

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

APPLICATION FOR LEAVE TO APPEAL BY STATE NO. 04 OF 2018

The State of Maharashtra
Through Police Station Officer,
Ashti, Dist. Beed

... **Appellant**

VERSUS

Sampat Bhimrao Sable
Age: 27 years, Occu: Labour
R/o Imangaon Tq. Ashti,
Dist. Beed

... **Respondent**

Mr. A. V. Deshmukh, Advocate for the appellant/State,

**CORAM : SMT. VIBHA KANKANWADI AND
Y. G. KHOBRAGADE, JJ.**

DATE : 20.03.2023

ORDER (Per Y. G. Khobragade, J.):

1. The prosecution, by the present application under section 378(1)(b) of the Criminal Procedure Code, is seeking leave to file appeal to challenge the judgment and order of acquittal dated 07.10.2017 passed by the learned Sessions Judge, Beed in Sessions Case No. 62 of 2013, thereby acquitting the respondent/accused for the offence punishable under section 376 of the Indian penal code.

2. Heard Mr. A.V. Deshmukh, the learned APP for the State at length. With the able assistance of learned APP, we have gone through the record.

3. Informant-victim of rape lodged a report with Ashti Police Station on 13.01.2013 stating that the accused is cousin brother-in-law of her married brother Santosh. Informant and accused were knowing each other and they were in love. She is handicap and the accused had assured her to marry. She has alleged that the accused had developed sexual relations with her on promise of marriage, since last four years. She became pregnant from accused and her pregnancy was of three months. However, the accused turned down the promise of marriage with her and performed marriage with another girl on 24.09.2012. The victim further alleged that she informed the accused on phone about her pregnancy from him but the accused told her to abort the fetus and he would pay money and then switched off the phone. She has then filed the First Information Report. On the basis said report, Crime No. 07/2013 was registered against the accused with Ashti Police Station for the offence punishable under section 376 of the Indian Penal Code.

4. Investigating Officer (PW-10) visited the spot of incident and carried out the spot panchanama and recorded statement of the witnesses. So also, the informant was sent for medical examination to Civil Hospital Beed. The medical examination revealed that the victim was carrying pregnancy. Necessary samples for DNA test was collected and referred to JJ Hospital. Respondent/accused came to be arrested on 18.01.2013, by drawing arrest panchanama Exh. 78 and he was referred for medical examination. Accordingly, the medical officer examined the accused and submitted report Exh. 55.

5. During the further course of investigation, the investigating Officer collected DNA test report of fetus and got recorded the statement of the victim under section 164 of the Cr.PC. through the learned Judicial Magistrate, First Class, Ashti. On conclusion of investigation, charge sheet came to be filed against the accused.

6. The learned trial court framed charge against the accused at Exh. 24. The accused pleaded not guilty and claimed for trial. In order to bring home the guilt of accused, the prosecution examined PW-1 Ajinath Ashruba Bangar at Exh. 36 who carried sample to CA, Forensic Lab, Kalina, Mumbai and proved copy of letter Exh. 37. PW-2-Prashant Lahanu Jasud at Exh. 38, PW-3 Victim at Exh. 39 who proved the FIR Exh.40 and statement under section 164 of Cr.PC. at Exh. 41, PW-4 Ashok Tulshiram Nikalje at Exh.45 and proved spot panchanama Exh. 46, PW5 Manisha Santosh Gaikwad vide Exh. 47, PW6 Dr. Renuka Shridharrao Sandhikar at Exh. 53 who proved letter Exh. 54, examination report Exh. 55, PW7 Dr. Pravin Shankarrao Deshmukh at Exh. 61 and proved disability certificate of complainant, PW8 Dr. Shashikant Hanumant Lade at Exh. 65, and proved letter Exh. 66, 67 i.e. DNA Test report, PW9 Dr. Upendra Devidasrao Kulkarni at Exh. 70 who proved discharge card Exh. 71 and medical case papers Exh. 72, PW10 Swapna Siddappa Shahapurkar vide Exh. 77 who proved arrest panchanama of accused vide Exh. 78, Letter to Medical Officer Exh. 79, letter to JJ Hospital Exh. 80, reply of JJ Hospital Exh. 81 and letter to Judicial Magistrate First Class Ashti vide Exh. 82, PW11 Dr.Balaji

