

Anand

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

CRIMINAL APPEAL NO.970 OF 2013

Rahul alias Sunil Mahadu Dalvi .Appellant
Age : 27 years
R/at : Umbarthan
Tal.Surgana,
District – Nasik.
(Now in Nasik Road
Central Jail, Nasik)

Vs.

The State of Maharashtra .Respondent
(Through Panchavati Police
Station, Nasik.)

Mrs.Rohini Dandekar, Advocate, for the Appellant
Mr.A.S.Shitole, APP, for the Respondent – State

CORAM : REVATI MOHITE DERE, J.

DATE : 15.06.2016

ORAL JUDGMENT

. By this Appeal, the Appellant has
impugned the Judgment and Order dated 28.09.2011
passed by the learned Adhoc Assistant Sessions
Judge-II, Nasik, convicting and sentencing him
as under :-

(i) For the offence punishable under Section 376(2)(f) of the Indian Penal Code to suffer rigorous imprisonment for 10 years and to pay fine of Rs.5,000/-, in default to suffer simple imprisonment for 3 months.

(ii) For the offence punishable under Section 363 of the Indian Penal Code to suffer rigorous imprisonment for 7 years and to pay fine of Rs.3,000/-, in default to suffer simple imprisonment for 2 months.

Both the aforesaid sentences were directed to run concurrently.

2. A few facts as are necessary to decide the Appeal are as under :-

A three year old girl (name withheld) went missing on 29.04.2009. Pursuant thereto, her mother (Complainant) lodged a missing complaint with the Panchavati Police Station, Nasik. On 04.05.2009, the police informed the Complainant, that the girl was found by the Police, Abhona Police Station, pursuant to

which, the girl's father went to the said police station and brought her back home. On her return back home, the Complainant learnt, that two sadhus had found her daughter, crying on Martand Rishi Parvat(Hill) at Vani on 02.05.2009 and that the said sadhus had handed over her daughter to the Police Patil of Martand Pimpri village, who in turn informed the Abhona Police Station about the same. In the interregnum, the girl stayed at the Police Patil's house, on the request of the Police. After the girl was brought home, everytime she urinated, she would cry and hence, the Complainant inspected her private part and found that there was swelling and redness on the said area. Accordingly, the Complainant went to the Police Station, who referred the girl for medical examination to the Civil Hospital, where she was admitted. The medical examination revealed that the girl was subjected to rape. Accordingly, a complaint was lodged by the girl's mother with the Panchavati

Police Station alleging offences punishable under Sections 376(2)(f) and 363 of the Indian Penal Code.

On 25.02.2010, the Appellant came in the vicinity, where the Complainant and her family were residing. The victim girl on seeing the Appellant, started crying and pointed out to the Appellant, pursuant to which he was apprehended and brought to the police station, by the Complainant and others. The police after making necessary inquiries, arrested the Appellant.

3. After completion of investigation, charge-sheet was filed in the Court of the learned Judicial Magistrate First Class, Nasik. As the offences were exclusively triable by the Sessions Court, the case was committed to the Court of Sessions, Nasik. The Appellant pleaded not guilty and claimed to be tried.

4. The prosecution in support of its case examined as many as 9 witnesses; PW.1 - Umesh Sukhdeo Gangurde - Panch (spot panchanama); PW.2 - Deepak Narayan Shirsath who identified the Appellant on the basis of the sketch, Exh.11); PW.3 (name withheld) (mother of the Complainant); PW.4 - Avinash Laxman Bharitkar - panch (spot panchanama from where the girl was abducted); PW.5 - Jalindar Khanderao Jadhav (the person with whom the Appellant was employed for a few days and who identified the sketch at Exh.11); PW.6 - Dr. Gorakhnath Kisanrao Gore - Medical officer, Civil Hospital, Nasik, who examined the victim girl; PW.7 - Rakesh Pratap Pawar (panch, to the seizure panchanama of the girl's frock and diary); PW.8 - Uglal Dev Idas Jovale - Police Patil of Martand Pimpri and PW.9 - PSI Anand Pandurang Magar - the investigating officer of Panchavati Police Station, Nasik. The Appellant did not examine any witness in support of his case. His defence was of denial and false

implication.

5. The learned Adhoc Asstt. Sessions Judge-II, Nasik, after considering the evidence on record was pleased to convict the Appellant as stated in Para 1, for the offences punishable under Sections 376(2)(f) & 363 of the Indian Penal Code.

6. Learned counsel for the Appellant assailed the Judgment on several grounds. She submitted that the prosecution case rests on circumstantial evidence and that the circumstances relied upon by the prosecution are not sufficient to convict the Appellant. She submitted that the prosecution had failed to prove the identity of the Appellant, as being the person, who had committed the alleged offence of rape on the victim girl. According to her, as the identity of the Appellant was not established, the Appellant ought to be given the

benefit of the doubt.

