

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD****CRIMINAL APPEAL NO. 440 OF 2013**

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BHASKAR ALIAS PAPPU SUDHAKAR DHAIGUDE
age 44 years, Occu. Agriculture,
R/o Behind Datta Mandir, Neknoor,
Tq. & District Beed.Appellant....
(Orig accused)

VERSUS

THE STATE OF MAHARASHTRA
through the Police Station Officer,
Police Station Neknoor, Tq. & District
Beed. ...Respondent...
(orig complainant)

...

Advocate for Appellant : Mr Hange Rajendra G.
APP for Respondents: Mr S W Munde

...

WITH
CRIMINAL APEAL NO. 50 OF 2014

THE STATE OF MAHARASHTRA
through the Police Station Officer,
Police Station Neknoor, Tq. & District
Beed. ...Appellant...
(orig complainant)

VERSUS

BHASKAR ALIAS PAPPU SUDHAKAR DHAIGUDE
age 44 years, Occu. Agriculture,
R/o Behind Datta Mandir, Neknoor,
Tq. & District Beed. Respondent/(Orig accused)

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APP for Appellant : Mr S W Mundhe
Advocate for Respondent : Mr R G Hange.

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CORAM : S.S. SHINDE & V.K. JADHAV, JJ.

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Reserved on : July 17, 2018
Pronounced on : July 30, 2018.

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JUDGMENT :- (Per V.K.Jadhav, J.)

1. This is an appeal preferred against the judgment and order of conviction passed by the Additional Sessions Judge-2, Beed dated 4.10.2013 in Sessions Case No.137/2012, thereby convicting the appellant accused for the offence punishable under section 376 of Indian Penal Code and sentencing him to suffer rigorous imprisonment for Ten years and to pay fine of Rs.5,000/- (Rs. Five Thousand), in default to suffer further R.I. for six months. Accused is also convicted for the offence punishable under section 506 of Indian Penal Code and sentenced to suffer RI for six months and to pay fine of Rs.1,000/-, in default to suffer further R.I. for one month and directed that both the substantive sentences to run concurrently.

2. The State of Maharashtra has also preferred Criminal Appeal No.50/2014 challenging the same

judgment and order of Conviction praying therein for enhancement of the sentence. As both the appeals arise out of the same judgment and order of conviction, we have heard both the appeals together and decided by this common judgment.

3. Brief facts giving rise to the present appeals are as follows :-

a] PW 8 Gajanan Abhiman Dongre is resident of Pimpaladevi, Tq. & District Beed and PW 5 Gokul Shripati Dongre is his uncle, who is blind. His uncle PW 5 Gokul was having one daughter by name Dropadi aged 12 years (deceased). His uncle Gokul and deceased Dropadi were begging from village to village and maintaining them. On 8.6.2012 the informant PW 8 Gajanan Dongre had received a phone call of Ramesh Gavhane r/o Pimpaladevi, Tq. & District Beed from Civil Hospital Beed informing thereby that deceased Dropadi Gokul Dongre was admitted in the Civil Hospital at Beed. Thus, the informant P.W. 8 Gajanan alongwith his relative Ashok Aware, his father Abhiman went to the Civil Hospital, Beed. He went in ward No.2.

Deceased Dropadi had started weeping after seeing them. PW 5 Gokul (father of deceased Dropadi) was also with her. The informant Gajanan had inquired with victim Dropadi. She disclosed that on 6.6.2012 when they were slept in the Chavadi at Neknoor at about 11.00 p.m. to 12.00 midnight, the appellant/accused was chitchatting with her father and when her father slept, the appellant/accused removed the clothes of the victim and committed forcible sexual intercourse with her. She had sustained bleeding injury on her private part. She had attempted to shout, so that her father awake. However, the appellant/accused pressed her mouth. After some time, the appellant/accused threatened to the victim that if she would disclose the incident to anybody, he would kill her and her father. Thereafter, the appellant/accused went away. She did not tell the incident to her father in the night due to fear. In the morning as she had severe pain, she started weeping. She was taken to the hospital at Beed. On 8.6.2012 the informant Gajanan Dongre had lodged the complaint against the accused.

