

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.877 OF 2006

THE STATE OF MAHARASHTRA)...APPELLANT

V/s.

**1) RAJENDRA NIVRUTTI BUTTE)
2) ASHOK TUKARAM BUTTE)...RESPONDENTS**

Mr.H.J.Dedhia, APP for the Appellant-State.

None for the Respondents.

**CORAM : PRASANNA B. VARALE &
V. G. BISHT, JJ.**

DATE : 22nd DECEMBER 2020

JUDGMENT : (PER : V. G. BISHT, J.)

1 This appeal is filed by the State challenging the judgment and order of acquittal dated 28th November 2005 passed in Sessions Case No.304 of 2005 by the 3rd Ad-hoc Additional Sessions Judge, Pune for the offences punishable under Section 376(2)(g) of the Indian Penal Code (IPC).

2 The factual matrix of the case is that the informant's daughter (victim) aged 16 years is mentally retarded and looks after cattle and helps in agricultural works. Two days prior to the lodging of the report, the informant's wife Nanda told the informant that the menstruation cycle of the victim is stopped. When they confronted the victim, she revealed that fifteen days ago accused Rajendra Nivrutti Butte (A-1) and Ashok Tukaram Butte (A-2) on the pretext of offering her *bhel* committed sexual intercourse with her. The informant later on contacted his elder brother namely Nandu Butte and after arrival of his brother and sister-in-law, he lodged the report against the accused.

3 On the basis of the report of the informant, Crime No.2 of 2005 for the offence punishable under Section 376(2)(g) of the IPC came to be registered with Police Station Manchar

4 It appears from the record that PW5 Investigating Officer during the course of investigation got the victim medically examined at Rural Hospital, Manchar, arrested the accused and

seized their clothes. He then visited the spot and prepared Spot Panchnama (Exh. 25). He also recorded the statement of witnesses and seized the clothes of the victim. He also collected the certificate of age of the victim from the Sassoon Hospital and obtained Chemical Analyzer's Report and after conclusion of investigation forwarded the charge-sheet against the accused.

5 The prosecution, in order to bring home the charge, has examined as many as five witnesses and exhibited a number of documents. The respondents-accused were questioned under Section 313 of the Code of Criminal Procedure about the incriminating evidence and circumstances and they denied them as false. According to respondent-accused, on account of rivalry over disputed lands, they have been falsely implicated.

6 Mr.Dedhia, learned APP, vehemently submitted that the learned Trial Judge ought to have appreciated the factual aspect of the case that the victim was below 16 years of age at the time of the offence and was also mentally retarded. The prosecution by

adducing cogent and convincing evidence duly proved that by taking undue advantage of the mental retardness of the victim, the accused committed heinous offence of rape. Despite the evidence being consistent and trustworthy, the learned Trial Judge wrongly disbelieved the prosecution case and wrongly acquitted the accused. For all these reasons, the judgment deserves to be set aside, argued learned APP.

7 None for the respondents, when called.

8 The prosecution has come with a case that at the time of the alleged incident, the victim was mentally retarded and as also was a minor girl. At the very outset, we note that the prosecution has adduced evidence of only PW1 father. There is no other evidence in order to substantiate firstly that the victim at the relevant time was a minor and secondly, she was suffering from mental retardness. The prosecution has not adduced any kind of medical evidence to prove even remotely that the victim at the relevant time was having any slightest of symptoms of she being

mentally challenged. So, from whatever evidence we have on record, we have to find out whether the prosecution indeed has been able to establish its case beyond reasonable doubt or not.

9 PW1 Shantaram Gulabrao Butte – father of the victim states in his evidence (Exh. 11) that prior to nine to ten months (of his deposition) the incident had taken place. Once his wife told him that the victim missed her menstrual period. He then asked his daughter as to what had happened. His daughter revealed that both the accused had raped her. He then telephoned his brother Nandu and after his arrival went to the police station and lodged the complaint. He then proved his complaint at Exh. 12. Lastly, it is his evidence that the victim is slightly mentally retarded but she understands everything.

10 PW1 father being a very material witness, it was expected of him to atleast adduce evidence in consonance with his own First Information Report (FIR). A very vague evidence is adduced by him by stating that his daughter told him that she was

raped by both the accused. His evidence absolutely nowhere makes it clear as to how, when and under what circumstances, as is claimed in the FIR, the victim was ravished. We are definitely not satisfied with the nature of evidence adduced by this witness.