7. Learned APP supported the impugned Judgment and Order convicting and sentencing the Appellant as stated in Para 1. He submitted that the circumstances on record were sufficient to show the complicity of the Appellant and that the identity of the Appellant was well established by the witnesses. He submitted that the medical evidence on record clearly established that the victim girl was subjected to sexual assault by the Appellant and as such, no interference was warranted in the impugned Judgment and Order of conviction and sentence.

8. Perused the entire evidence on record and all the documents relied upon by the parties. PW.9 - PSI Anand Pandurang Magar investigated the said case. He has in his evidence deposed that one lady (name withheld) had come to the Panchavati Police Station and

informed that her daughter was missing from 29.04.2009. He has stated that pursuant to the said information, PSO - H.C.Sonawane recorded the lady's missing complaint, which is at Exh.17. He has stated that the said lady had furnished her daughter's photograph, which was pasted on the missing complaint, which is at Article 'A'. He has stated that on receipt of the said complaint, he sent wireless messages to all the police stations, in Nasik District and also issued public notices in all leading newspapers as well as local TV channels. He has produced all the relevant documents in support of the same and the said documents have been exhibited.

9. He has further deposed that on 03.05.2009, he received a phone call from Abhona Police Station, Taluka - Kalwan, District - Nasik, disclosing that the missing girl had been found. Pursuant to the said information, he sent

Police Constable Sonawane alongwith the father of the missing girl to Abhona Police Station. He has stated that when Police Constable Sonawane and the father of the girl went to Abhona Police Station, they learnt that the said girl was in the custody of the Police Patil of Martand Pimpri village, which is in the jurisdiction of Abhona Police Station. The custody of the missing girl was, thereafter, handed over to her father and the statement of Uglal Devilal, the Police Patil was recorded and the missing complaint was accordingly disposed of.

10. PW.9 - PSI Magar has further deposed that on 06.05.2009, the parents of the victim girl came to the police station and informed him, that their daughter had swelling and redness on her genitals and that some of her internal parts were injured. Accordingly, he sent the victim girl for medical examination to the Civil Hospital with LPC alongwith a request

letter to the Medical officer. On receipt of the medical opinion of the Medical officer, stating that the victim girl had been raped, the victim girl's mother lodged a complaint with the Panchavati Police Station, which was registered vide C.R.No.224 of 2009 for the alleged offences punishable under Sections 363 and 376(2)(f) of the Indian Penal Code. The said FIR is at Exh.18. PW.9 - PSI Anand Magar has deposed that during investigation, he had recorded the statement of the victim girl's father (name withheld) as per his narration. He has deposed that the girl's father, who expired one year prior, had disclosed to him, that when he and his wife would go for work, their three children (including the victim girl) would play nearby one chatri. He has stated that the said girl's father had further disclosed to him, that 2-3 days prior to the incident, one unknown person was loitering in the area, around his family; that the said person used to take the victim

girl and play with her for some time; and that on the day when his daughter went missing, the said person also disappeared. He has also stated that the girl's father had given the description of the said person, pursuant to which, a sketch of the said person was prepared by Professor Netawate. He has stated that the said sketch was thereafter circulated to all the police stations in Nasik District and was published in all leading newspapers and local TV channels. Thereafter, the spot panchanama, from where the victim girl went missing was prepared. The said panchanama is at Exh.21. He has stated that the said sketch was shown to the witnesses, who identified the person shown in the sketch, pursuant to which their statements were recorded.

11. According to PW.9 - PSI Anand Magar, on 09.05.2009, the girl's father brought the clothes worn by his daughter and one diary to

the police station. The said articles were seized under a panchanama (Exh.38). PW.9 has stated that the sketch of the person, was also shown to Appa Charoskar, Jalindar Jadhav, Baliram Rama and others, who identified the person therein, as Sunil (Appellant). He has stated that from all the statements, it appeared that the person in the sketch was "Sunil".

12. PW.9 - PSI Anand Magar has further stated that on 14.05.2009, he had gone to one Ashram in Kotamgaon, in search of the sadhus, who had handed over the victim girl to the Police Patil of Martand Pimpri, however, they could not be traced. Accordingly, he recorded the statement of Kachru Mhaske, the Sarpanch of Kotamgaon. He has further stated that on 25.02.2010, the victim girl's parents came to the police station alongwith the victim girl, Deepak Shirsath and the Appellant. He has stated that on enquiry, the parents disclosed that the

Appellant was loitering in the area and when the victim girl saw him, she started crying and told her parents that he had taken her away and tortured her. PW.9 has stated that to ascertain the said fact, he took the victim girl near the Appellant and asked her to tell him who he was, pursuant to which the girl started crying incessantly and appeared to be scared. Thereafter, the supplementary statements of the witnesses were recorded. On being questioned, the Appellant disclosed his name as Rahul Mahadu Dalvi. Thereafter, the Appellant was arrested and sent for medical examination. After collecting all the evidence including the C.A.Report, charge-sheet was filed as against the Appellant.

