

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

APPLICATION FOR LEAVE TO APPEAL (STATE) NO. 13 OF 2024.

The State of Maharashtra
(through Bhandup Police Station)

...Applicant
(Orig.
Complainant)

Versus

NAVNATH
SITARAM
WAGHMARE

Rinkusingh Shivbakas Singh
Age: 23 Years,
R/o. Room No.1, Near Buddha Vihar, Near Ideal High
School, Tulshetpada, Bhandup (West) Mumbai

...Respondent
(Orig. Accused)

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NAVNATH
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Ms. Sharmila S. Kaushik, APP for the Applicant.

Ms. Seema Singh for the Respondent, (appointed through Legal Aid).

CORAM : M.M. SATHAYE, J.

DATE : 10th SEPTEMBER, 2026

P.C. :

1. The matter arises out of Protection of Children from Sexual Offences Act, 2012, which is referred to as 'POCSO Act'. Indian Penal Code, 1860 is hereinafter referred to as 'IPC' and Code of Criminal Procedure, 1973 is referred to as 'CrPC' for short.

2. The State has filed this Application seeking leave to file appeal challenging order of acquittal dated 16.05.2017 passed by the learned Designated Special Court (under POCSO Act), Greater Mumbai in POCSO Case No. 338 of 2014. By the said impugned judgment and order Respondent-accused is acquitted for the offences punishable under Sections 452, 376(2)(i) and 506 of IPC read with section 4 of POCSO Act.

3. The case of the prosecution in short is that the victim is a younger daughter of the informant residing on the first floor of Jagdev Chawl. The entrance of the house is on the ground floor where there is a shutter to climb the stairs. The wife of the informant was suffering from Thyroid and taking

treatment in the KEM hospital. On 29.04.2014, the informant along with his wife and son went to the KEM Hospital for taking treatment of wife of informant and their elder daughter also left the house for work in the morning. On said day, at about 12.00 O' clock noon time, the informant returned and by opening shutter on the ground floor, reached the house on the first floor. At that time, he found that victim was lying on bed and she was very frightened. When informant enquired with the victim, she pointed towards a curtain in the house. When the informant pulled the curtain, he saw the Respondent/Accused hiding behind the curtain. On enquiry, the victim said that when nobody was at home, the Accused had come inside, threatened the victim and forcibly committed rape. The informant immediately put a lock on his house and went to call police. When the police came at home, they arrested accused and report was lodged vide C.R. No. 139 of 2014. Investigation was carried out. The Respondent pleaded not guilty and claimed to be tried. Defence of Respondent is of total denial and false implication.

4. The prosecution examined 11 witnesses, viz. Informant as PW-1, Victim as PW-2, Panch Witness as PW-3 and PW-4 about clothes seizure panchnama of victim as well as accused, Panch witness of Spot seizure Panchnama as PW-5, Medical Officers as PW-6 and PW-7, Lady Police Sub Inspector as PW-8, Head Constable attached to concerned Police Station as PW-9, API Investigating Officer ('IO' for short) as PW-10, and Headmistress of BMC School as PW-11. On appreciation of evidence, the learned Judge has acquitted the Respondent.

5. Learned APP submitted that the Respondent has been acquitted on conclusion that the age of the victim is not proved and also that the victim had consensual sexual relation with the Respondent-accused. She submitted that as per Section 2(d) of the POCSO Act, 'child' means any person below the age of 18 years. She submitted that in the present case, school leaving certificate of the victim shows her date of birth as 10.06.1999. The Victim has

deposed her date of birth as 24.09.2000 and ossification test shows that victim was 13 to 15 years of age. Therefore, the victim was minor and therefore her consent is immaterial in the present case. The birth certificate was not available and therefore other evidence is produced to prove the age. That documentary evidence coupled with ossification is conclusive proof of age. That the victim has stated that she has not consented. That presumption under Section 29 of the POCSO Act runs against the Respondent-accused. That the DNA samples/ Chemical analysis report proves the offence. Therefore, it is prayed that leave be granted.

6. On the other hand, learned counsel appearing for the Respondent-Accused (appointed through Legal Aid) supported the impugned order contending *inter alia* that material on record clearly indicates consensual relationship between parties. She submitted that the evidence regarding age is inconclusive and therefore the benefit of doubt must be given to the Respondent, which is already given resulting into acquittal. Therefore, no interference is required.

