

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

CRIMINAL APPEAL NO.514 OF 1994

Rajendra Rambhaji Garud
age 28 years, resident of
Panjandeo, Taluka Nandgaon,
District Nasik.

... Appellant

Versus

The State of Maharashtra

... Respondent

.....

Ms. Sonia S. Miskin, Advocate appointed for appellant.
Mr. P.H. Gaikwad, APP for State.

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**CORAM : C.V. BHADANG, J.
DATE : 27th APRIL, 2017**

Judgment:

1. The appellant (original accused No.1) is challenging the judgment and order dated 01st September, 1994 passed by the learned Additional Sessions Judge, Malegaon in Sessions Case No.41/1990. By the impugned judgment, the appellant has been convicted for the offences punishable under Sections 363, 366, 376 and Section 506 of the Indian Penal Code (IPC for short). For the offences punishable under Sections 363 and 366 of IPC, the appellant has been sentenced to suffer RI for 5 years and to pay a fine of

Rs.250/- on each count and in default to suffer further RI for 1 month. For the offence punishable under Section 376 of IPC, the appellant has been sentenced to suffer RI for 7 years and to pay a fine of Rs.500/- and in default to suffer RI for 2 months and for the offence punishable under Section 506 of IPC, the appellant has been sentenced to suffer RI for 2 months and to pay a fine of Rs.100/- and in default to suffer RI for 15 days. The original accused Nos. 2 and 3 came to be acquitted.

2. The prosecution case may be briefly stated thus:

That, Nanda Pagare (PW-1) is the daughter of Bhika Pagare (PW-2). The date of birth of Nanda is 1st June, 1975 and thus on the date of incident i.e. on 16th February, 1990, she was below 16 years of age. On 16th February, 1990 at about 3.00 pm Nanda returned back home from field, for taking meals. It is stated that, at that time, the appellant entered the house of Nanda and asked her to accompany him, threatening her that else she will be stabbed. It is stated that the appellant also took an amount of Rs. 500/- from a box in the house. The accused No.2 Ashok Sakharam Pagare who is cousin of Nanda was standing in front of the house. The trio came to the field, where accused No.3 Parvatabai, who is the mother of Ashok made Nanda to wear a *Saree* and at about 6.00 pm they came to Khatgaon. By 10.00 pm, all of them reached at Manmad S.T. stand from where the appellant and Nanda came to Malegaon. They reached there at about 11.00 pm. The appellant took Nanda to her relative's residence.

There, one Kedabai put one '*Kali Pot*' around her neck and thereafter they came at Pimpalgaon and then to Karsul at the residence of Balu Jadhav (PW-4), who is the relative of the appellant. It is the material prosecution case that in the night intervening between 15.02.1990 and 16.02.1990, while PW1 Nanda was sleeping in the kitchen, the appellant had committed forcible sexual intercourse with her.

3. Bhika Pagare PW-2 came to know about Nanda being taken by the appellant. He made a search and thereafter filed a complaint with the Police Station on 17.02.1990, on the basis of which, an offences under Sections 363 and 366 of IPC was registered. On 20.02.1990, Nanda (PW-1) was found at the residence of the relative of the appellant in HUDCO Colony at Manmad from where she along with the appellant were brought to the police station. There, the statement of Nanda PW-1 was recorded and appellant came to be arrested. The appellant and Nanda were sent for medical examination. Their clothes were seized. A spot Panchanama was drawn of the scene of offence at village Karsul. Nanda (PW-1) was also referred for examination for determination of her age. The medical officer had certified on the basis of radiological examination that the age of Nanda was between 14 to 16 years. On completion of investigation, a charge-sheet came to be filed which was committed to the Court of Sessions.

4. The learned Sessions Judge framed a charged under Sections 363 and 366 read with 34 of IPC against the appellant and

Parvatabai (accused no.3) whilst under Section 366-A and Section 107 of IPC against the accused Nos. 2 and 3 and for the offences punishable under Section 376 and 506 of IPC against the appellant. The appellant and the co-accused pleaded not guilty to the charge and claimed to be tried. Their defence was one of total denial. It was claimed that there was enmity between Bhika Pagare (PW-2) and the accused No.2 Ashok, wherein the appellant had supported the accused No.2 in the *Grampanchayat* Election. It was claimed that therefore they have been falsely implicated.

5. During the trial, the prosecution examined in all six witnesses and produced the contemporary record of investigation. The appellant neither entered into the witness box nor led any defence evidence.

6. The learned Sessions Judge, found the appellant guilty for the offences as stated earlier and he came to be sentenced accordingly. Being aggrieved, the appellant is before this Court.

7. I have heard Ms. Miskin, the learned Counsel appointed on behalf of the appellant and Mr. P.H. Gaikwad, APP for the respondent. With the assistance of the learned Counsel for the parties, I have gone through the evidence and the impugned judgment.

