

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 1137 OF 2008**

Sunil Maruti Padval	)	
Age: 24 years, Occ. Service,	)	
R/o. Shastri Nagar, Kothrud, Pune.	)	
(At present detained at Yerwada	)	
Central Prison, Pune.	).	Appellant.
vs.		(Orig. Accused No.1)
The State of Maharashtra	...	Respondent

**ALONG WITH
CRIMINAL APPEAL NO. 1284 OF 2008**

Sham Vitthal Nimbale	)	
Age 20 years, Occu: Service,	)	
R/at: Mahatoba Nagar, Kothrud, Pune.)		
Presently detained at Yerawada	)	
Central Prison, Pune.	)..	Appellant
vs.		(Orig. Accused No.3)
1. The State of Maharashtra	)	
2. Sarika Sudham Bhagat	)	
Age: 18 years, Occu: Student	)	
Residing at Yerandawana, Pune.	)..	Respondents

Mr. Bhushan Deshmukh h/f Mr. uday Warunjikar for the appellant in Appeal No.1137 of 2008.

Mr. Omkar Nagwekar, Court appointed Advocate for appellant in Appeal No.1284 of 2008.

Mr. Arfan Sait, APP, for the State.

**CORAM: SMT.SADHANA S.JADHAV,J.
RESERVED ON: 1st December, 2015.
PRONOUNCED ON: 7th March, 2016.**

JUDGMENT:

The appellants herein are the original accused No.1 and 3

respectively in Sessions Case No.215 OF 2006. The appellants are convicted for the offence punishable under Section 376(2)(g) of the Indian Penal Code and sentenced to suffer R.I. for ten years and fine of Rs.3,000/- each in default further R.I. for one year. They are also convicted for the offence punishable under Section 506 read with Section 34 of IPC and sentenced to R.I. for two years and fine of Rs.500/- each. The accused No.1 is also convicted for the offence punishable under Section 366-A of IPC and sentenced to suffer R.I. for 3 years and to pay fine of Rs.1,000/- in default to pay fine, to undergo further R.I. for 2 months by the learned Sessions Judge, Pune, vide judgment and order dated 19.7.2008.

2. Such of the facts necessary for the decision of this appeal are as follows :-

(a) On 20.11.2005 at about 8 p.m., the prosecutrix, who happened to be 15 years old, had been to Chaitanya Stationary Shop at Poud Road for purchasing the files. The shop was closed. She was, therefore, returning home. While she was passing through Maji Sainik Vasahat, Kothrud, accused No.1 Sunil, who was acquainted with her, approached her on a motorcycle along with accused No.2. Accused No.2 had expressed his

liking for her. The prosecutrix had responded negatively. Sunil then offered to take her home on his motor-cycle. She had refused to offer. However, she was made to sit on the motorcycle in between Sunil and Kisan. They had allegedly gagged her mouth and threatened her of dire consequences. She was then taken near Doordarshan Kendra. She was forcibly taken in the bushes. She was raped by both accused Nos. 1 and 2. After some time, accused No.2 returned along with his friend, who had then forcibly taken her to Gujarat Colony in the office of a credit society. The said office was opened by Bhagwan. The prosecutrix was pushed inside the office of the credit society. She was again ravished by accused Nos. 1 and 2. It is alleged that she was ravished by original accused Nos. 1, 2, 4 and 5.

(b) Despite repeated enquiries, the prosecutrix had not disclosed the incident to her parents initially. Thereafter, in the afternoon, she had disclosed to her mother the entire incident. She had led her parents and neighbours to the office of credit society. Original accused No.5 – Bhagwan was present in the office. He was taken to Kothrud Police Station. The prosecutrix had then given the complaint at Kothrud Police Station. On the basis of her complaint, C.R. No.702 of 2005 was registered. Accused No.5 -Bhagwan was arrested. The prosecutrix was

referred to Sassoon Hospital for medical examination. The prosecutrix was examined by Dr. Ambuja Govindraj, who had examined her and found the evidence suggested of penetrative vaginal intercourse.

3. The supplementary statement of the prosecutrix was recorded on 24.11.2005 from which it had transpired that when she was detained in the office of Credit Society, accused Nos. 1 and 2 had left the scene to fetch food and had returned along with accused No.3. Test identification parade of all accused was held on 18.1.2006 in Yerwada Jail. The prosecutrix had identified all the accused. After completion of investigation, charge-sheet was filed on 24.2.2006. The case was committed to the Court of Sessions and was registered as Sessions Case No.215 of 2006. The prosecution examined 11 witnesses to bring home the guilt of the accused.

4. The most relevant witness would be PW-1 since she is the prosecutrix. PW-2 is her mother. PW-3 is the Executive Magistrate, who has conducted the test identification parade. PW-4 -Pandurang Vithoba Dangat is the panch witness to the scene of offence. He has resiled from his earlier statement. PW-5 has recorded the spot panchnama. PW-6 Ashok Pisal has

reduced the complaint into writing. PW-7 is the Manager of the credit society. PW-8 is the panch for seizure of clothes from the hotel.

5. PW-9 – Brahmanand Naikwadi had arrested original accused No.5 and seized the motor cycle under a panchnama. PW-10 P.I. Rajaram Shinde who had recorded the statements of witnesses. PW-11 – Dr. Ambuja Govindraj had examined the prosecutrix. The patient had given history that on 21.11.2005, at about 8.30 p.m., when she was returning from the stationery shop, she was accosted by two boys by name Sunil and Kisan, out of whom Sunil was her neighbour. They had taken her to T.V.Tower. Kisan had ravished her. She was then taken to credit society . There Sunil and Kisan accompanied by two other boys, one was a watchman and the other boy was unknown. She was ravished by four boys and in the morning they had left her near her house. The witness has admitted in the cross-examination that in the course of examination, he did not find any bleeding, however, there was inflammation. Swelling is one of the signs of inflammation. He did not notice any other injuries.

