafter, Swapnali (PW.2) visited their house and the incident was disclosed to her; and on the next day, i.e. 14.09.2011 at 2.45 p.m., the FIR was lodged. The evidence of the witnesses show that since the Appellant was related to the prosecutrix, there was some apprehension about lodging the complaint, as they were concerned about the welfare and honour of Swapnali (PW.2) and her children. It is, in these circumstances that the complaint was lodged on the next day.

20. Merely because the C.A.Reports (Exhs. 11 to 13) show NIL, does not mean that no such incident had occurred. Similarly, merely because

the prosecutrix had not suffered any physical injury on her person would not be a ground to discard her evidence. It is settled law that if the evidence of the prosecutrix is found to be truthful, credible and reliable, conviction can be based on her sole testimony, without any corroboration. A perusal of the evidence shows that no worthwhile reason had come on record, to even remotely suggest that the Appellant has been falsely implicated. Although, it was sought to be suggested to the witnesses that because of some tap dispute, the Appellant was falsely implicated, the said suggestion has been denied by the witnesses. There is nothing on record to show what the exact nature/cause for the dispute, or its gravity, for the prosecution to falsely implicate the Appellant, in such a serious offence. As noted earlier, the evidence of the prosecutrix (PW.1), Swapnali (PW.2) and Sharada (PW.3) inspires confidence. The said witnesses appear to be truthful and credible

witnesses and there is no reason to disbelieve them or to doubt their credibility.

21. Much emphasis was laid by the learned counsel for the Appellant about the discrepancy that had come in the substantive evidence of the prosecutrix and the history given by the prosecutrix to the Doctor i.e. (PW.6). The history given to the Doctor reads thus :-

"Sunil Wadkar is her close relative and her neighbour. One year ago when she went to his house for some domestic work (to fetch water), he was alone in his house. So he raped her under life threats. Since then he is forcing her to have repeated sexual contacts (almost daily) by blackmailing her, up till now. Last sexual contact is on 13.09.2011."

22. Learned counsel for the Appellant has submitted that even the local examination shows age of hymen tear as old healed and as such, the said finding is inconsistent with the

substantive evidence of the prosecutrix. Perused the evidence of the prosecutrix and the medical evidence in this regard. I do not find any major inconsistency in the history given by the prosecutrix to Dr.Kiran Kalyankar (PW.6) with her evidence that has come on record, so as to discard the prosecution case. The fact remains that the prosecutrix was sexually assaulted on 13.09.2011, pursuant to which the aforesaid complaint was lodged. The said evidence is corroborated by the evidence of Swapnali (PW.2), wife of the Appellant and aunt of the prosecutrix. Swapnali (PW.2), in no uncertain terms has disclosed that the Appellant had confessed to her about the mistake, when she confronted him about the allegation of sexual assault by him on the prosecutrix. The said evidence has gone unchallenged. The said evidence is also corroborated by the evidence of Sharada (PW.3), the grandmother of the prosecutrix. The evidence of all the three

witnesses inspires confidence and that there is nothing on record to disbelieve their testimony and to discredit them. Apart from the aforesaid evidence, broken pieces of the bangles were seized from the spot panchanama i.e. from the house of the Appellant where the incident had taken place. The said finding of broken bangles is consistent with the evidence of the prosecutrix and Sharada (PW.3). The submission of the learned counsel for the Appellant, that the possibility of it being a case of consent, is devoid of merit, considering that the prosecutrix was a minor and the fact, that there is no material on record to suggest the same, not even in the cross.

23. Considering the evidence on record, no interference is warranted in the impugned Judgment and Order. The learned Judge has rightly convicted the Appellant for the offence punishable under Section 376 of the Indian Penal

Code, after considering the evidence on record.

24. Accordingly, the Appeal is dismissed.

25. In view of disposal of the Appeal, Cri.Appln.No.819 of 2016 does not survive and the same stands disposed of accordingly.

(REVATI MOHITE DERE, J.)