

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY STATE NO.16 OF 2018

The State of Maharashtra,
Through Police Inspector,
Karjat Police Station,
Dist-Ahmednagar.

...APPLICANT

VERSUS

- 1) Tushar Baban Lad,
Age-21 years, Occu:Agri.,
- 2) Ram Laxman Lad,
Age-19 years, Occu:Agri.,
- 3) Gajanan Maruti Lad,
Age-25 years, Occu:Agri.,

Accused Nos. 1 to 3 R/o-Pategaon,
Tq-Karjat, Dist-Ahmednagar,

- 4) Vilas @ Kaka Ashru Davne,
Age-28 years, Occu:Agri.,
R/o-Kolwadi, Tq-Karjat,
Dist-Ahmednagar,
- 5) Om @ Dada Sarjerao Shinde,
Age-19 years, Occu:Agri.,
R/o-Mirajgaon, Tq-Karjat,
Dist-Ahmednagar,
- 6) Rahul Govind Lad,
Age-24 years, Occu:Agri.,
R/o-Pategaon, Tq-Karjat,
Dist-Ahmednagar

...RESPONDENTS

...
Mr. A.M. Phule A.P.P for Applicant - State.
...

**CORAM: SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

DATE : 16th JUNE, 2023

ORDER [PER SMT. VIBHA KANKANWADI, J.] :

1. Present Application has been filed by the prosecution seeking leave to appeal under Section 378(1)(b) of the Code of Criminal Procedure challenging the acquittal of the respondents by the learned Additional Sessions Judge, Ahmednagar in Sessions Case No. 39 of 2017 from the offence punishable under Sections 376(2)(n), 506 read with Section 34, 109, 306 read with Section 116 of the Indian Penal Code, Section 3 punishable under Section 4 and Section 16 punishable under Section 17 of the Protection of Children from Sexual Offences Act, on 29th November 2017.

2. We have heard Mr. Phule, learned APP appearing for the State. The learned APP has taken us through the evidence which was before the learned trial Judge.

3. The prosecution story, in short is that the prosecutrix was 17 years 4 months old on the date of First Information Report (for short "the FIR") i.e. on 14th October 2016. She was taking education in 12th standard on that day of incident. Her cousin sister was also taking education in the same college, standard and both of them used to go up and down from their village to college by bicycle and bus. Accused No.1 and accused No.6 used to follow them on motorcycle but initially they were not paying attention to them, but on one day accused No.1 had put a chit containing his mobile number in the bag of prosecutrix. Thereafter she used to talk with accused No.1 from the mobile phone of her father to the said mobile number which was given by him. The friendship developed between them. They had gone to Soutada on the motorcycle of accused No.1. They roamed around, took photographs and then he left her to Karjat. Accused No.1 told that she should not disclose that they had gone for a trip otherwise he would show the photographs and defame her. Thereafter by giving threat that he would make her photographs viral, accused No.1 used to call her for going at different places. Three to four months prior to the FIR, accused No.1 called her at S.T. stand and expressed love for her. He also told that if she does not marry him he would defame her. He asked her to

accompany him to hotel. Due to fear she accompanied him. He took her in a room of the hotel and then committed rape on her and gave threat that he would make the photographs viral. She did not therefore disclose the thing to anybody. Thereafter also once accused No.1 had called her forcibly in a hotel and had sexual intercourse with her without her consent. She got fed up with the harassment from accused No.1 and therefore consumed poisonous powder around 11.00 p.m. on 6th October 2016. When prosecutrix started vomiting, father asked her as to why she has done such act and then she told the entire incident to her father. She told that even the cousin sister was sexually harassed by accused No.6 who used to accompany accused No.1. When they tried to contact accused No.1, it was learnt that he had fled away. Thereafter she lodged the FIR.

4. After the investigation was over, charge-sheet came to be filed against six persons and the trial was conducted. Prosecution examined in all six witnesses to bring home the guilt of the accused. After considering the evidence on record, the learned trial Judge has acquitted all the accused persons from all the charges. Hence the present Application.

