

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.373 OF 2015

Nanasaheb Chandu Nikam
Age-22,
R/o: Tokewadi,
Tq. and Dist. Ahmednagar,
At present Ranjani,
Tq. Pathardi

...APPELLANT
(Orig. Accused)

VERSUS

State of Maharashtra

...RESPONDENT

...
Mr. Vijay Sharma, Advocate appointed for
Appellant.
Mr. R.B. Bagul, A.P.P. for Respondent.
...

CORAM: A.I.S. CHEEMA, J.

DATE : 22ND AUGUST, 2016

ORAL JUDGMENT :

1. The Appellant-accused has been convicted
under Sections 307 and 376 of the Indian Penal

Code, 1980 ("I.P.C." in brief) and for each of the Sections he has been sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs.5000/- and in default to suffer further simple imprisonment for one year. The conviction order was passed by Additional Sessions Judge, Ahmednagar in Sessions Case No.53 of 2010 on 24th November, 2014. Being aggrieved, present Appeal has been filed.

2. The case of prosecution, in short, is that prosecutrix (hereafter referred as "victim") is resident of village Ranjani, Tq-Pathardi, Dist-Ahmednagar. On 13th December 2009 at about 11.00 a.m. she went for grazing cattle in the field called as "*Hamindara*". Incident occurred at about 4.30 p.m. She saw a boy standing on the *Bandh* at some distance holding a "*Gulel*" i.e. catapult, who suddenly used the same and hit a stone to her head and ran up to her. She tried to hit him with a stick but he over-powered and beat her and dragged

her to one side and forcibly committed intercourse with her. She started shouting and hearing her shouts, villagers came on that side and at that time accused ran away from the spot. One Bhausahab Ghodke (PW-3) lifted her and carried her to the Hospital. The Doctor informed the Police and the Police reached the Hospital and complaint was recorded. She reported about the incident as above. In the F.I.R. itself she mentioned that she knows the accused and his name is Nanasaheb Nikam and he is from Bhil community and had come to reside at the place of one Arjun Bhimsen Pawar as a guest. The offence was registered on 13th December, 2009 vide Crime No.335 of 2009 at 20.05 hours at Pathardi Police Station. The investigation was taken over by P.I. Bhagwat Jaibhai (PW-12). He went to the spot and did Panchnama Exhibit 37. He also seized black colour nicker and one white colour slip having blood stains, from the spot. He collected the blood stain samples from the ground. The accused was

arrested on 14th December 2009 and arrest Panchnama Exhibit 22 was drawn. The blood stained clothes from the person of the accused were seized. While in the custody, the accused agreed to produce banyan which he was wearing at the time of incident. Consequently, in presence of Panchas, accused gave discovery of banyan from the place of hiding near the spot from near the canal and the Memorandum Exhibit 32 and Panchnama Exhibit 33 came to be prepared. The Police had got victim medically examined on 13th December 2009 and collected medical certificate. When the accused was arrested, he was also referred to the doctor for medical examination and certificate was collected. The gown of the victim which she was wearing at the time of incident also came to be seized. On 15th December 2009 the accused agreed to give discovery of the catapult. In presence of Panchas, Memorandum Exhibit 68 was recorded and catapult came to be seized hanging from the log in his house vide Panchnama Exhibit 69. The

Investigating Officer recorded statements of the witnesses. Concerned blood samples, vaginal swab and nail clippings etc. were collected from the Hospital and sent to Chemical Analyzer (C.A.) and the C.A. Reports were obtained. Completing the investigation, Charge-sheet came to be filed.

3. The charge under Section 307 and 376 of I.P.C. was framed against the Appellant - accused. He pleaded not guilty. His defence is of denial.

4. Prosecution examined in all 13 witnesses and brought oral and documentary evidence on record. The trial Court, after hearing the counsel for both sides and considering the oral and documentary evidence, has found the accused guilty and passed the Order of conviction and sentenced the accused as above.

