

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

CRIMINAL APPEAL NO.334 OF 2017

Gourav Narendra Singh
Age : 28 years, Occu.: Business,
R/o. Mukkam Kapasa,
Post. Umbarpada, Palghar, Dist. Thane
(Presently lodged at Arthur Road Jail)

...Appellant

Versus

1. The State of Maharashtra
(At the instance of Santacruz Police Station,
Mumbai vide crime bearing No.100 of 2013)

2. The Prosecutrix min. - "X",
Add:- xxxxxxxxxxxx,
xxxxxxxxxxxxxxxxxxxxxxxx,
xxxxxxxxxxxxxxxxxxxxxxxx,
xxxxxxxxxxxxxxxx.

...Respondents

Mr. Vinod V. Kashid for the Appellant

Mr. S. V. Gavand, A.P.P for the Respondent No.1– State

CORAM : REVATI MOHITE DERE, J.
RESERVED ON : 8th FEBRUARY 2021
PRONOUNCED ON : 25th MARCH 2021

JUDGMENT :

1 By this appeal, the appellant has impugned the judgment and
order dated 29th March 2017, passed by the learned Additional Sessions

Judge, Greater Bombay, in Sessions Case No.500 of 2013, convicting and sentencing him as stated hereinunder :

- for the offence punishable under Section 376 of the Indian Penal Code, to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.2,00,000/-, in default of payment of fine, to suffer further rigorous imprisonment for 1 year;
- for the offence punishable under Section 506 of the Indian Penal Code, to suffer rigorous imprisonment for 2 years and to pay a fine of Rs.50,000/-, in default of payment of fine, to suffer further rigorous imprisonment for 3 months.

Both the aforesaid sentences were directed to run concurrently.

The fine amount, if recovered, was to be paid as compensation to the victim.

2 The prosecution case, in brief, is as under :

The appellant is the cousin brother of the prosecutrix, who was aged 13 years (a minor) at the time of the alleged incident i.e. the grandfather of the appellant and grandfather of the prosecutrix are real brothers. The prosecutrix was residing with her maternal grandparents and maternal uncle and aunt, at the relevant time. As the prosecutrix's

grandmother was diagnosed with Cancer, she was frequently required to visit the hospital for treatment and would be accompanied by the prosecutrix's grandfather and maternal uncle and aunt, as a result of which, the prosecutrix would often remain alone at home. The house key would be kept with the neighbour-Gulabi Giri and the prosecutrix, after returning from the school, would pick up the said key from Gulabi Giri. The appellant would visit the prosecutrix's house often.

According to the prosecutrix, in February 2012, the appellant took the key from the neighbour-Gulabi Giri, opened the house and was sitting on the mezzanine floor of the house, watching television. It is the prosecution case, that when the prosecutrix returned home from school, the appellant asked her for some biscuits and when the prosecutrix brought the biscuits, the appellant pulled her towards him and sexually assaulted her. The appellant is also alleged to have clicked nude photographs of the prosecutrix and threatened to upload the same on the internet, if she disclosed the incident to anyone. The appellant, on the basis of the said photographs, during the period February 2012 to September 2012, sexually assaulted the prosecutrix on number of occasions, by threatening to defame her and her family, by uploading the photographs on the internet.

When the prosecutrix's parents came to Mumbai from their native place, the prosecutrix went to reside with them. On seeing bodily changes in her, her father questioned her, pursuant to which, she disclosed that she was sexually assaulted by the appellant. The prosecutrix's father informed the same to the grandfather, pursuant to which, FIR was lodged as against the appellant. During the course of investigation, the appellant was arrested and after investigation, charge-sheet was filed as against the appellant for the aforesaid offences.

Charge was framed against the appellant, to which, the appellant pleaded not guilty and claimed to be tried.

The prosecution, in support of its case, examined 7 witnesses i.e. PW 1 - prosecutrix; PW 2 – maternal grandfather of the prosecutrix; PW 3 – Santosh Jha (panch to the spot panchanama); PW 4 – Omprakash Jaiswal (panch to the seizure of appellant's clothes); PW 5 - Dr. Rachana Shah, Medical Officer at J.J. Hospital, who examined the prosecutrix; PW 6 – Pramila Dhondkar (PSI attached to the Santacruz Police Station), who registered the FIR and conducted part of the investigation; and PW 7- Babaji Awhad, Police Officer attached to the Santacruz Police Station, who also conducted the investigation and filed charge-sheet in the said case.