6. It is true that the victim was acquainted with Sunil and Kisan, who, according to her, had ravished her first in point of time. The accused Kisan

had challenged his conviction in Sessions Case No.215 of 2006 by filing Criminal Appeal No.914 of 2008. The said appeal was withdrawn on 19.10.2011. Hence, his conviction was confirmed. Original accused No.5 had challenged the conviction by filing Criminal Appeal No.833 of 2008, which was allowed to be withdrawn on 3.4.2012. Hence, his conviction was confirmed.

7. The present appellant – Sunil Maruti Padwal was arrested on 22.11.2005 and was never granted bail at the time of trial or at the time of admission of the appeal.

8. The learned counsel for the appellant submits that the present appellant has undergone the substantive sentence imposed upon him. The appellant Sunil Padwal has undergone the substantive sentence and does not wish to challenge the conviction. In view of this, the appeal filed by Sunil Padwal deserves to be dismissed. The conviction and sentence imposed upon the appellant – Sunil Padwal is hereby upheld.

9. Sham Nimbale, who is original accused No.3, is granted bail by this Court vide order dated 6.3.2009 and has been on bail. It is pertinent to note that PW-1, in her cross-examination, has categorically admitted that accused No.3 was the boy who was brought by accused Sunil and Kisan.

The witness had identified Sunil, Kisan and Bhagwan. She had also pointed out accused Sham and Rahul and had identified them from amongst the five accused sitting together. Identification in Court is substantive evidence. She has pointed out accused Sham Nimbale.

It is elicited in the cross-examination that PW-1 prosecutrix had not read her complaint before she signed it. According to her, she had specifically told the police that the alleged heinous offence is committed by five persons. She has further stated in the cross-examination that the persons who were made to stand for identification parade i.e. dummies were of different description of height, health and age. According to her, the girls could have identified the witnesses on the basis of their particular characteristics. She has not given in the FIR any particular characteristics.

10. As far as recovery of articles is concerned, in the present case, there was no recovery at the instance of accused Sham Nimbale. According to the learned counsel for the appellant, he was only standing guard to the premises. The fact that the prosecutrix was purposely taken to the secluded area may not inspire confidence of the Court. That it could have been the threat of the police officers. The very fact that the dummies were not

having similar features, the test identification parade cannot be relied upon. That there is positive evidence that the present appellant had accompanied the co-accused and participated in the second incident which had taken place in the office of the credit society. The fact that the prosecutrix has identified him before the Court is sufficient to hold that there is positive involvement of the appellant. The prosecutrix has categorically proved the involvement of the appellant.

11. The prosecutrix (PW-1) has deposed before the Court that Sunil and Kisan had taken her to Doordarshan Kendra where she was taken in the bushes. From Doordarshan Kendra she was taken to Tapi-Sahakari Patpedhi, Gujarat Colony (hereinafter referred as "Credit Society"). There Sunil and Kisan had left her with Bhagwan and accused No.4. They returned back with liquor and eatables and were also accompanied by one more boy.

12. PW-1 has further deposed that accused No.3 present before the Court is the boy who was brought by accused Sunil and Kisan afterwards. The prosecutrix had identified all the accused, before the Court, by attributing specific role and their names were written as per the information

given by them.

13. In para 43 of her deposition it appears that she was asked 'whether Accused No.3 Sham Vitthal present before the Court was the person who was brought by Kisan at Doordarshan Kendra' The prosecutrix has rightly answered in the negative for the simple reason that it is her case specifically that accused No.3 was brought by Sunil and Kisan at the office of Credit Society when they had returned with liquor and eatables and that the said boy had ravished her in the office of Credit Society. The act of rape is attributed to accused No.3. She has denied that accused No.3 had not reached her to her house. It appears from the records that on the basis of answer given in para 43 of the deposition of PW-1, the appellant – accused No.3 was enlarged on bail. This Court cannot be oblivious of the fact that the prosecutrix has identified accused No.3 before the Court as the person who had committed rape on her in the office of the Credit Society. There is no reason for false implication or mistaken identity. The evidence of PW-1 inspires the confidence of the Court. Identification in T.I. Parade is only a corroborative piece of evidence.

14. The appellant – Sham Vitthal Nimbale was in jail from

25.11.2005 to 6.3.2009 i.e. when he was enlarged on bail by this Court. He has undergone imprisonment for 3 years and 4 months approximately. The appeal is listed for hearing after 7 years. The incident is of the year 2005. Hence, the appellant deserves to be sentenced to R.I. for 7 years instead of 10 years.

ORDER

Criminal Appeal No. 1137 of 2008

- (i) The appeal is dismissed.
- (ii) The conviction and sentences imposed upon the appellant – Sunil Maruti Padval are upheld.
- (iii) The sentence of fine is maintained.

Criminal Appeal No.1284 of 2008

- (i) The appeal is partly allowed.
- (ii) The appellant – Sham Vitthal Nimbale is convicted for the offence punishable under Section 376 of IPC and sentenced to R.I. for 7 (seven years).
- (iii) The sentence of fine is maintained.
- (iv) The appellant is granted six weeks' time to surrender to serve the rest of the sentence.

(v) In the eventuality that the appellant does not surrender within six weeks from today, the learned Sessions Court, Pune, shall issue non-bailable warrant against the appellant calling upon him to serve the rest of the sentence.

Both the Appeals stand disposed of accordingly.

(SMT.SADHANA S.JADHAV, J.)