7. I have considered the rival submission and perused the impugned judgment as well as oral depositions place on record.

8. At the outset, it is material to note that the date of incident is 29.04.2014, when rape is alleged to have been committed. POCSO Act provides for definition of 'child' which means any person below the age of 18 years. Victim says date of birth is 24.09.2000, whereas as per the school leaving certificate the date of birth is 10.06.1999 and Aadhar Card indicates year of birth as 2000. It has come on record that the entry in the school register is made only on the basis of the date informed by mother of the victim and not on the basis of any document. Therefore, variation has been found in the date of birth. PW-7 Doctor Bhor advised X-ray of wrist, elbow and pelvic joints. After going through the X-ray report, he has given his opinion about the age of the victim as between 13 to 15 years. The ossification report is at (Exhibit-46). He has admitted that the medical opinion

may differ about age.

9. It is settled position that the ossification test carries a marginal error of plus or minus 2 years.

10. Considering all aforesaid birth dates with variations, even assuming the best case scenario for Respondent-Accused and considering the earliest date of birth (10.06.1999), victim would be below 15 years of age on the date of incident. Also giving benefit of margin plus 2 years going by ossification test, the age of the victim will be 17 years, which will be still less than 18 years, as per the definition of child provided under POCSO Act.

11. However, so far as IPC offences are concerned, picture emerging is different.

12. After considering the evidence, the learned Sessions Judge has found that the victim's house was situated at the first floor and it was situated at thickly populated area and the victim has admitted that loud sounds from the ground floor are audible in her house and it is alleged that at the time of incident she had raised shouts. The learned Judge has held that if it was against her consent and shouts were raised then neighboring people would have heard it. The incident has taken place at noon time. It is also the case that Respondent-Accused has committed rape twice in the past on 23.04.2014 and 24.04.2014, when the parents were not at home and nothing is disclosed by the victim even to the mother. Learned Judge has held that it is nobody's case that Respondent-Accused used any weapon to threaten and then committed rape. Learned Judge has held that fresh injury marks were not found on the private parts of the victim and therefore it is difficult to believe that it was a forceful sexual Act. Though, it is stated that the Respondent-Accused resisted the act and scratched him with nails, however medical report of the accused does not indicate any scratch marks. Learned Judge has observed in statement under Section 164 CrPC, that the victim has stated that she liked the accused. Victim has admitted that she knew the Accused since 5

years and he had told her about his family. Overall, it appears that victim voluntarily kept physical relationship with the Accused.

13. Considering the material available on record in respect of age of the victim (with variations) age will be about 15 years as per the documentary evidence and it will be between the range of 13 to 15 years as per the ossification test. In **Shweta Gulati and Anr. V/s. The State Government of NCT of Delhi 2018 SCC OnLine Del 10448**, learned Single Judge of Delhi High Court was considering similar issue, where it is held that while determining the age of the victim on the basis of ossification test, the benefit of doubt should go to the accused and higher limit under the ossification test should be considered. In the present case, since the ossification test has rendered the estimated age between 13 to 15 years, after adding error margin of 2 years on the higher side, there is clear doubt as to whether the victim was below 16 years of age. Therefore, fulfilling ingredients of Section 376(2)(i) is doubtful. Therefore, there is no reason to grant leave to file appeal against acquittal so far as Section 376(2)(i) of IPC is concerned.

14. Clubbing the apparent consensual relationship between the parties with the evidence discussed by the Sessions Judge about the entry to the house in Paragraph No. 36 and victims' admission that she opened the door for accused and that usually their door is open, ingredients of house trespass under Section 452 of IPC are not made out. Hence, leave to file appeal in respect of acquittal under Section 452 also cannot be granted.

15. However, on the basis of available material in the form of documentary evidence as well as corroborative ossification test, even assuming best case for the benefit of doubt and considering the age on the higher side and adding margin of 2 years, the age of the victim will be 17 years which is below 18 years of age. Hence, the evidence requires scrutiny again, so far as the offence under Section 4 of the POCSO Act is concerned.

16. Therefore, the application is partly allowed. The Applicant/State is

permitted to file appeal challenging the acquittal under Section 4 of the POCSO Act. However, leave is refused for filing appeal against acquittal under the sections of IPC.

17. Action under Section 390 of CrPC or 431 of Bharatiya Nagarik Suraksha Sanhita, 2023 be initiated for securing presence of Respondent-Accused.

18. Application is disposed of in above terms.

(M.M. SATHAYE, J.)