b] On the basis of the complaint lodged by P.W. 8-Gajanan Dongre crime No.68/2012 for the offence punishable under section 376, 506 of Indian Penal Code was registered. The Investigating Officer investigated into the crime and submitted the charge sheet before the Judicial Magistrate First Class, Beed. Judicial Magistrate First Class, Beed has committed the case to the Court of sessions as the offence under section 376 of the Indian Penal Code is exclusively triable by the Court of sessions. The learned Additional Sessions Judge-2, Beed has framed the charge against the appellant/accused. The appellant/accused has pleaded not guilty to the charge and claimed to be tried. The defence of the accused is of total denial. In order to substantiate the charges levelled against the appellant/accused, prosecution has examined in all ten witnesses. The learned Additional Sessions Judge-2, Beed by the judgment and order dated 4.10.2013 in Sessions Case No.137/2012 convicted the appellant/accused for the offence punishable under section 376 of Indian Penal Code and sentenced him to

suffer rigorous imprisonment for Ten years and to pay fine of Rs.5,000/- (Rs. Five Thousand), in default to suffer further R.I. for six months. Appellant/accused is also convicted for the offence punishable under section 506 of Indian Penal Code and sentenced to suffer RI for six months and to pay fine of Rs.1,000/-, in default to suffer further R.I. for one month. Hence, this appeal.

3. Learned counsel appearing for the appellant/accused submits that some days after the incident, deceased Dropadi died due to some other ailments and, in consequence thereof prosecution could not examine Dropadi before the Court nor her statement was recorded by police during the course of investigation. Learned counsel submits that evidence tendered by the prosecution during the trial was hearsay evidence and the learned Judge of the trial court has relied upon the legally inadmissible evidence and recorded the conviction as against the appellant/accused. As per the story of the prosecution, deceased Dropadi had disclosed the incident to PW 8 Gajanan and PW 9 Ashok in the hospital and at that

time police were present in the hospital. However, deceased Dropadi had not disclosed the incident to the police. The Investigating Officer PW 10 Bajrang Malwade had attempted to record the statement of the victim, but she had not given the statement to him. Learned counsel submits that in terms of the provisions of Section 32 of the Law of Evidence, the declaration made by a person who is dead, is relevant when it relates to the cause of his death. In view of the above, the statement if made by the deceased Dropadi before the prosecution witnesses about commission of rape by the appellant/accused same is not admissible in terms of the provisions of Section 32 of the Evidence Act and as such evidence of the prosecution witnesses on the point of disclosure statement of deceased Dropadi would be hear say evidence which is not admissible. Learned counsel submits that the entire approach of the trial court to accept such a statement of deceased Dropadi under section 157 of the Indian Evidence Act is misconstrued and not in accordance with law. The provisions of Section 157 operates in different context

and the same cannot be applied/attracted to the facts and circumstances of this case in any manner. Though, the incident had occurred on 6.6.2012 and, till 22.6.2012 victim Dropadi was alive, the Investigating Officer did not record her statement. Deceased Dropadi was suffering from Kidney and brain disease and she died due to said ailment. Further, deceased Dropadi was mentally retarded patient and in view of the same deceased Dropadi was not in a position to disclose the incident to the prosecution witnesses. Though, the prosecution has examined PW 4 Dr. Deepali Gavhane, who has issued certificate about the medical examination of deceased Dropadi into the allegations of rape, however, Dr. Deepali is not confirm about the commission of rape with the deceased. In the report of the C.A., no semen was found on the vaginal swab etc.

4. Learned APP appearing for the State submits that on 8.6.2012 deceased Dropadi had disclosed the incident to PW 8 Gajanan and PW 9 Ashok. Deceased Dropadi had narrated the entire incident to them. She had disclosed to them that the appellant/accused had

committed sexual intercourse with her in a Chavadi at village Neknoor. He had pressed her mouth. He had threatened her that if she told the incident to anybody, she would have to face dire consequences. She had disclosed to them about bleeding in her private part and pains in her stomach. PW 4 Dr. Deepali, who has medically examined deceased Dropadi who was 12 years old at the time of incident, noted hymen ruptured. She had also given opinion that there was possibility of rape. PW 5 Gokul Dongre who happened to be the father of deceased Dropadi has also deposed that the appellant/accused has committed sexual assault on his daughter. He has further deposed that the appellant/accused was inquiring them day to day as to where they are going to sleep. He was knowing the appellant/accused from his voice. Learned APP submits that prosecution has proved the case against the appellant/accused. The learned Judge of the trial Court has thus rightly convicted the appellant/accused for the offence punishable under section 376, 506 of Indian Penal Code. There is no merit in the appeal and the

appeal is thus liable to be dismissed.