After the prosecution examined its witnesses, the statement of the appellant was recorded under Section 313 of the Criminal Procedure Code. The defence of the appellant was that of denial and false implication. According to the appellant, he was falsely implicated in the said case on account of a pending property dispute between the prosecutrix's grandfather and appellant's father and grandfather and hence, at the instance of the prosecutrix's grandfather, the complaint was lodged.

After hearing the parties and after considering the evidence on record – both, oral and documentary, the learned Additional Sessions Judge, Greater Bombay, convicted and sentenced the appellant as stated in para 1 above.

3 Learned counsel for the appellant submitted that the prosecution had not proved its case against the appellant beyond reasonable doubt. He submitted that the appellant has been falsely implicated at the instance of prosecutrix's grandfather, on account of a property dispute between the prosecutrix's grandfather and the appellant's father and grandfather. He further submitted that there is a delay of 13 months in lodging the FIR, inasmuch as, the alleged incidents are stated to have taken

place between February 2012 to September 2012, whereas, the FIR was lodged on 9th March 2013. He further submitted that the medical evidence also does not support the prosecution case of sexual assault on the prosecutrix. He further submitted that the prosecutrix has also failed to prove that the prosecutrix was a minor at the relevant time. He submitted that the prosecution has not examined Gulabi Giri, the neighbour, with whom the house key was kept, thus, belying the prosecution case that the appellant had taken the keys from Gulabi Giri and as such, there is no corroboration to the same. Learned counsel also relied on the opinion given by PW 5-Dr. Rachana Shah that, it could not be commented whether rape/sexual intercourse had taken place or not. He submitted that the prosecution evidence not being reliable, cannot be relied upon in the absence of any corroboration and that the testimony of the prosecutrix cannot be accepted as gospel truth. According to the learned counsel, the prosecutrix was used as a scapegoat by her grandfather, to falsely frame the appellant because of a property dispute. He also submitted that there are several discrepancies in the evidence of PW 1 and PW 2, rendering their evidence unreliable. He submitted that although the prosecutrix has alleged that MMS clips were taken, the mobile phone of the appellant has not been recovered and as such it is not proved that the appellant had taken any objectionable video clip.

4 Learned A.P.P submitted that no interference was warranted in the impugned judgment and order. He submitted that a large part of the prosecutrix's evidence has gone unchallenged. He submitted that the evidence of the prosecutrix inspires confidence and has rightly been relied upon by the learned trial Judge. He submitted that there are no material omissions/contradictions in her evidence. Learned A.P.P further submitted that the prosecution had proved the date of birth of the prosecutrix i.e 13th November 1990, which shows that she was a minor at the time of the alleged incident. Learned A.P.P relied on the Birth Certificate issued by the Health Department of BMC under Sections 12 and 17 of the Registration of Births and Deaths Act. He submitted that infact, the appellant has not disputed the prosecutrix's date of birth. According to the learned A.P.P, the defence of the appellant that there was a property dispute, has not been established by the appellant and nor has the Section 29 presumption rebutted by the appellant. He submitted that not a single document has been produced by the appellant to show that there was any civil dispute between the parties.

5 Perused the papers with the assistance of the learned counsel for the parties.

6 The prosecutrix (PW 1), in her evidence, has stated that she was residing with her maternal uncle and aunt and maternal grandparents at the relevant time and that her parents were residing at Jamala, District Jhonpur, Uttar Pradesh. She has stated her date of birth as 13th November 1990. According to PW -1, the house in which she was staying, consisted of one room and a *potmala* (mezzanine floor) above the said room. She has stated that she knew the appellant and that he would frequently visit their house, as they were related; that her grandmother was undergoing medical treatment for cancer during the said period and as such, was required to regularly visit hospital for treatment; that sometimes the appellant would take lunch and dinner in their house; that whenever her grandmother would visit the hospital and they were out, the keys of the house were kept with their neighbour-Gulabi Aunty; that the appellant was aware of the medical treatment given to her grandmother and that the house key was kept with Gulabi Aunty. According to the prosecutrix, whenever her grandmother went for treatment, she was accompanied by her maternal uncle and aunt. She has stated that her school timing was 7:00 a.m to 1:00 p.m, and that Gulabi Aunty was also aware that the appellant would come to their house and therefore she used to handover the house key to him, whenever he asked for it.

