

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

APPLICATION FOR LEAVE TO APPEAL BY STATE NO. 7 OF 2018

THE STATE OF MAHARASHTRA
VERSUS
AKSHAY SUNIL SURYAWANSHI

...
Advocate for Appellant/State : Mrs. V.S. Choudhari

...
**CORAM : SMT. VIBHA KANKANWADI &
Y.G. KHOBRADE, JJ.**

DATE : 21st March, 2023

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

1. By the present application, the prosecution is seeking leave to file appeal under Section 378 of the Cr.P.C. against the order of acquittal of the respondent-accused passed by the learned Additional Sessions Judge-2, Ahmednagar in Sessions Case No.295/2016 on 05.10.2017.

2. With the able assistance of learned APP Smt. V.S. Choudhari, we have gone through the record.

3. In short it is the case of the prosecution that the prosecutrix lodged a report with Kotwali Police Station, Ahmednagar on 12.03.2016 alleging that she is a minor and her elder sister's marriage solemnized in the year 2014. After marriage her sister was cohabiting with her husband. Prosecutrix was frequently visiting the matrimonial house of her sister. The accused is cousin brother-in-law of her sister; therefore, she is acquainted with the accused. The accused took her mobile number and used to talk frequently with her. She developed friendship with the accused. One day the accused

promised her to marry. Accused made repeated calls to her since morning on 11.03.2016. She answered the phone call of the accused at about 9.30 a.m., who told her that, they would perform marriage at Ahmednagar and he called her there. Accordingly, the prosecutrix boarded in ST bus from her village and reached at Maliwada Bus Stop, Ahmednagar at about 02.30 p.m., where the accused was already present. Thereafter, the accused took her on his motorcycle at Sanman Lodge, Ahmednagar in a room and at about 04.30 to 05.30 p.m. committed rape on her under the pretext of marriage, due to which she sustained pain. Thereafter, she asked the accused to drop her to house. Accordingly, the accused took her on his motorcycle but dropped her at Pathardi Bus Stand at about 09.30 p.m. where she halted and on next day i.e. on 12.03.2016 she went to her house and narrated incident to her grandmother. Thereafter, the prosecutrix lodged a report against the accused, on which basis a Crime No.94/2016 registered with the concerned Police Station for the offence punishable under Section 376 of the I.P.C. and under Section 3 and 4 of the Protection of Children from Sexual Offences Act, 2012 (in short the POCSO Act).

4. The Investigating Officer-PW6 Shri Vinod Chavan (API) conducted investigation and sent the victim for medical examination at Civil Hospital, Ahmednagar with lady police constable under a request letter. The statement of victim came to be recorded under Section 164 of the Cr.P.C. by the learned J.M.F.C. the Investigating Officer conducted spot panchanama and snapped some photographs of the spot of incident. The Investigating Officer also seized condoms which were found at the spot of incident under seizure panchanama and collected CDR of mobiles of accused and victim. During the course of investigation, the Investigating Officer collected birth certificate of

victim, necessary documents of lodge in which the alleged incident of rape had occurred. The Investigating Officer recorded statements of the witnesses and collected medical examination reports and CA reports pertaining to examination of samples of the victim and accused. On completion of investigation charge-sheet came to be filed before the learned Special Court under the POCSO Act.

5. Learned trial Court framed charge against the accused at (Exh.9) for the offence punishable under Section 376 of the I.P.C., and under Section 3 and 4 of the POCSO Act. The accused pleaded not guilty and claimed for trial.

6. In order to bring home the guilt of accused for the offence punishable under Section 376 of the I.P.C. and under Section 3 and 4 of the POCSO Act, the prosecution examined in all 6 witnesses and after conclusion of the trial statement of accused under Section 313 of the Cr.P.C. was recorded. The defence of the accused is of total denial and of his false implication.

7. Learned Special Court passed the impugned judgment and order on 05.10.2017 and acquitted the respondent-accused for the offence punishable under Section 376 of the I.P.C. and under Section 3 and 4 of the POCSO Act, which the prosecution wants to challenge by seeking leave to file appeal against the order of acquittal.

8. The learned APP submitted that on day of incident of rape the victim was minor within the meaning of Section 2(d) of the POCSO Act and she was sexually abused by the accused under the false promise of marriage.

The prosecutrix (PW5) testimony is in corroboration with the medical evidence i.e. injury certificate (Exh.29) as well as testimony of the Medical Officer-PW3. The victim's date of birth is 01.05.2000 and the incident occurred on 11.03.2016. That means, on the date of incident the victim PW5- was 15 years, 10 months and 10 days old. Therefore, even the victim was in love with the respondent-accused, her consent was immaterial. Prosecution had brought substantial material on record to prove that the accused had committed rape on minor victim and sexually abused her. Therefore, the learned trial Court ought to have held accused guilty. However, the learned trial Court has recorded perverse findings and acquitted the accused. Hence, the prosecution is seeking leave to file appeal against the order of acquittal.