5. Deceased Dropadi was 12 years of the age at the time of incident. Her father PW 5 Gokul Dongre is blind person. Deceased Dropadi alongwith her father PW 5 Gokul was maintaining herself and her father by begging. On 8.6.2012 the informant PW 8 Gajanan Dongre had gone to Civil Hospital, Beed alongwith PW 9 Ashok Aware. On seeing them, deceased Dropadi had started weeping and she had narrated the entire incident to them. She disclosed to them that the appellant/accused had committed sexual assault with her in a Chavadi of village Neknoor. The appellant/accused had also threatened to her that if she happened to disclose the incident to her father in the morning, he would kill her and her father. There was bleeding from her private part and pains in her stomach. Though, deceased Dropadi was alive till 22.6.2012, the Investigating Officer has not recorded her statement. Even, the Superintendent of Police, Beed has conducted inquiry as to whether the investigation in the present crime has been properly conducted by the

Investigating Officer. The report of the Superintendent of Police, Beed was placed before this Court during the pendency of the appeal on June, 18, 2014. On perusal of the same, it appears that, the Superintendent of Police, Beed has specifically observed that the Investigating officer has deliberately avoided to record the statement of deceased Dropadi and recorded statement of her father PW 5 Gokul, belatedly. Thus, this Court has directed the Superintendent of Police, Beed to take appropriate action against the concerned Investigating Officer, in accordance with law. By an order dated 25.11.2014 this Court has recorded satisfaction on the basis of the affidavit filed by the Superintendent of Police, Beed and also recorded that action has been taken against the concerned Investigating Officer.

6. Apart from this, the evidence of PW 8 Gajanan and PW 9 Ashok cannot be discarded on the ground that victim Dropadi had not disclosed the incident to her father PW 5 Gokul and also for the reason that the Investigating Officer has not recorded her statement,

when she was alive. Evidence of PW 8 Gajanan and PW 9 Ashok is also corroborated by the evidence of PW 5 Gokul Dongare. He has also deposed that the incident had taken place in the Chavadi near Bankat Swami Math, Neknoor in the night. He himself alongwith deceased Dropadi slept in the Chavadi. There was sexual assault on his daughter. He came to know about actual incident from other persons. He has deposed that the appellant/accused has committed sexual assault on his daughter. He could identify the accused from his voice. He has deposed that the appellant/accused was inquiring them day to day as to where they are sleeping in the night time. Deceased Dropadi was 12 years of age at the time of incident. We can understand that it might not have been possible for a girl of a tender age to disclose the sexual assault to her father, however, she had rightly disclosed the incident to her cousin PW 8 Gajanan on his visit to Civil Hospital, Beed and inquired with her about the incident. Even, the Investigating Officer has also deposed that deceased Dropadi was in frightened state of mind and,

therefore, it was not possible for him to record her statement. It is nobody's case and even the appellant/accused has also not suggested to any of the prosecution witnesses that deceased Dropadi was deaf-and-dumb or that she was not able to express herself as she was a mentally retarded girl. On the other hand, PW 8 Gajanan has denied that deceased Dropadi was unable to talk. PW 8 Gajanan has also denied that deceased Dropadi was mentally retarded and she was deaf and dumb. PW 5 Gokul, who happened to be the father of the deceased Dropadi was blind and deceased Dropadi alongwith PW 5 Gokul was maintaining herself and her father by begging. They were visiting the surrounding villages for begging. It would not have been possible for a mentally retarded girl to take her blind father to the various villages for begging purpose and to maintain herself and her father PW 5 Gokul.

7. PW 4 Dr. Dipali Gavhane has carried out the medical examination of deceased Dropadi on 8.6.2012. She has noticed pains over chest and redness around vulva and vagina. She has also noticed hymen

ruptured. Since the incident had taken place on 6.6.2012, she has observed tears found old and no active bleeding or conjection. On the basis of the aforesaid findings, PW 4 Dr. Deepali has opined that there was a possibility of rape. There is nothing in the cross examination to disbelieve the expert's opinion.