PW 1 has further stated that in February 2012, when she returned from school at about 1:45 p.m, she went to Gulabi Aunty's house and asked for house key; that Gulabi Aunty told her that the appellant had taken the key from her, so she went to her house; that she kept her school bag and saw the appellant watching Television on the *potmala*; that she left the house and went to Gulabi Aunty's house; that after some time, appellant called her and asked her whether there was anything to eat in the house and hence, she returned home and gave him biscuits on the *potmala*, where he was sitting; that the appellant held her from behind; that when she tried to rescue herself and shouted, the appellant gagged her mouth with a handkerchief and forcibly pulled her, tied her hands with a *dupatta* and forcibly pushed her on the bed; he touched her on her waist and chest, removed her clothes as well as his and sexually assaulted her. She has stated the details of the act in her evidence. She has further stated that she tried rescuing herself, however, the appellant resisted the same. She has stated that because of the sexual assault, she started bleeding. According to PW 1, after the incident, the appellant threatened her by stating that he had prepared an MMS of the act on his mobile and showed her the MMS; that he threatened her that if she disclosed the incident to anyone, he would circulate the MMS on internet, and that she as well as her grandparents would be defamed and she will have to commit suicide. PW 1 has further

stated that after the aforesaid, the appellant went away and that she put the bed-sheet and her nicker having blood stains in the cupboard, so that, no one would know about the incident. She has further stated that she had abdominal pain, however, as she had tuitions, she washed her face, changed her clothes and went for tuitions. She has stated that when she returned back from tuitions, she was not feeling well and hence, her grandmother asked her what had happened. PW 1 has stated that she told her grandmother that she was not feeling well. She has stated that after taking dinner, she went to sleep. PW 1 stated that after 14-15 days, the appellant again came to their house, when she was alone in the house; showed her the MMS of the previous incident and threatened to circulate the same and defame her and her grandparents. According to PW 1, whenever her grandmother visited the hospital along with the family members, the appellant would come home and threaten to make the video public, and under the said threat, would sexually assault her. She has stated that same went on till September 2012.

PW 1 has further stated that during the said period, her parents shifted to Mumbai with her two brothers and a sister and were staying in a room at Santacruz. She has stated that in September 2012, when she went to reside with her parents, her father found bodily changes in her and

questioned her. She has stated that her father, on one occasion, assaulted her and questioned her about the bodily changes, pursuant to which, she disclosed the incident of sexual assault by the appellant on her. The said disclosure was made in January 2013. She has stated that as her father was addicted to alcohol, her father also took undue advantage of her and touched her private part. She has further stated that her father disclosed the incident of sexual assault by the appellant to her grandparents, pursuant to which, her grandfather took her to Santacruz Police Station, pursuant to which, she lodged a complaint. She has identified her signature on the said complaint/FIR which is at Exhibit 12. She has stated that she was sent for medical examination, where she disclosed to the doctor, the incident that had taken place. She has also stated that she handed over the bed-sheet, school uniform and underpants to the police, which she had kept in a cupboard. She has identified the clothes worn by her at the time of the incident. She has also identified the appellant.

In her cross-examination, PW 1 has admitted that she was residing with her grandparents since she was 6 months old and that her parents would periodically come to Mumbai to meet her; that she had not gone to Uttar Pradesh, even once; that her maternal grandfather i.e. PW 2 is a lawyer; and that it was true that in the police statement, she has given her

age as 13 years and that in March 2013, she was studying in the 8th standard. She has also stated that the house door had 4 keys; that one key was with Gulabi Aunty, one with her grandfather, one with her maternal uncle and one with her grandmother. She has further admitted that it was not possible to hear what was spoken in their room on the first floor, in the house of Gulabi Aunty. She has also admitted that she had not disclosed the incident to her maternal aunt or grandmother on the same day and that she disclosed the incident to her father only when he assaulted her. She has also admitted that she had kept the bed-sheet in her cupboard, which was used by other family members.

7 Despite a grueling cross-examination of PW 1, PW 1 has stuck to her evidence of sexual assault by the appellant as stated by her in her examination-in-chief. She has also in her cross-examination stated that the appellant would come to their house, would show her the video of the sexual act and threaten her not to disclose the incident to anyone or he would make the video public. She has stated that because of the same, she did not disclose the incident of sexual assaults to her grandparents, as she was frightened. She has admitted in her cross-examination that the appellant used to come to their house, show her the video, threaten her and commit forcible intercourse with her and that out of fear, she did not

disclose the same to anybody. She has also admitted in her cross-examination that when her father assaulted her and expressed suspicion with respect to bodily changes in her, she got frightened and disclosed the incident to her father. She has also admitted that she had lodged an FIR against her father for inappropriately touching her, in the Police Station and that the said complaint against her father was lodged on the same day, on which she lodged the complaint against the appellant.