5. I have heard learned counsel for the Appellant-accused. It has been argued that in this

matter there is serious doubt regarding the identity of the accused. According to the learned counsel, the evidence of the complainant or victim PW-1 shows that she was not knowing the accused since before and she had not seen him earlier. The evidence of PW-3 Bhausahab Ghodke also, according to the counsel, shows that although he deposed the name of the accused in his examination-in-chief, the evidence shows that he was not knowing the accused since before and his evidence is that he saw the person running away from behind. Learned counsel submitted that if the evidence of PW-1 victim and PW-3 Bhausahab Ghodke as well as PW-6 Sandip Bhatane is read together, it would show that PW-3 and PW-6 reached the spot only after the incident was over after hearing shouts of the victim. According to the counsel even this evidence of these witnesses is doubtful as the witnesses also stated in the cross-examination that they came to know about the incident from PW-7 Mandabai Avhad and then they had gone to the

spot. Learned counsel submitted that the evidence of PW-8 Dr. Manisha Hange also shows that the victim when she was taken to the Hospital, had given details of the incident where assault and rape by unknown person was claimed and thus according to the counsel it is surprising that the witnesses should try to depose that before going to hospital itself they had come to know the name of the accused. In fact according to the counsel, there is evidence to show that witnesses verified the name of accused only on the basis of gossip. It is further argued that looking to the incident if the arrest Panchnama of the accused is seen, it does not show that accused had any injury on his person. According to the counsel the record rather shows that there was letter issued by PW-10 Dr. Mr. Ashok Gite which is marked in the original file of the trial Court as Exhibit 10/1 informing the police that on radiological examination of the accused, the age of the accused was not less than 17 years and not above 19 years. According to the

learned counsel if this is kept in view, and the age as was applicable at the relevant time to the juvenile as per the Juvenile Justice (Care and Protection of Children) Act, 2000 the accused would have to be treated as juvenile. Thus according to the learned counsel the accused was wrongly put up for trial in the regular Court and apart from merits, on these grounds also the accused deserves to be acquitted. According to the counsel the accused is already in custody for more than three years and no useful purpose would be served by sending the matter back to the Juvenile Court.

6. Against this, learned A.P.P. for the State submitted that the prosecution has brought on record all the necessary oral and documentary evidence and the trial Court has, for good reasons which have been recorded, convicted the accused. According to the A.P.P., he supports the reasons recorded by the trial Court and the conviction may

not be disturbed. The A.P.P. stated that no fault can be found in the conduct of the witnesses if instead of chasing the accused they tried to help the victim first to reach the hospital. Impression of the victim for the accused may be of well built person as has been deposed by her and only because the arrest Panchnama or medical papers of the accused show him not so well built, the benefit can not be granted to the accused person.

7. I have gone through the material in this matter. Most important evidence is of the victim PW-1. She claimed that on 13th December 2009 she was grazing cattle at field called *Hamindara*. At about 4.30 p.m. she took the cattle for drinking water. Her evidence is that a boy was standing on the *Bandh* having a catapult. The boy hit her head with the stone hurled through catapult and came speedily towards her. Her evidence is that at this point of time she cried out loudly. She deposed that she tried to beat the said person by stick

which she was carrying but the said person snatched the same and gave her blows on her back, face, leg, stomach. She deposed that the said boy dragged her to one side. Her evidence further shows that forcible intercourse was committed on her. She further deposed that she was shouting and one Bhausahab Ghodke came there and then the boy ran away. Now, if the evidence of PW-3 Bhausahab Ghodke is perused, he deposed that he heard shrieks at about 4.30 p.m. when he was in his land at *Hamindara* and he saw the victim was calling out him as "*Bhau*". He went to victim. She was lying on the ground and there was bleeding from her head. His evidence is that he saw the accused Nanasaheb while running away. He deposed that accused Nana had come as guest in their village in the house of one Arjun Pawar from Bhill community. His evidence further is that the witnesses Bhaginath Avhad and PW-6 Sandip Bhatane and others came there immediately.

. If the evidence of PW-6 Sandip Bhatane is perused, he deposed that on hearing shriek and cry of the victim he as well as Santosh Bhatane and PW-3 Ghodke rushed to the spot of incident and saw the injured victim. She had head injury. He has also deposed that accused Nana was seen while running from the spot.