5. Learned APP strongly objected to the fact that the learned trial Judge has not appreciated the evidence properly. Unnecessary comments have been made in respect of the victim girl and the cousin sister. Though they might have gone with the accused willingly out of friendship but it ought not to have been inferred that they had given consent for sexual intercourse. It was wrongly considered that the victim and her cousin sister had attained the age of maturity when the record shows that they were minors. A very technical approach has been taken in respect of considering the age of the victim in this case. The prosecution had examined the Deputy Principal PW-3 and Gram Sevak PW-4 to prove the school leaving certificate and the date of birth. Entry in the date of birth register was taken on the basis of the order passed by the Executive Magistrate i.e. Tahasildar in the year 2005 and unnecessarily objection has been taken as to under which provision the Executive Magistrate had exercised the jurisdiction. In 2005 there was no dispute in respect of age of the prosecutrix and there was no question asked to the father of the girl as to why there was necessity to approach the Executive Magistrate. It ought to have been then held that the girl is minor and her consent, even if for the sake of arguments accepted, was no consent at all. Accused No.1 ought not to have

been acquitted by the trial Court and therefore, there is necessity to re-appreciate the said evidence.

6. We find much substance in the submissions made by learned APP. The first and foremost fact that is required to be noted is that in her FIR the prosecutrix has given her age as 17 years and 4 months. That means though she may not have given the date of birth, she has tried to give the correct computation of her age. She had given the school leaving certificate of her college as well as school. Whatever correction was there, it was in the year 2005 when there was no dispute at all and taking into consideration her date of birth as 1st June 1999, she would have been only six years old in 2005. Another fact to be noted is that merely because the girl is on the verge of majority, whether any concession could have been given to the accused, was a question which has not been dealt with properly by the trial Court. Under the said circumstance, whether the alleged consent can be taken as a free consent which cannot attract ingredients of Section 375 of the Indian Penal Code, would be a question. The issue in this respect is pending before the Hon'ble the Supreme Court also in respect of teenage love matters. It will not be out of place to mention here that the cousin sister whose

reference is there in the case, has filed FIR against accused No.6 herein as the person who had expressed love for her and then had sexual intercourse with her. The said cousin sister has been considered as 'child' and accused No.6 herein has been held guilty in that case. The prosecution is also challenging his sentence and acquittal from certain offences. No doubt both the cases are different but still said cousin sister has been examined as a witness in this case and the present informant – prosecutrix has been examined as a witness in another case. If such behaviour is to be allowed to let go by taking the technical view, then its repercussions on the society are also required to be considered and therefore, we find that this case needs reconsideration so far as acquittal of accused No.1- respondent No.1 herein is concerned.

7. As regards offence under Section 506 of the Indian Penal Code is concerned, definitely both the witnesses are saying that they were put to fear and then the consent was obtained. Whether that consent can be said to be legal consent is required to be seen and therefore the Application needs to be allowed to the extent of accused No.6 – respondent No.6 herein also for the offence punishable under Section 506 of the Indian Penal Code.

8. However, as regards the other accused persons are concerned, it does not appear from the evidence that except accused Nos. 1 and 6 the other persons could have had knowledge and intention to commit the crime against the girls and therefore, the application deserves to be rejected in respect of respondent Nos.2 to 5.

9. As regards respondent No.6 is concerned, the leave also deserves to be granted to the extent of Section 16 punishable under Section 17 of the POCSO Act and Section 109 of the Indian Penal Code. Accordingly, the Application deserves to be allowed, partly. Hence the following order:-

ORDER

(I) Application stands partly allowed, i.e. only against respondent No.1 and respondent No.6.

(II) Application stands rejected as against respondent Nos. 2 to 5.

(III) Leave is granted to the prosecution to file Appeal to challenge the acquittal of respondent Nos.1 and 6.

(IV) Registry to register the Appeal.

(V) Appeal stands **admitted**.

(VI) Call Record and proceedings.

(VII) Action under Section 390 of the Code of Criminal Procedure be taken against respondent Nos.1 and 6 to the satisfaction of the trial Court.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE