

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.172 OF 2006**

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| The State of Maharashtra |) |Appellant |
| V/s. | | |
| 1. Nandu Pandu Kamble |) | |
| Age about 21 yrs. |) | |
| 2. Sanju @ Sandip Dadu Kamble |) | |
| Age about 18 yrs. |) | |
| 3. Mahadeo Dhondiram Kamble |) | |
| Age about 21 yrs. |) | |
| 4. Dadu Bhau Kamble |) | |
| Age about 41 yrs. |) | |
| All r/o Vesarde, Tal: Gaganbavada |) | |
| Dist Kolhapur |) | ..Respondents (Org. Accused nos.1 to 4) |

Mrs. Anamika Malhotra, APP for State
Ms Tanvi Tapkire appointed for respondent no.1

**CORAM : K.R.SHRIRAM, J.
DATED : 23rd NOVEMBER 2020**

ORAL JUDGMENT :

1 This is an appeal impugning an order and judgment dated 30-9-2004 passed by Learned 3rd Ad-hoc Asstt. Sessions Judge, Kolhapur, by which, the accused were acquitted for the offence punishable under Sections 363 (*Punishment for kidnapping*), 366(A) (*Procuration of minor girl*) r/w Section 34 (*Acts done by several persons in furtherance of common intention*) of Indian Penal Code and accused no.1 was also acquitted for the

offence punishable under Section 376 (*Punishment for rape*) of Indian Penal Code.

2 The facts in brief are, P.W.-7 Nakushi Shamrao Kamble and accused no.1 – Nandu Pandu Kamble were cousins. It is prosecution's case that the four accused kidnapped P.W.-7 – Nakushi and later accused no.1 raped Nakushi. Trial Court concluded that the prosecution has failed to adduce cogent evidence that the accused kidnapped Nakushi and accused no.1 raped her. Evidence indicated that Nakushi voluntarily eloped with accused no.1, they got married at a temple and had sexual intercourse on 6 occasions. Learned APP in fairness states that evidence clearly indicates consensual sex. Learned APP, however, submitted that Trial Court had erred in concluding that prosecution failed to prove that Nakushi was below 16 years of age. Ms. Malhotra submitted that under Section 375 of IPC, prior to the amendment Act 13 of 2013, the date of the incident being 14-9-2003, even if there was consensual sex, a man is said to commit rape when he has sexual intercourse with a woman, with or without her consent when she is under 16 years of age. What remains to be seen is whether the victim-Nakushi was below the age of 16.

3. Prosecution, in support of its case that Nakushi was below 16 years of age relied upon the testimony of P.W.-8 Balwant Baburao Chavan, the school Head Master, in whose school Nakushi is stated to have studied for 3 years and certificate issued by him (Exhibit 49), testimony of P.W.-9 - Dr.

Tukaram Govinda Mane, Medical Officer and of P.W.-11 Dr. Ranoji Vijaysingh Shinde.

P.W.-8 has stated in his evidence that as per the records of the school, the date of birth of Nakushi is 20-9-1990, she was admitted in the school on 13-6-1997 and she left the school on 31-12-2000 as her name was removed from the school as she was continuously absent.

4 Ms Tapkire, who is appointed as special counsel for accused no.1 (who is not traceable), and other accused nos.2 to 4 have not remained present though served, submitted that school record indicates the name of victim as Bunti Shamrao Kamble, whereas her name is Nakushi Shamrao Kamble and, therefore, school record should not be accepted. P.W.-6 Shamrao Kamble, father of Nakushi, in his evidence has stated that Nakushi was called Bunti at home and that has not been challenged by the defence. In his examination-in-chief, P.W.-6 says “we call her as bunti”. That has not been challenged in the cross-examination. Therefore, the difference in name is a non-issue.

5 Ms Malhotra submitted that school record indicates the date of birth of Nakushi as 20-9-1990 and incident occurred on 14-9-2003 and, therefore, on the date of incident Nakushi was less than 16 years.

P.W.-6 Shamrao Kamble, who is the father of Nakushi, however, has nowhere stated in his FIR (Exhibit 45) or in the statement before police that

Nakushi was studying at Village Bhogaon. P.W.-6 has also not stated before the police that nick name of Nakushi was Bunti. Even P.W.-7 Nakushi has not stated in the statement before police that she studied at Village Bhogaon.

Not only this, P.W.-6, who is the father of P.W.-7 Nakushi, says Nakushi was born in the Government Hospital at Village Bazar Bhogaon but is unable to give date of birth of Nakushi. P.W.-10, I.O., states that he went to the Grampanchayat office at Bhogaon, but did not find entry about the date of birth of Nakushi in the register and P.W.-6 informed him that he had taken a note of date of birth in a note book but that note book also was not found. If Nakushi, was really born at Village Bhogaon in Government Hospital, certainly Grampanchayat office at Bhogaon would have record of Nakushi being born there. In his cross-examination, I.O. (P.W.-10) states that neither complainant or Nakushi have stated in their statement that Nakushi was born at Village, Bhogaon. P.W.-10 states he has not recorded the statement of officer of Grampanchayat of Bhogaon or for that matter Head Master of the school. P.W.-10 also states in his cross-examination that neither complainant P.W.-6, nor Nakushi P.W.-7 have stated in their statement that Nakushi had studied in the school at Village Bazar, Bhogaon.

6 P.W.-11 Dr. Ranoji Vijaysing Shinde has given opinion about the age of Nakushi on the basis of report given by Dr. Mane P.W.-9. P.W.-11 was a Gynaecologist and P.W.-9 was Radiologist. P.W.-11, relying on the report

given by P.W.-9, states he has opined that Nakushi was above 14 years but less than 16 & ½ years of age. P.W.-9 Radiologist in his cross-examination has admitted that error in case of age based on ossification test may be 2 to 3 years.

7 Ms Tapkire relied on the judgment of the Apex Court in ***Jaya Mala Vs. Home Secretary, Government of Jammu & Kashmir***¹, where the Apex Court held that the margin of error in age ascertained by radiological examination is two years on either side.

In the present case, it is the prosecution's case that Nakushi P.W.-7 was 14 years of age and, therefore, error could be only plus two years and not minus two years. If the error is of plus two years, P.W.-7 must be 16 years of age and, therefore, the charge under Section 376 cannot stick. One more point which has weighed in the mind of the Trial Court while concluding prosecution has not proved that Nakushi was under 16 years of age is according to P.W.-6, the age of his daughter Nakushi was 14 years, but school record produced by P.W.-8 indicate the age of P.W.-7 at the time of incident was 13 years.

8 The Apex Court in ***Chandrappa & Ors. V/s. State of Karnataka***² in paragraph 42 has laid down the general principles regarding powers of the Appellate Court while dealing with an appeal against an order of acquittal.

¹ AIR 1982 SC 1297

² (2007) 4 SCC 415

Paragraph 42 reads as under:

“42. From the above decisions, in our considered view, the following general principles regarding powers of appellate Court while dealing with an appeal against an order of acquittal emerge;

(1) An appellate Court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.”

9 In the circumstances, in my view, the opinion of the Trial Court cannot be held to be illegal or improper or contrary to law. The order of acquittal, in my view, need not be interfered with.

10 Appeal dismissed.

11 High Court Legal Services Committee to award fees of Ms Tapkire appointed for respondent no.1 fixed at Rs.10,000/-.

(K.R. SHRIRAM, J.)