8. Keeping the evidence of these witnesses in view, if their cross-examination is perused, the victim deposed that she was not knowing the accused before the incident. When she saw the said boy on the Bandh, he was 10-15 feet away. The stone hurled with the help of catapult, hit her on back side of the head. The evidence is that the incident lasted for about one hour. The cross-examination of victim shows that land of PW-3 Bhausaheb Ghodke is near the spot. She further deposed that when she was being taken to the hospital, at that time she came to know the name of the accused and the mother of accused told his

name to her parents. PW-3 Bhausahab Ghodke in the cross-examination deposed that house of Arjun Pawar is not visible from his house. There was Jawar crop of up-to his height standing in the land concerned. According to him he was seeding maize crop on the day of incident. He admitted that he did not see the incident of actual rape taking place. He deposed that PW-7 Mandabai called him and then he went to the spot. He accepted that he had told police that in response to call of PW-7 Mandabai he had gone to the place of spot. He further admitted that he had seen the person running away from the spot only from the back side. Cross-examination of PW-3 Bhausahab further shows that he accepted that name of accused Nana came up after the gossip and discussion amongst the villagers. He further deposed that he came to know about the event from PW-7 Mandabai when he was seeding maize. Looking to the cross-examination of this PW-3 Bhausahab, it is doubtful if he reached the spot when the incident was still

taking place. The cross-examination of PW-6 Sandip Bhatane is that he had not seen the incident personally. He rather deposed that he alongwith Santosh Bhatane and PW-3 Ghodke had reached the spot and the victim disclosed the incident to them.

9. The evidence of PW-7 Mandabai Avhad, the sister of victim, is that at about 4.30 p.m. she was going home and heard cry and turned back and saw that PW-3 Bhausahab Ghodke was carrying the victim on his back and so she stopped. She further deposed that she came to know at that time from the victim that accused Nana had hit on head of the victim by stone hurled with the help of catapult and had beaten the victim and also raped her. Thus, this witness claims that immediately after the incident while victim was being taken to home, the victim had told her name of the accused. The same PW-7 Mandabai in cross-examination deposed that she heard cry of the victim and PW-6

Sandip and one Santosh Bhatane came to the spot and when she reached the spot, she saw only the victim and she deposed that victim told her that accused Nana had raped her. She deposed in cross-examination that she did not see the accused at the site of incident. She deposed that she had asked PW-3 Bhausahab Ghodke to help and (rather) she told Bhausahab about the incident which had happened with the victim. She further deposed in the cross-examination that PW-3 Bhausahab did not tell her about he seeing the incident or the accused.

10. Looking to the evidence as above, when evidence of PW-8 Dr. Manisha Hange is seen, she deposed that she examined the victim on 13th December 2009 at Government Hospital, Pathardi. She gave details about the various injuries the victim had. Her evidence is that for the injuries of victim she issued certificate Exhibit 40. She deposed that the multiple injuries to the eye

sight, head and legs were probable if the person is beaten by stick. She deposed that the nail mark injuries and rest of the injuries to the side of private part of the victim show that she had resisted the sexual assault. Her evidence is that the injuries in the certificate are most probable due to forceful sexual assault and resistance by the victim. If such evidence of the Doctor is kept in view, it will be clear that the victim had resisted the assault on her. In fact the F.I.R. and the evidence of the victim is also that she had tried to assault the boy who had attacked her, with the help of stick. But then the injuries of the victim and the evidence of the doctor is that the victim had resisted the sexual assault. If this is so, it is surprising to see that arrest Panchnama Exhibit 72 does not show that the accused had any injuries. PW-10 Doctor Ashok Gite had medically examined the accused, who was arrested next day on 14th December 2009, in the morning itself and issued certificate Exhibit 61.

The certificate also does not show that there were any injuries on the person of the accused. PW-10 Dr. Ashok also did not depose about the injuries on the person of the accused. The Investigating Officer PW-12 Bhagwat Jaibhai was asked in the cross-examination and he deposed that he did not remember whether there were any marks of injury noted on the body of accused.

11. The evidence of PW-8 Dr. Manisha in para 2 shows that the victim had the following injuries:-

" On breast examination, primary areola developed, multiple linear abrasions present over both supra manary area, red in colour, 3-4 cm. In length, 5-6 in number. Injuries over external genital aree on examination external genitala well developed, external urethral neatus normal, labia minora right side laceration of size $\frac{1}{2}$ X $\frac{1}{4}$ X $\frac{1}{4}$ cm., hymenal tear at 3 O'Clock and 8 O'Clock position with hymenal tag seen, with fresh bleeding through it, abrasion over posterio forchete $\frac{1}{2}$ X $\frac{1}{2}$ cm.