11 Although PW1 father then states in his evidence that at the time of the incident, the victim was 16 years old and that he had submitted before the police School Certificate of his daughter showing her date of birth, but that date of birth certificate, it seems, was not brought on record by the prosecution for the reasons best known to it. In this regard, we also note from the evidence of PW5 Investigating Officer that during the course of investigation he also obtained the certificate of the age of the victim from the Sassoon Hospital but then again surprisingly, in his evidence neither that birth certificate saw light of the day nor any reason was assigned by the prosecution as to why the said date of birth certificate was withheld. Despite there being date of birth certificate and the fact that the prosecution still withheld it, we are here to draw an adverse inference against the prosecution.

Thus, for all purposes, the fact remains that the prosecution has not been able to establish that at the time of the alleged incident the victim was minor.

12 Similarly, it can be gathered from the evidence of PW1 father that the victim is slightly mentally retarded but she understands everything. This piece of evidence speaks a lot. Moreover, as is pointed out at the very beginning, no medical evidence is adduced by this witness or for that matter by the prosecution to establish that the victim was undergoing any kind of treatment. It is also not the case that her mental retardness, may be of slightest nature, was not curable. Rather, it appears from the evidence of PW1 father that she was capable of understanding everything. We are purposely pointing out this piece of evidence because this will go a long way while appreciating the evidence of PW2 victim.

13 PW2 victim states in her evidence that she knows the accused as they are staying in her neighbourhood. As per her

evidence, the accused had taken her in the crop of Shalu-Jawar. One accused was saying that he would give her *vada-pav* and other *bhel*. Then they removed her clothes and also removed their clothes and had physical relation with her. The accused also told the victim that if she revealed about the incident to her family members, she would be hanged. The accused had such physical relation with her for four days, twice a day.

14 Before looking into the cross-examination, we would like to point out from her examination-in-chief itself how the testimony of the PW2 victim is questionable. It may be seen from her evidence that the incident of rape had taken place in the field where the crop of Shalu-Jawar was standing. But this has come by way of omission in as much as that being not a part of her statement recorded by the Investigating Officer, she was confronted in the cross-examination but she insisted of having said so before PW5 Investigating Officer. PW5 Investigating Officer, on his part, has proved this material omission by stating that the victim in her statement had not stated that both the

accused had taken her to the field of Shalu-Jawar crop and had sexual intercourse with her for four days, twice a day. Similarly, her evidence showing that she was threatened with death by hanging has also come by way of omission and again this omission is duly proved by PW5 Investigating Officer in his cross-examination.

15 What is glaringly disturbing is that at no point of time the victim offered any kind of resistance to the alleged act of accused or for that matter protested the indecent advances and act made by the accused.

16 If we go through her cross-examination then we find her material admission where she admits that at the time of the incident, the people from locality were working in their respective fields and when the accused had taken her, she neither resisted nor shouted and had not even beaten the accused. This admission is very much explanatory as to the conduct of the victim.

17 Further, she states in her cross-examination that the incident had taken place everyday in the morning hours and everyday after the incident, she used to graze the cattle entire day and return home as usual. This also reflects poorly on the part of the victim. Then comes the material admission in the form of admission wherein she states that her brother had seen her going with the accused in the Shalu-Jawar field and then he had beaten her with belt and because of this the people of village came to know about it. What else can be inferred from the conduct of the victim than that she was a consenting party to the whole affair.

18 She then admits that after the said incident, her father (PW1) and uncle discussed that there would be problem of fixing her marriage and as well as the daughter of her uncle because of the incident. She further admits that she was taken to the police station and while going to the police station, her father (PW1) and uncle asked her to tell the police that the accused had taken her to the field of Shalu-Jawar and accordingly she stated in her statement. Thus, it seems to us, an aftermath of the incident

which was seen by the victim's brother, the father (PW1) and the uncle got worried as to the future of their daughters because of the incident in question and in a way, admittedly, tutored the victim to give a statement fashioned in a particular way so as to suit their ends.

19 The next witness examined by the prosecution is PW3 Dr.Supriya Sharad Kulkarni (Exh. 17). It appears from her evidence that she had examined the victim and found her hymen torn. In her opinion, evidence of penetrative vaginal intercourse was present which means the victim was habituated to sexual activity. The evidence of this witness does not help the cause of prosecution in as much as the material witnesses have failed to convince and satisfy the court that it were the accused who committed the act of sexual assault.

20 Having regard to the above discussion and as also the conduct of the victim and the fact that the prosecution has failed miserably to prove, firstly, that at the time of the incident the

victim was a minor and, secondly, that it was the accused who sexually assaulted the victim against her will, we hold that the learned Trial Judge was justified in acquitting the accused in absence of clear and unambiguous evidence pointing out involvement of the accused in this crime. We do not find any illegality or perversity in the finding recorded by the learned Trial Judge.

21 For the aforesaid reasons, we find no merit in the appeal and the same is dismissed accordingly.

(V. G. BISHT, J.)

(PRASANNA B. VARALE, J.)

Arti V.
Khatate

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