

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION (ALS) NO.151 OF 2017

The State of Maharashtra

... Applicant

V/s.

Rakesh Madhukar Naik

... Respondent

Mr.A.R. Kapadnis, APP for the applicant/State.

Mr.Jayant Joseph Bardeskar for respondent no.1

CORAM : A.M.BADAR J.

DATED : 11th JUNE 2018.

P.C. :

1. This is an application for leave to appeal by the State questioning acquittal of the respondent/accused of offences punishable under Sections 366-A, 376, 506 of the Indian Penal Code (IPC) as well as 3, 5 6, 11 and 12 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) recorded by the learned Special Judge, Kolhapur vide order dated 23rd August, 2017 in Special Case No.9 of 2015.

2. Heard the learned Additional Public Prosecutor for the State. He took me through to the evidence of PW6 Dr.Raviraj Godkar of C.P.R.

Hospital, Kolhapur and argued that non rupture of hymen is not deciding factor to conclude that the victim female child was not subjected to penetrative sexual assault. By taking me through the evidence of PW5 Rajashri Shivaji Koli, Record Keeper of the Kolhapur Municipal Corporation, the learned APP argued that she deposed about record of the Government in respect of date of birth of the victim female child and her evidence needs to be accepted to conclude that the victim female child was below 18 years of age at the time of commission of offence. The learned APP further argued that evidence of victim female child i.e. PW2 and that of her mother PW1 Shobha Bamane points out the commission of crime in question by the respondent / accused.

3. Against this the learned Advocate for the respondent / accused justified the impugned acquittal by contending that the prosecution has failed to prove age of the prosecutrix so also the fact that she was subjected to the penetrative sexual assault by the present respondent.

4. I have carefully considered the rival submissions and also perused the impugned judgment and order of acquittal as well as copies of deposition of prosecution witnesses and record made available.

5. The learned Trial Judge acquitted the respondent / accused of the alleged offence by holding that age of the prosecutrix is not proved by the prosecution, the alleged spot of incident is located in the populous area and evidence of the victim female child in respect of the penetrative sexual assault is improbable. The learned Trial Court also concluded that medical evidence is not at all supporting the prosecution case. It is well settled that if the view taken by the Trial Court is plausible view based on evidence on record then even if other view which lean towards the conviction is possible, the plausible view taken by the Trial Court cannot be jettisons.

6. The victim female child PW2 claimed to be taking education in Prakash Vidya Mandir, Sadar Bazar, Kolhapur in Sixth standard at the time of the incident. She as well as her mother PW1 Shobha claimed the date of birth of victim female child as 4th April, 2002. The incident in question allegedly took place from 27th September, 2014 to 29th September, 2014. According to the prosecution case, the respondent / accused used to kidnap the victim female child regularly. He used to take her to lonely place at Kasaba Bawada and then used to commit penetrative sexual assault on her.

7. In the case of present nature, the age of the victim child is of utmost important. The same is required to be proved by adducing cogent and truthful evidence. In the case in hand, the prosecution has to rely on birth certificate issued by the Registrar under the Registration of Births and Deaths Act, 1969 and for that purpose PW5 Rajashri Koli, Record Keeper from Kolhapur Municipal Corporation came to be examined. Her evidence shows that on 4th April, 2002, the victim female child was born to Bhikaji and Rekha Bamane. However, it is seen that mother of the victim female child has candidly accepted the fact that at the time of registration of FIR, the documents recording date of birth of the victim female child were not produced before the Investigating Officer. PW9 Vidya Jadhav, Investigating Officer has accepted this position. It is seen that after the charge was framed and after recording evidence of mother of the prosecutrix viz. PW1 Shobha as well as after recording evidence of the minor female child, an application came to be moved in the Office of Kolhapur Municipal Corporation to change the name of the mother of the victim female child from Rekha to Shobha. Such application was not accompanied by even extract of the Government Gazette notifying change of name of mother from Rekha to Shobha. In the wake of this evidence, the learned Trial Court concluded that it is not possible to conclude that PW1

Shobha is mother of PW2 victim female child, and that the victim child is the same person in respect of whom, there was subject entry in the birth Register. The Trial Court concluded that with such evidence, it cannot be said that the prosecution has proved date of birth of the victim female child as 4th April, 2002.

8. To prove the age of the minor female child, the prosecution has examined PW8 Kamal Pandharbale from the School where PW2 allegedly took education. However, evidence of this witness shows that recorded date of birth of victim female child i.e. PW2 was not on the basis of birth certificate issued by the Municipal Corporation, but it was on the basis of affidavit of her mother. PW1 Shobha who claims to be mother of the victim female child has stated that she had given birth to the victim female child at C.P.R. Hospital, Kolhapur and evidence of PW5 Rajashri Koli shows that on the basis of counter form of the Hospital entries are taken in the birth register. The prosecution has not explained as to why the date of birth recorded in the school record was not from the birth certificate issued by the Municipal Corporation but on the basis of affidavit of the mother. This was the factor relied by the learned Trial Court for holding that age of victim female child is not proved by the prosecution. Such appreciation of evidence of

prosecution is correct and cannot be faulted with.

9. PW1 Shobha has deposed that she married at the age of 13 years and after two year she delivered boy and thereafter one year she gave birth to the victim female child. PW1 Shobha deposed that her current age has 35 years. This implied that at the time of commission of alleged offence the victim female child was in fact above 18 years of age. This was also the factor which weight the learned Trial Court for holding that age of the prosecutrix victim child is not proved to be below 18 years of age by the prosecution.

10. According to the victim female child, the respondent/accused used to take her to Kasaba Bawada area on motorcycle from 27th September, 2014 to 29th September, 2014. There he used to commit penetrative sexual assault on her. The spot of the incident according to the evidence of the prosecution was located near Zoom Project where many houses were found to be situated apart from traffic of vehicles. It was populous spot as per the evidence of the prosecution. It was visible to all and sundry. The victim female child never raised any alarm. Coupled with this, upon her medical examination, PW6 Dr. Raviraj had noted that there were no external injuries on body of the alleged victim

female child. He found her breast and axillary pubic hair were developed. No injury to her private part was found. Hymen of alleged victim female child was also found to be intact. With this evidence, the learned Trial Court concluded that the prosecution failed to establish the offence punishable under Section 376 of IPC or under POCSO Act

11. I have categorically mentioned the position of the evidence as well as findings of the Trial Court. The findings which resulted in acquittal of the respondent/accused are based on evidence adduced by the prosecution. Those findings are not perverse. Plausible view which resulted in acquittal of the respondent is taken by the learned Trial Court on the basis of evidence on record. Hence, no case for grant of leave is made out. The application is therefore rejected.

(A.M.BADAR J.)