Introitus admit one finger with difficulty.

1) Other injuries over her body noted are CLW right parital area 2 in number, measuring $3 \times \frac{1}{2} \times \frac{1}{2}$ cm. and $3.5 \times \frac{1}{2} \times \frac{1}{2}$ cm.

2) CLW over left paretal area $3 \times \frac{1}{2} \times \frac{1}{2}$ cm.

3) CLW left tempora parital area $2 \times \frac{1}{2} \times \frac{1}{2}$ cm.

4) Contusion over upperlip 2×1 cm.,

5) Black eye right side with swelling periorbital area 3×2 cm.,

6) CLW over throat over larynix of $1 \times \frac{1}{2} \times \frac{1}{2}$ cm.,

7) Contusion right arm 7×2 cm.,

8) Contusion over back interscapular area 10×2 cm.,

9) Contusion over right scapula 4×5 cm.,

10) Contusion over left scapula 4×3 cm.,

11) Abrasion over right side neck 1 cm linear suggestive on nail mark,

12) Contusion over pinna of left ear 4 x 1 cm.,

13) Abrasion over left shoulder 2 x 10 cm.,

14) Contusion over right side buttock 8 x 2 cm.,

15) Linear abrasion over left thigh 5 cm. in length".

. Regarding these number of injuries, the doctor has deposed that they indicate forcible sexual assault and resistance by the victim. If this is kept in view, surprisingly no injuries on the person of the accused have been established by the prosecution. When victim had resisted, if accused was the culprit, he would have at least some injury? None is proved.

12. Although the evidence is that when victim was being taken to the hospital, she had come to know the name of the accused, the evidence of PW-8 Dr. Manisha Hange who had got the MLC registered,

shows and it is deposed that the history victim stated was that on 13th December 2009 at about 5.00 p.m. she was coming out from the hilly region alongwith the cattle and at such time an unknown young boy hurled stone through his catapult and hit her head from the behind and further committed rape and assaulted her with stick. The doctor was thus told that an unknown young boy had committed the incident. The doctor proved Exhibit 43, an intimation to the Police reporting that victim had been admitted in the hospital due to serious injuries to the head. It was received by PW-9 Sahebrao Gawali, Police Head Constable. PW-9 deposed that he was P.S.O. of Pathardi Police Station and the Medical Officer sent report about the victim being admitted for beating and assault. He made station diary entry on the document Exhibit 43 which is proved at Exhibit 47. This entry is dated 13th December 2009 at 18.15 hours. Thus the evidence of PW-8 doctor Manisha read with the evidence of PW-9 Sahebrao

and considered with the documents Exhibits 43 and 47, shows the evidence that till that point of time the only information given was that the incident had been committed by an unknown person. Thus the attempt of witnesses to say that at the time of incident unfolding and on way to hospital itself the identity of accused had become clear, is doubtful. It appears that at hospital, later PW-12 Bhagwat went and recorded the F.I.R. - Exhibit 25 and in Exhibit 25 name of the accused was put.

13. There is substance in the argument of the learned counsel for the Appellant-accused that identity of accused is doubtful. This can be gathered easily from the examination-in-chief of the victim. She deposed that accused person was between 18-19 years old and was having beard and mustaches and was of blackish colour and was sturdy and healthy and taller than the victim. She deposed that the accused at the concerned time was

wearing blue pant and coloured lined full sleeves shirt. Although she deposed about the accused to be wearing blue pant at the concerned time, the witness relied on by her PW-3 Bhausahab Ghodke deposed that the accused he had seen running away from the spot was wearing yellow full pant and shirt of blue colour. As regards the physical description of the accused given by the victim, the arrest Panchnama Exhibit 72 describes the accused as "slim" (*Sadpatal*) and the column concerned regarding mustache is having dash (-), which means that there was no mustache. The medical certificate Exhibit 61 of the accused also shows him to be hardly of the weight of 43 kgs. The learned A.P.P. has submitted that the idea of "sturdy and healthy person" of the victim would depend upon her own physic. However nothing is shown from the record as to the built and weight of the victim. Thus the description given by the victim of the accused in her oral evidence compared with the record, does not appear to be

matching with the description she gave of the accused.