8. PW 8 Gajanan and PW 9 Ashok have seen the actual condition of deceased Dropadi in the Civil Hospital at Beed. She had disclosed the entire incident to them. There is nothing in their cross-examination to disbelieve their version. Further, we find that their evidence is corroborated by the medical evidence as well as the evidence of PW 5 Gokul. So far as non-examination of deceased Dropadi in the Court due to her untimely death, evidence of PW 8 Gajanan and PW 9 Ashok cannot be discarded for the reason that their evidence is hear say evidence.

9. In a case State of Maharashtra Vs. Bandu @ Daulat reported in (2018) 11 Supreme Court Cases 163, the Supreme Court has believed the evidence of the

victim's mother. Victim 14 years of age was deaf and dumb and mentally challenged to some extent. Rape was confirmed by the medical evidence. Victim had explained to her mother by gesture as to what happened. The High Court reversed the conviction on the ground of non-examination of victim herself, however, the Supreme Court has restored the conviction with the observations in paragraph no.3, 7 and 8 of the judgment, which are as follows :-

“3. The victim is deaf and dumb and mentally challenged to some extent. Main evidence on record is of PW-1, Asha Ramratan Bangar @ Asha Panchu Dhurve, the mother of the victim. She lodged FIR on the next day i.e. 30 th June, 2008 to the effect that the accused was the landlord of the house in which they were living. The victim was lured away by the accused by offering some sweet meat and was taken to the market. She did not return home and it was at 9.30 p.m. in the night that two boys brought her home. The victim explained to her mother by gesture as to what happened. On this version, FIR was registered and investigation was carried out. Medical examination of the victim confirmed the commission of rape. The age of the victim at the time of the commission of the offence was about 14 years.

7. The evidence of the mother of the victim clearly shows that it was the respondent-accused who took away the victim. The victim and the accused were seen together by PW-2, Gajanan Marutrao Sonule on the date of commission of offence. The victim immediately after the occurrence narrated the same to her mother as to what happened as reflected in the FIR and the version of the PW-1. Rape has been confirmed by medical evidence. Identity of accused is not in dispute. In these circumstances the trial court having convicted the respondent, the High Court was not justified in setting aside the conviction.

8. Accordingly, we restore conviction of the respondent under [Section 376](#) IPC and sentence him to undergo rigorous imprisonment for seven years. He may be taken into custody to serve out the remaining sentence.

10. In view of the peculiar facts of the case, though we confirm the order of conviction recorded by the Additional Sessions Judge-2, Beed in Sessions Case No.137/2012 against the appellant/accused, we deem it appropriate to reduce the sentence and confine the same to the extent of the imprisonment already undergone by the appellant/accused. The appellant/accused is in jail since 8.6.2012. In view of the discussion above, we find no merit in the appeal preferred by the State of Maharashtra for enhancement of the sentence. We accordingly dismiss the State appeal bearing Criminal Appeal No.50/2014 (State of Maharashtra Vs. Bhaskar @ Pappu Sudhakar Dhaigude) preferred by the State of Maharashtra. Accordingly, we proceed to pass the following order.

ORDER

- I. Criminal Appeal No.440/2013 (Bhaskar @ Pappu s/o Sudhakar Dhaigude Vs. State of Maharashtra) is hereby partly allowed.

II. The judgment and order of conviction passed by the Additional Sessions Judge-2, Beed dated 04.10.2013 in Sessions Case No.137/2012 is hereby confirmed, however, we hereby quash and set aside the order of sentence passed against the appellant/accused Bhaskar @ Pappu Sudhakar Dhaigude, instead we sentence the accused Bhaskar @ Pappu s/o Sudhakar Dhaigude to suffer Rigorous Imprisonment already undergone by him for the offence punishable under section 376 of the Indian Penal Code and u/s 506 of the Indian Penal Code.

III. Criminal appeal No.440/2013 is accordingly disposed of.

VI. In view of the order passed in Criminal Appeal No.440/2013 (Bhaskar @ Pappu Sudhakar Dhaigude Vs. State of Maharashtra), Criminal Appeal no.50/2014 (The State of Maharashtra Vs. Bhaskar @ Pappu Sudhakar Dhaigude) preferred by the State of Maharashtra stands dismissed.

(V.K. JADHAV, J.)

(S.S. SHINDE, J.)

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