13. PW.6 - Dr. Gorakhnath Kisanrao Gore examined the victim girl. He has stated that the victim girl was admitted to the hospital on 06.05.2009 and that she was examined initially

by Dr.Thakur in the Casualty department. He has stated that the injuries as disclosed by Dr. Thakur in the report, were as under :-

"Healed burn wound on forehead and healed burn wound on the right cheek below the right eye."

He has further deposed that after Dr. Thakur conducted the physical examination of the victim girl, she was brought to the Gynaecological department, where he conducted her genital examination. He has stated that on examination of her genital area, he found visible external injuries.

"The vulva was swollen erythematus i.e. there was swelling and redness. In the vagina, there was a tear noted about 1 cm x $\frac{1}{2}$ cm just below the urethra. The hymen was torn. There was also tenderness present. The forchette was also found torn and lacerated. Only tip of the finger was admissible for P/V examination."

On completion of the examination, he opined that there was evidence of rape and accordingly, he issued a Certificate. He has identified the Certificate issued by him as well as the Certificate issued by Dr.Thakur. After examination, PW.6 also took samples of nails, vaginal swabs and vaginal smear. He did not collect blood samples, as the patient was a minor and she was not co-operative. He put all the samples in separate sterile bulbs and sealed the same and thereafter, handed it over to the police constable, for forwarding the same to the Chemical Analyzer. 'X' rays of the victim girl were also taken and the same were produced in the Court and were marked as Exhs.35 & 36.

PW.6 – Dr. Gore has further stated as under :-

“Introitus is a part of the vulva. There can be pressure on the vulva only if the penis is forcibly inserted in the introitus. There was bleeding from forchette and lacerated wound in the introitus because of forcible insertion of the penis.”

He has further stated that the relatives of the victim girl at the time of admission had narrated that the victim girl had complained that one man had slept on her.

14. There is no substantial cross-examination of the said witness, except the suggestion, that he had filed false and fabricated documents, which was denied by him. From the medical evidence and the case papers which are at Exhs.26 & 27, it is clearly evident that the victim girl was raped.

15. The question that arises for consideration is, whether the prosecution has established the identity of the Appellant, beyond reasonable doubt as being the person, who committed rape on the victim girl ? In order to establish the same, the prosecution has examined PW.2 - Deepak Narayan Shirsathh, PW.3 - Complainant, the victim girl's mother and PW.5 -

Jalindar Khanderao Jadhav, who identified the sketch, as being that of the Appellant. At the outset, it would be pertinent to note, that the police had recorded the statement of the father of the victim girl. The said witness could not be examined, as he had expired, before the recording of the evidence in this case commenced. However, the said statement of the victim girl's father was brought on record, by PW.9 - PSI Anand Magar, the investigating officer, who had recorded his statement. It has come in the evidence of PW.9 - PSI Anand Magar, that the victim girl's father had stated that at about 2-3 days prior to the incident, one unknown person was loitering around the family; that he used to take the victim girl and play with her for some time; and that on that day when his daughter went missing, the said person also disappeared. Pursuant to the description given by the victim girl's father, a sketch was prepared by Prof. Netawate and the

said sketch was circulated to all the police stations in Nasik District and in all leading newspapers and local TV channels. It is pertinent to note, that the aforesaid evidence which has come on record through PW.9 - PSI Anand Magar, the investigating officer has literally gone unchallenged. The said sketch drawn on the basis of the description given by the victim girl's father was shown to PW.2 - Deepak Shirsath and PW.5 - Jalindar Jadhav, who identified the sketch to be that of the Appellant. It is pertinent to note, that PW.2 - Deepak Shirsath has in his evidence stated that he had seen the Appellant. The said witness has further stated that during investigation, the police had shown him a sketch and that he had identified the Appellant, on the basis of the said sketch. He has further stated that from the day when the victim girl was kidnapped, even the Appellant was not seen. He has stated that the victim girl was found about 3-4 days after the