Pandurang Gutte at Exh.89 who proved document Exh.90, 91 entry to register Exh.92, extract of register Exh.94, PW12 Dr. Anil Ashok Borage at Exh.98 who proved birth certificate of child Exh.99, Acknowledgment Exh.100, Report Exh.103, application of declaration Exh. 104, 105 and PW13 Dr. Ganesh Ramnath Bade at Exh 109 who proved medical case papers at Exh.110 and 111.

7. The learned trial court recorded the statement of accused under section 313 of Cr.P.C. The defence of accused is of total denial and he has been falsely implicated in the crime. Learned trial court passed the impugned judgment and order on 07.10.2017 and acquitted the accused for the offence punishable under section 376 of IPC.

8. It is submitted that the prosecution has proved the spot panchanama Exh.46 and spot of incident appears to be the house of victim. On perusal of evidence of prosecutrix PW-3 as well as PW-5 who is wife of her brother, it appears that accused is cousin brother-in-law of married brother of the victim. The victim is handicapped and did B.A. The victim and the accused are well acquainted with each other. Since the victim is major and well educated, it can be concluded that she had knowledge about sexual relationships and its consequences. The evidence of prosecution suggests that the victim was in love with the accused. Now she alleges that accused kept sexual relations with her by giving promise to marry. Important point to be noted is that she has not disclosed as to why she had not disclosed about her love affair and

promise by accused to her family members. What was the hurdle for them in performing marriage, has not been disclosed. What were the circumstances in which she succumb to his promise and indulged into sexual relations with him have been not explained. The said explanation that he did the acts under the promise to marry will not be sufficient. It rather gives a picture that she was the consenting party. PW-3 victim deposed that though she asked the accused to perform marriage with her as she was pregnant from him, she says that accused told her to herself aborted and he would pay money for the same. Accused had married another lady. But informant had not lodged any report immediately. Thereafter, the victim delivered a male child at Civil Hospital, Ahmednagar on 05.06.2013. When she had entered the witness box, her son was about two and half years old. The PW-12 Dr. Anil Borage testified about issuance of Exh.99 birth certificate in respect of new born child to the victim and, the respondent/accused did not seriously challenge said evidence.

9. No doubt, the collected DNA samples were sent for examination at CFSL, Kalina, Mubai. However, there is no investigation report in respect of blood sample of new born baby of the victim i.e. who had collected the sample. Though prosecution produced Exh.110 Medical Report and Exh.99 Birth Certificate of new born child, but these documents do not conclusively prove that the said child is that of victim and accused. Since the accused respondent challenged the paternity of the new born child to the victim, the prosecution ought to have proved

the DNA test which should have been carried out by following rules and regulations.

10. On perusal of evidence of prosecutrix PW-3, it appears that she was consenting party for the sexual relations with the accused for a considerable period and if the accused could have committed forcible sexual act with her, in that event, the victim could have reported the said fact to her mother, brother and sister-in-law but the victim kept quiet. When those relations were kept by a major girl, then it will not amount to rape as defined under Section 375 of Indian Penal Code.

11. Learned trial court has passed the impugned judgment and order after considering the evidence available on record and acquitted the accused for the offence punishable under section 376 of IPC. The said finding does not require re-appreciation and re-assessment. No grounds are made out to interfere with the findings recorded by the trial court. Therefore, we do find this to be a fit case to grant leave to file appeal, hence, the application deserves to be dismissed.

12. In view of the above discussion, the present application for leave to appeal stands dismissed.

(Y. G. KHOBRAGADE, J.)

(SMT. VIBHA KANKANWADI, J.)

JPChavan