

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

**CRIMINAL APPLICATION NO.83 OF 2015
IN
CRIMINAL APPEAL NO. OF 2015**

The State of Maharashtra

.. Applicant
(Orig. Complainant)

V/s.

Deepak Sunil Zample

.. Respondent

.....
Mr. K. V. Saste, APP for Applicant – State.

.....

**CORAM : NARESH H. PATIL AND
PRAKASH D. NAIK, JJ.**

DELIVERED ON : JULY 22, 2016.

P.C. :

Applicant/State of Maharashtra has preferred this application seeking leave to file Appeal vide Section 378 (3) of the Code of Criminal Procedure challenging the order of acquittal passed by the Additional Sessions Judge – 1, Solapur vide judgment and order dated 13th May, 2015 in Sessions Case No.139 of 2014.

2 Respondent was prosecuted in the aforesaid case for an offence punishable under Section 377, 323 and 506 of the Indian Penal Code (for short "IPC") as well as Section 6 of the Protection of Children from Sexual Offences Act, 2012.

3 The prosecution case is as follows:

- (a) Complainant is the father of victim boy who was residing at Shivganga Nagar, Solapur along with his family. On 13th February, 2014 at about 4.00 p.m. while the complainant was out of his house, he received a phone call from his wife calling upon him to return home urgently. After attending the work complainant returned at about 9.45 p.m.
- (b) On returning home, wife of the complainant informed that at about 4.30 p.m. while the victim son aged five years was returning home from tuition, the accused had called upon him in his house and the boy was sexually assaulted.
- (c) The victim boy narrated the incident to his mother i.e. complainant's wife and thereafter complainant inquired with the victim boy who narrated the incident to him. He

also complained of pains. Complainant and his wife noticed bleeding from anus of the victim boy. Thereafter, they lodged complaint with MIDC Police Station for the aforesaid offences.

- (d) Charge was framed against the accused. He pleaded not guilty. Prosecution examined four witnesses. P.W.1 is the victim boy namely Kanhaiyya Shankar Jadhav, P.W. 2 is Shankar Yamaji Jadhav, the complainant/father of the victim, P.W.3 is Smt. Sheetal Shankar Jadhav, mother of victim. P.W. 4 is Prakash Masal, investigating officer. After recording the evidence, statement of accused under Section 313 of Cr.P.C. was recorded.
- (e) The Additional Sessions Judge, Solapur vide his judgment and order dated 13th May, 2015 acquitted the accused/respondents of all the charges.
- (f) The trial Court while acquitting the accused had taken in to consideration the oral evidence of the witnesses as well as medical evidence which was placed on record by prosecution. Trial Court observed that P.W. Nos. 2 and 3

have specifically stated that there was bleeding from anus of the victim boy. Under such circumstances, recourse can be taken to the medical report produced by the prosecution. It is observed that the medical report which was marked as Exhibit-24 was issued by the medical officer of Civil Hospital, Solapur. In the said report, it was specifically opined that there is no evidence of any injury to genital and anal region. There is no signs of suggestive of bite marks and that are consistent with non-penetrative sexual assault. It is also specifically reported that there is no evidence of any injury to the anus of the victim. Forensic medical examination report of the victim boy is produced at Exhibit-25. C.A .report produced at Exhibits - 18 and 19 are also negative and it is specifically certified that neither blood nor semen was detected on the clothes. Trial Court further observed that although the victim boy and his parents supported prosecution and narrated the prosecution story, there is no medical evidence on record suggesting penetrating sexual assault upon victim boy. Though the parents specifically deposed that there was blood from the anus of victim, the medical evidence is totally negative in that respect. Victim boy is aged about

five years and he has not specifically deposed that the accused penetrated sexual assault upon him. The deposition of the victim boy does not inspire confidence to hold the accused guilty of the offence. Prosecution has not proved penetrative assault and voluntarily causing simple hurt to the victim beyond reasonable doubt and the benefit of doubt has to be given to the accused. Victim boy has not referred to any threats allegedly given by the accused. Deposition of complainant and his wife does not refer to the words of abuses allegedly used by the accused. On the basis of the aforesaid observations, the trial Court was pleased to acquit the accused of all the charges.

4 We have perused the evidence on record and prosecution has relied upon oral testimony of P.W.1 who is the victim boy. Prosecution has also placed reliance on the deposition of parents of the victim boy. Medical evidence was also placed on record. However, medical officer was not examined by prosecution. Trial Court has appreciated the oral testimony of witnesses. However, it is observed that medical evidence is contrary to oral evidence given by the witness. It is pertinent to note that the trial Court has accepted the fact that

prosecution witnesses have deposed about the incident however, it is not corroborated by the medical evidence and, therefore, benefit of doubt was given to the accused. In the normal circumstances, we would have not appreciated finding of the trial Court that the medical evidence is contrary to oral evidence and that accused deserves acquittal. However, in the present case, taking into consideration the nature of allegations, the manner of assault and the narration of incident as deposed by the witnesses, medical evidence would assume importance. It is necessary to note that in the judgment, trial Court has stated that the entire story of prosecution depends upon oral testimony of the victim and his parents. The parents were not the eye witness to the incident and they have not seen the victim boy either entering house of the accused or returning from his house. There is no witnesses stating the fact being examined by prosecution. Evidence of P.W.2 and 3 is hearsay about the exact incident. Trial Court had based its conclusion on the fact that P.W.2 and P.W.3 have deposed about the bleeding from anus of victim boy which is completely negated by the medical evidence. It is pertinent to note that prosecution has not examined the medical officer but has placed on record the medical report as well as the forensic report vide Exhibits 24 and 25. Trial Court has taken into

consideration the fact that, in the medical report it is opined that there is no evidence of any injury to genital and anal region. It is further observed that forensic report indicate that there is no evidence to any injury to anus of the victim. Trial Court has also taken into consideration C.A. reports which were negative and wherein it was specifically certified that neither blood or semen was detected on the clothes. There was no independent witness to support the prosecution case. Trial Court has, therefore, in the circumstances, given benefit of doubt to the accused. In the forensic report dated 26th February, 2014 addressed to the Deputy Medical Superintendent, Solapur, it was opined that there is no evidence of genital injury and there is no evidence of any injury to genital and anus region. Medical report also indicated that there is no evidence of any injury to the anus.

5 The principle of criminal jurisprudence is that the prosecution has to prove its case beyond reasonable doubt. The accused cannot be convicted on the basis of inferences or surmises. In the present case medical evidence was important piece of evidence which does not corroborate with the allegations to constitute the offence under Section 377 of the Indian Penal Code. There is no independent evidence. There is no cogent

evidence to justify other penal provisions. Prosecution is required to prove its case on its own and in case of any infirmities in the evidence or if there is any doubt about involvement of the accused in the crime, benefit has to be given to the accused. It is also pertinent to note that accused has been acquitted by the trial Court by giving benefit of doubt. Judgment and order of acquittal is not required to be set aside only on the ground that a second view was possible. The view taken by the trial Court is also a possible view wherein benefit of doubt has been given to the accused. In view of the aforesaid circumstances, we are not inclined to grant leave to file an Appeal against the impugned judgment and order of acquittal by invoking Section 378(3) of the Code of Criminal Procedure.

6 Hence, we pass the following order:

:: ORDER ::

- (i) Leave to file an Appeal against judgment and order of acquittal dated 13th May, 2015 in Sessions Case No.139 of 2014 passed by the Additional Sessions Judge-1, Solapur is refused and application stands rejected;

- (ii) Parties to act on an authenticated copy of this order.

(PRAKASH D. NAIK, J.)

(NARESH H. PATIL, J.)