14. Although the clothes of the victim and the accused were collected and samples of vaginal swab, nail clippings etc. were collected and sent to C.A., the C.A. reports Exhibits 21 to 23 do not show that the prosecution could draw any benefit from these forensic reports so as to connect the accused with the incident.

15. The evidence of PW-12 Bhagwat shows that accused was arrested on 14th December 2009 in the morning and from his person blood stained clothes were seized. Still, it is surprising to see that separately discovery of blood stained banyan is shown. The counsel for accused rightly stated that this would be as if accused removed the banyan and hid the same and again wore the blood stained shirt. The oral evidence of PW-12 that when accused was produced in Police Station he was

wearing blood stained clothes does not match with Panchnama Exhibit 64 which is silent about blood stains. Regarding the recovery of catapult, it is argued by the learned counsel that it is common article found in the house of the villagers and the catapult seized hanging on the wooden log in the house of the accused would not be material evidence.

16. For above reasons, I find that in this matter it would be risky to rely on the evidence brought on record by the prosecution to hold the accused guilty. No identification parade was held. The victim had not seen the assailant before the incident and was not knowing him since before. Her cross-examination shows that when she was hit by stone it was from her behind and she could not shout as she started feeling giddy. F.I.R. did not give description of the assailant. F.I.R. was filed in such a way, where the first part referred to the assailant as a boy standing on the *Bandh*

and in the second part it claimed that the victim was knowing the assailant to be Nanasaheb Nikam who has came as guest in the house of Arjun Bhimsen Pawar. The above discussion shows that how the name of the accused came in front, is not clear. The other witnesses though claiming to have reached the spot after hearing shouts, it is doubtful if they reached when assailant of the victim was still there. The evidence at one point is also that the victim started shouting from the point of time when she was hit by stone hurled with the help of catapult. PW-3 Bhausahab Ghodke claimed to have reached the spot after hearing the shouts. At one place the evidence is that incident lasted for one hour. If the shouting started in the beginning itself, when the other witnesses reached in the course of incident, is not clear. Composite reading of the evidence shows that these other persons reached the spot only after the incident came to an end and the victim lay injured and asking for help.

17. At the time arguments, from the original record from the documents which are part of miscellaneous file, there is report of doctor Ashok Gite. This PW-10 had reported to the police with reference to their letter and inquiry about the age of the accused that as per the report of radiologist, Ahmednagar age of accused is 17 to 19 years. It was stated that it was not less than 17 years and not above 19 years. The doctor had attached copies of the reports received from Civil Hospital, Ahmednagar. There is photocopy of an MLC attached with the document. This document at the time of arguments came to be noticed as PW-10 Dr. Ashok Gite who proved document Exhibit 61 which related to medical examination of the accused had in para 15 with reference to injuries on body recorded that "mentioned in MLC certificate attached to this". As this document was being traced, the letter of this witness marked at Exhibit 11/1 is seen. Learned counsel for the

accused rightly submitted that if this document was to be kept in view, the age of the accused at the relevant time was between 17 years to 19 years and if that is so, looking to the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000, relevant at the concerned time, the accused can be stated to be below 18 years of age and benefit of the said document should be given to the accused. The learned counsel submitted that in this view of the matter the trial in regular Court could not have taken place and the Sessions Court failed in its duty to verify the age of the accused. The accused could have been tried only by the Juvenile Justice Board, it is stated.

18. As on merits itself I do not find the offences established against Appellant, it does not appear necessary to remand back the matter to Juvenile Justice Board.

19. For reasons discussed above, I find that the prosecution failed to establish link between the Appellant and the incident which had taken place. It is seriously doubtful if the Appellant was the person who assaulted and violated the victim. This being so, I am unable to concur with the trial Court.

20. In the result, I proceed to pass following order:-

O R D E R

(I) The Criminal Appeal is allowed.

(II) The conviction and sentence as imposed by the trial Court vide impugned Judgment dated 24th November 2014 in Sessions Case No.53 of 2010 passed by the Additional Sessions Judge, Ahmednagar is hereby quashed and set aside.

(III) The Appellant - Nanasaheb Chandu Nikam is acquitted of the offences punishable under Sections 307 and 376 of the Indian Penal Code, 1860.

(IV) The fine, if paid, shall be refunded to the Appellant.

(V) The Appellant shall be released forthwith, unless his presence is required in any other case.

[A.I.S. CHEEMA, J.]