8 It is pertinent to note that there is no cross-examination of PW 1 with respect to her age, that she was 13 years old at the relevant time. Thus, the said evidence of PW 1 that she was a minor aged 13 years has gone unchallenged. Although, there are minor discrepancies, the said discrepancies are not material, inasmuch as, PW 1 has stuck to her case of sexual assault by the appellant. No worthwhile reason has come on record why PW 1 would falsely implicate the appellant, who was related to her.

9 It is well settled that conviction can be based on the sole testimony of the prosecutrix, if it is found to be cogent, reliable and trustworthy. The Apex Court in the case of ***State of Maharashtra vs. Chandraprakash Kewalchand Jain***¹ held that a woman, who is the victim

1 (1990) 1 SCC 550 : 1990 SCC (Cri) 210

of sexual assault, is not an accomplice to the crime but is a victim of another person's lust and, therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice; and that, if the evidence of the prosecutrix inspires confidence, it is not necessary to look for corroboration. Similarly, in the ***State of Punjab vs. Gurmit Singh***², the Apex Court held that in cases involving sexual harassment, molestation, etc., the Court is duty-bound to deal with such cases with utmost sincerity. Minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. Evidence of the victim of sexual assault is enough for conviction and it does not require any corroboration unless there are compelling reasons for seeking corroboration. It was further observed that the Court may look for some assurances of her statement to satisfy judicial conscience, if necessary and that the statement of a prosecutrix is more reliable than that of an injured witness, as she is not an accomplice. The Court further held that delay in filing FIR for sexual offence, even if not properly explained and if found natural, can be relied upon. Relevant portions of paras 8 and 21 are reproduced hereinunder :

"8. ... The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would

2 (1996) 2 SCC 384 : 1996 SCC (Cri) 316

come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. ... Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. ... Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. ...”

“21. ... The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.”

10 Even in ***State of Himachal Pradesh vs. Raghubir Singh***, the Apex Court held that there was no legal compulsion to look for any other evidence to corroborate the evidence of the prosecutrix before recording an order of conviction. Evidence has to be weighed and not counted and that conviction can be recorded on the sole testimony of the prosecutrix, if her

evidence inspires confidence and there is absence of circumstances which militate against her veracity.

11 Thus, the legal position that emerges is, that the statement of the prosecutrix, if found to be cogent, trustworthy, natural and reliable, requires no corroboration and that the Court may convict an accused on the sole testimony of the prosecutrix.

12 Keeping the aforesaid legal position in mind and having perused the evidence of the prosecutrix, I am of the opinion that PW 1's evidence inspires confidence, is cogent and trustworthy. A perusal of the evidence of PW 1 reveals that the appellant sexually assaulted her when she was alone at home and thereafter, continued to sexually exploit her by showing her the MMS of their act and by threatening to circulate the same, so as to defame her and her grandparents. PW 1 was only 13 years of age and was being exploited by her own cousin, aged 28 years. PW 1's evidence inspires confidence and clearly points to the complicity of the appellant.

13 Be that as it may, in the facts, the evidence of PW 1 is duly corroborated by PW 2 – her grandfather. PW 2 has stated that he was

residing with his wife, son, daughter-in-law and PW 1. He has stated that PW 1's parents were staying in Uttar Pradesh and in 2012 had shifted to Mumbai, after which, PW 1 went to reside with them. PW 2 has further stated that the appellant is the grandson of his eldest brother-Ram Pujan Singh and that the appellant would visit their house as they had a joint family system at his native place. He has stated that in January 2012, the appellant would come frequently to their house in their absence. He has stated that they were busy between January to September, as his wife was undergoing treatment for cancer. PW 2 has stated that he received a call from the prosecutrix's father, informing him that during the period February 2012 to September 2012, the appellant had sexually assaulted the prosecutrix, without her consent. He has stated that the prosecutrix's father was upset, angry with him, as the incident had taken place under his guardianship and that he was not permitting the prosecutrix to visit his house. He has further stated that the prosecutrix herself came to their house, as she was assaulted by her father and disclosed that her father had assaulted her, when she disclosed about the sexual assault to him. PW 2 has stated the details of sexual assault on her as well as the MMS prepared by the appellant and the threats given by the appellant to the prosecutrix. He has stated that the prosecutrix told him that she did not disclose the incident to anyone because of the threats. On hearing the aforesaid, PW 2 asked the

prosecutrix to lodge a complaint, pursuant to which, they went to Santacruz Police Station and lodged the said complaint/FIR.

