

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.

Criminal Application (APPA) No. 645/2017
in
Criminal Appeal No.154/2016
(Suresh Bhagwan Pardeshi .vs. The State of Maharashtra, through PSO,
Amdapur, Buldhana and others.)

Office Notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders	Court's or Judge's orders.
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Mr. S.D. Mohod, Advocate for Appellant.
Mr. B.M. Lonare, APP for Respondent No.1.
Mr. R.M. Daga, Advocate for Respondent No.2.
Mr. N.B. Kalwaghe, Advocate for Respondent No.3.

CORAM : R.K. Deshpande & Manish Pitale, JJ.
DATED : September 04, 2017.

This application is for grant of leave under Section 378(3) of the Code of Criminal Procedure to file an appeal under the provision to Section 372 therein. The learned Special Sessions Judge has acquitted the accused for the offences punishable under Sections 363, 366(A), 376, 506 read with Section 109 of the Indian Penal Code and Sections 4 and 12 read with Section 16 of the Protection of Children from Sexual Offence Act, 2012. This application is filed by the complainant, the guardian of the victim.

2. Shri Mohod, the learned counsel appearing for the applicant, has invited our attention to the observations of the trial Court in paragraph 13 to the effect that "it is settled law that sexual intercourse with a girl above 16 years, is not a rape as contemplated by

section 375 of the I.P.C., and a girl below the age of 18 years is not a child as defined in POCSO Act". He invites our attention to the amended provisions of Section 375, sixth description which states that "with or without her consent, when she is under eighteen years of age". He further invites our attention to the finding of the trial Court in paragraph 26 to the effect that "it is quite impossible that any person can rape single handedly to a grown up girl without meeting the stiffest possible resistance from her and absence of any injury either on the accused or the prosecutrix". In this regard, he invites our attention to Section 375 proviso to explanation 2 below the description seven which states that "provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity". Relying upon the provision of Section 311 of the Cr.P.C. read with Section 165 of the Indian Evidence Act, he has urged that the trial Court ought to have called for the witnesses on the production of school leaving certificate produced on record showing the date of birth of the prosecutrix as '11.11.1997', if accepted would show that the prosecutrix was below the age of 18 years on the date of incident on 20.11.2014.

3. In view of above, we grant leave in this matter as claimed.

4. The **Appeal is admitted.**

5. The action under Section 390 of the Cr.P.C. be initiated.

JUDGE

JUDGE

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