incident and that he learnt that she was raped. He has stated that the Appellant returned back, after a hair cut and after looking at him, the victim girl started crying. He has stated that pursuant to the same, the parents of the victim girl, two others and himself held the Appellant and brought him to the Panchavati Police Station and handed him over to the police. The said witness has identified the Appellant and has stated that prior to the incident, the Appellant had long hair and a beard and after his return, he had cut his hair and was without a beard. Infact, it has come in the cross-examination of the said witness, that he had seen the victim girl being taken away by the Appellant, from a distance and that he chased him, but he could not find him. PW.5 - Jalindar Jadhav has also identified the Appellant, on the basis of the sketch (Exh.11) shown to him. He has stated that he was engaged in the business of bricks and kiln for the last ten years and that the police

had come to his house and shown him a sketch and asked whether he could identify the person shown in the sketch. He has stated that the said person was working with him for four days about two months prior and as his behaviour was improper, he was dismissed. PW.5 disclosed the name of the person in the sketch, as being Sunil (Appellant), hailing from Surgana. PW.5 has identified the person depicted in the sketch and the person in the Court, as being the same i.e. the Appellant. It is, thus, evident that both these witnesses had identified the Appellant on the basis of the sketch that was prepared on the description given by the girl's father and as such, the identity of the Appellant has been clearly established.

16. PW.3 - Complainant, the mother of the victim girl had lodged the missing complaint, as well as, the FIR. She has stated that on 29.04.2009 when she had gone for work, her

daughter and son were playing near the dome (chatri) and at about 1.00 p.m. to 1.30 p.m., her daughter went missing. She has stated that on 30.04.2009 she lodged a missing complaint with the Panchavati Police Station, Nasik, being Exh.17. She has stated that after 3-4 days, police informed them, that their daughter was found on the Martand Rishi Parvat (Hill). She has stated that pursuant to the said information, her husband and two police constables went to bring her back. She has stated that her daughter was staying with the Police Patil and was brought back from his residence. She has further stated that while bathing her daughter, she saw certain injuries on her private parts, pursuant to which she went to the police station. She has stated that the police then sent her daughter for medical check up, where she was admitted; and after examination, the doctor disclosed that her daughter was subjected to rape, pursuant to

which, she lodged a complaint/FIR, with the Panchavati Police Station, being Exh.18. She has stated that after a couple of days i.e. on 25.02.2010, while they were having food at the dome (chatri), her daughter got agitated on seeing the Appellant and went and held one person tightly. She has stated that when she questioned her daughter, as to why she was upset and agitated, she disclosed that the Appellant had given her cigarette burns on her face and that the Appellant had taken her to one Hill and had slept on her person. She has stated that pursuant to the said information, she, her husband and one neighbour held the Appellant, put him in a Rickshaw and took him to the police station. She has stated that the Appellant tried to escape from the said Rickshaw. She has further stated that when the police questioned him, the Appellant disclosed his name as Rahul Dalvi. Nothing significant has come in the cross-examination of the said witness to

discard, discredit her evidence or to disbelieve her testimony.

17. PW.8 - Uglal Dev Jovale, Police Patil of Martand Pimpri has deposed that on 02.05.2009, two unknown sadhus brought one small girl down from Martandeya Hill at about 3.00 p.m. He has stated that on inquiry, one of them disclosed his name as Bhaurao Dada Bhasane. He has stated that the said two sadhus disclosed to him, that they had found the girl crying on the Hill and hence, had brought her down. He has stated that he took the two sadhus and the girl to Abhona Police Station. He has further stated that the police requested him to keep the girl in his custody, till the police traced out her family, pursuant to which, he took the girl home. He has further stated that police thereafter, informed him that the girl belonged to Nasik and that on 03.05.2009, the girl's father came alongwith two police, pursuant to

which he handed over the girl to her father.

18. The defence of the Appellant under Section 313 of the Code of Criminal Procedure was of total denial. From the evidence on record that has come, it is clear that the prosecution has proved that the victim girl, aged three years was raped. It is also evident that identity of the Appellant was proved by PW.2 - Deepak Shirsath and PW.5 - Jalindar Jadhav, on the basis of the sketch shown to them as being that of the Appellant. The Appellant has also been identified by the said witness in Court. The said witnesses have identified the Appellant in the Court, on the basis of the sketch, the description of which was furnished by the girl's father. It is also evident from the evidence of PW.3, the mother of the victim girl, that when the victim girl saw the Appellant, she was scared, upset and agitated and disclosed to her that it was the Appellant, who had given

cigarette burns to her and had slept on her. There is no substantial challenge to the said evidence. The Appellant was apprehended immediately by PW.3 and others and taken to the police station. From the evidence on record, it cannot be said that it is a case of mistaken identity and that the Appellant was not the person, who committed the alleged act. Prosecution has proved its case as against the Appellant, beyond reasonable doubt.

19. Considering the material on record, no interference is warranted in the impugned Judgment of conviction and sentence. Accordingly, the Appeal is dismissed.

(REVATI MOHITE DERE, J.)