8. It is submitted by the learned Counsel for the appellant that the evidence of PW1 is not reliable and one inspiring confidence. It is submitted that there is no corroboration forthcoming to the

evidence of PW1 particularly when the CA report shows that tests to determine the blood group were inconclusive. It is submitted that there is no acceptable evidence about the age of the prosecutrix, which is a material aspect, in as much as the evidence shows that PW-1 had willingly accompanied the appellant and stayed at the house of one of his relatives. It is submitted that, this is not a case in which an offences under Sections 363/366 or Section 376 of IPC can be said to be made out. It is submitted that, the learned Sessions Judge has not properly appreciated the evidence on record and the conviction and sentence is bad in law.

9. On the contrary, the learned APP has supported the impugned Judgment. It is submitted that the age of PW1 Nanda has clearly come on record, her date of birth being 01.06.1975. It is submitted that the prosecutrix was below 16 years age on the date of incident. It is submitted that, there is a clear evidence to show that the appellant had taken the prosecutrix from the lawful custody of her father Bhika Pagare (PW-2) and had committed forcible sexual intercourse with her. It is submitted that, there is nothing in the cross-examination of the material witnesses namely PW-1 and PW-2 so as to dislodge the evidence of these witnesses. It is submitted that, the medical evidence corroborates the evidence of PW-1.

10. I have carefully considered the circumstances and the submissions made.

11. Firstly, it is necessary to see what was the age of Nanda (PW-1) at the time of the incident. Nanda (PW-1) as well as her father Bhika Pagare (PW-2) have stated about the birth date of Nanda being 01.06.1975, which is corroborated by the School Leaving Certificate (Exhibit 33). It has come on record that Nanda had dropped out of school while she was in the 6th Standard. The age of Nanda has clearly come on record on the basis of the date of birth as mentioned in the School Leaving Certificate (Exhibit 33). We also have the evidence of Dr. Anil Gholap (PW-3), who on the basis of the radiological examination has certified the age of Nanda being between 14 to 16 years. The Certificate is at Exhibit 38. It is true that the actual age can be two years plus or minus on the either side. However, we have specific evidence of PW-1 and PW-2 and the School Leaving Certificate, which is in consonance with the evidence of Dr. Gholap and thus, in my considered view, the learned Sessions Judge has rightly come to the conclusion that Nanda (PW-1), as on the date of the incident, was below 16 years of age.

12. It has come in the evidence of Nanda (PW-1) that she was taken by the appellant from her house to Karsul at the residence of her relative where they had taken meals. She had stated that while she was washing utensils, the appellant came near her and asked her to allow him to have sexual intercourse with her, else he threatened her that she will be beaten. She had categorically stated that the members of the family slept in another room while she was sleeping in a separate room. The appellant came there and lifted her *saree* and

Petticoat against her wish and had forcible sexual intercourse with her. She also stated that, she tried to shout, however, the appellant threatened her saying that she will be gagged. It has further come in the evidence that on the next morning, the appellant and his father took her to the Manmad railway station and thereafter to one of their relatives house at HUDCO. It was at the house of the said relative, that Nanda was traced by the police. I have carefully gone through the cross-examination of Nanda (PW-1) and there is nothing in the cross-examination to dislodge her evidence. At this stage, it is necessary to state that even assuming that Nanda (PW-1) had accompanied the appellant, the fact remains that her willingness and / or consent in this regard would be of no consequence, Nanda having not attained the age of consent. In this case, the appellant and Nanda (PW-1) were medically examined and the Medical Certificates at Exhibit 22 and 23 are on record. It is pertinent to note that, these Medical Certificates have not been disputed. In the report (Exhibit 22) the appellant is found to be a person capable of having sexual intercourse. Nanda (PW-1) was medically examined on 20.02.1990 i.e. four days after the incident. The medical report shows that, her hymen was found torn, however, the medical officer was unable to give any opinion of recent rape or sexual intercourse. As noticed earlier, Nanda (PW-1) was medically examined four days after the incident. Thus the inability of the medical officer to give opinion of a recent sexual intercourse would not be decisive. The fact remains that the medical officer had found the hymen torn.

Thus, this is not a case wherein the medical evidence is contradictory or rules out the possibility of sexual intercourse with Nanda (PW-1). It is now well settled that once the ocular evidence is found to be acceptable and reliable and one inspiring confidence, the medical evidence cannot be used to disbelieve the ocular evidence unless the medical evidence is such, which entirely rules out the possibility of the incident, as deposed by the witnesses having occurred. In other words, incongruity in the ocular evidence and medical evidence has to be of such a nature and degree that both cannot stand or exist together. This is certainly not a case in which the medical evidence rules out the possibility of the sexual intercourse four days prior to the examination.

13. I have carefully gone through the judgment of the learned Sessions Judge and I do not find that any case for interference is made out. In the result, the appeal is hereby dismissed. The accused is on bail. His bail bond stands cancelled. Accused be taken in custody.

(C.V. BHADANG, J)