9. The victim PW5 deposed (Exh. 37) and her examination-in-chief is as per her FIR. The accused who is cousin brother-in-law of her sister ought to have knowledge about the age of the prosecutrix. It appears that he had called her to Ahmednagar by giving call on the mobile. Accordingly, she visited at Maliwada Bus Stop at Ahmednagar in a Bus where the accused was already present. Thereafter, the accused took her on his motorcycle in one room of Sanman lodge where the accused committed forcible sexual intercourse with her. Thereafter, the victim asked the accused to drop at her house, as she was suffering from stomach ache but the accused dropped her at Pathardi old Bus stand on his motorcycle but she halted at Pathardi bus stand and on 12.03.20216 she reached at her house. Thereafter, she narrated the alleged incident of rape to her grand-mother but on that day, she was not feeling well, therefore, she went with her grand-mother to Kotwali Police Station, Ahmednagar on 13.03.2016, and lodged a report (Exh.38). In cross-

examination the PW5-victim admitted about love affair with the accused and she was willing to marry him.

10. It can be seen from the evidence of prosecutrix that, she alone travelled in a bus from her village to Maliwada Bus Stop, Ahmednagar and met the accused. Thereafter, she herself proceeded on motorcycle of accused visited at Sanman Lodge. It is not the case of prosecution that, the victim was not willing to visit the lodge accompanying the accused. She could have taken objection to accused before entering the room in the lodge. As per testimony of the PW5-victim, the accused committed rape on her in a lodge and if the victim could not have been a consenting party to the sexual intercourse in that event she could have raised voice due to which the owner / manager of the lodge or surrounding persons would have got alert.

11. In the case in hand, the prosecution claimed that the PW5 was minor on the date of incident of rape i.e. on 11.03.2016 therefore, it is necessary to scrutinize all evidence.

12. In order to prove birth date of the victim the prosecution examined PW5-victim at (Exh.37). The PW5 deposed that at the time of incident she was studying in 11th std. and her date of birth is 01.05.2000. However, in cross-examination she denied that birth certificate (Exh.40) is her birth certificate. She has admitted about pursuing Primary Education at Jalna where she studied 7th to 10th std., at Takli-Manur and Kerul. It appears that at the time of her admission in 1st std. her birth certificate was not produced.

13. The prosecution examined PW3-Medical Officer at (Exh.28) who deposed that as per opinion of Radiologist age of victim was 15 to 16 years

and despite medical examination, no opinion was formed whether sexual intercourse took place or not. So also, no abnormality was seen in hymen but it was old rupture and no parineal tears found and no fresh injury was found. The PW6-Investigating Officer has collected birth certificate of the victim (Exh.60) maintained under Registration of Births and Deaths Act. As per the entry made in birth register, the birth date of victim is shown as 13.12.1997. As per the evidence of prosecutrix-PW5 the incident occurred on 11.03.2016. Therefore, on the date of incident she was 18 years, 2 months and 27 days old. Therefore, it appears that on the day of alleged incident the victim-PW5 was more than 18 years and she was not minor / child within the meaning of Section 2(d) of the POCSO Act. Therefore, considering the conduct of the prosecutrix as she herself travelled in bus from her village to Ahmednagar and accompanied with accused in a lodge and indulged in physical relations with the accused, which appears that the victim was a consenting party to the alleged sexual act. Further, though the prosecution proved CA report (Exh.31 to 33), however, all these reports in respect of examination of clothes, nail clippings, public hairs, blood of accused and victim respectively as well as vaginal swab of victim do not reveal about detection of semen on clothes of the victim and the accused.

14. It would be worthwhile to mention here that while lodging the report the victim did not disclose about use of condoms by the accused while performing sexual intercourse with her, however, recovery-cum-spot panchanama appears about seizure of torn condoms from outside of the lodge, which does not corroborate case of the prosecution. The testimony of the sole prosecutrix is not inspiring confidence. There is no evidence of lodge owner or servant to support that she was in frightened condition. It appears

that she had not disclosed anything to her sister. If she wanted to marry accused, then she could have disclosed it to her parents and relatives. How she was going to perform marriage on that day, in their absence is a question. She has not stated that there was opposition for their marriage from her family. These facts show that she was consenting party. Therefore, the prosecution certainly failed to establish offence under Section 376 of the I.P.C. and under Section 3 and 4 of the POCSO Act.

15. Learned Special Court passed the impugned judgment and order on 05.10.2017, and acquitted the accused for the said offences which itself is justifiable and no substantial grounds are set out to grant leave to file appeal challenging the order of acquittal. Therefore, the present application is hereby dismissed at the threshold.

[Y.G. KHOBRADE, J.]

[SMT. VIBHA KANKANWADI, J.]