The said witness was cross-examined at length to show that there was a dispute between the appellant's father and grandfather on the one side and PW 2 on the other. PW 2 has denied that there was any property dispute between them. He has stated that there were cases i.e. chapter cases instituted against him, but it was post the incident. He has admitted in his cross-examination that when the FIR was lodged, the prosecutrix was of 13 years of age and that the prosecutrix was mentally strong. He has further admitted in his cross-examination that although they had learnt about the incident much prior to lodging of the FIR, they did not lodge a complaint immediately, due to fear of reputation as the appellant had taken MMS and would threaten that he would make the same public. PW 2 has categorically denied any dispute between him and the appellant's grandfather. He has stated that the dispute was between him and another brother-Laxman Singh. He has denied that at his instance, the appellant has been falsely implicated.

14 It is also pertinent to note that PW 7-PI Babaji Awhad produced the original birth certificate of PW 1 to show her date of birth as 13th November 1999. The said birth certificate is issued by the Government

of Maharashtra's Health Department, B.M.C. The date of registration of PW 1's birth is 31st December 1999. The said birth certificate is at Exhibit 33. There is no cross-examination with respect to the said birth certificate produced by PW 7-PI Awhad. Thus, the prosecution has proved that PW 1 was a minor aged 13 years at the time of the incident.

15 The aforesaid evidence is also duly corroborated by the evidence of PW 5-Dr. Rachana Shah. She has stated that on 2nd March 2013 at 7:30 p.m, the prosecutrix was brought by Sunita Padwa, Woman Police Naik of Santacruz Police Station. She has stated that the prosecutrix gave history of sexual assault/rape multiple times between February 2012 to September 2012 by her cousin brother, at her grandfather's house. On examination, the doctor found an old tear of hymen at 9 O'Clock position, however, no evidence of injury to the perineum or any foreign body or signs of STD, was found. The doctor has stated that due to long gap between the date of assault and medical examination and due to lapse of time, opinion could not be given whether sexual intercourse had taken place. PW 5 – Dr. Shah, in her cross-examination, has denied that she has falsely stated that the history given by the prosecutrix and the examination finding match each other. She has also denied that there is no corroboration of history to the findings in medical examination.

16 It is pertinent to note that the prosecutrix was examined in February 2013, after more than 5-6 months of the incident of sexual assault and therefore, PW 5-Dr. Shah has stated that due to lapse of time, opinion could not be given, whether sexual intercourse had taken place. It may be noted that on examination, the doctor did find an old hymen tear at 9 O'clock position. There is no suggestion made to Dr. Shah that the said injury was possible due to any other reason, other than sexual assault. As noted above, medical corroboration is not always necessary, if the testimony of the prosecutrix is found to be cogent, reliable and trustworthy.

17 Merely because there was a delay in lodging the FIR, cannot be a ground to disbelieve the testimony of the prosecutrix (PW 1) and PW 2 – prosecutrix's grandfather. Having regard to the age of the girl, the threats administered by the appellant of circulating the MMS and of defamation of the family, are all factors to be considered, for delay in lodging the FIR. When the perpetrator is a family member, it is extremely difficult for a young girl to come forward, without any family support, for various reasons. The delay in the facts, has been duly explained by the prosecutrix (PW 1) and PW 2 – her grandfather and there is no reason to disbelieve them.

18 Although learned counsel for the appellant submitted that the appellant has been falsely implicated in the said case because of a property dispute and pending civil cases, not a single document has been placed on record to show that there was any such dispute between the appellant's family and the prosecutrix's family. The burden cast upon the appellant under Section 29 of the Protection of Children from Sexual Offences Act has thus not been discharged by the appellant. If at all there was a property dispute between the parties and cases instituted against each other as alleged by the appellant, the appellant could have certainly placed the said documents/case papers on record or could have even examined himself or a defence witness in support thereof.

19 Considering the aforesaid, no fault can be found in the impugned judgment and order of conviction and sentence. Appeal is accordingly dismissed.

REVATI MOHITE DERE, J.