

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

9 APPLN. FOR LEAVE TO APPEAL BY STATE NO.55 OF 2018
WITH
CRIMINAL APPLICATION NO.757 OF 2018
IN
CRIMINAL APPEAL STAMP NO.211 OF 2018

THE STATE OF MAHARASHTRA
VERSUS
OMKAR BABASAHEB RODE

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APP for Appellant : Mr. A.V. Deshmukh
Advocate for Respondent: Mr. M.B. Kolpe h/f V. B. Deshmukh

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CORAM : SMT. VIBHA KANKANWADI & S. G. CHAPALGAONKAR, JJ.
Dated: June 26, 2023

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PER COURT :-

1. Criminal application no.55 of 2018 seeking leave to file appeal by the State, Criminal application no.757 of 2018 in Criminal appeal stamp no.211 of 2018 has been filed by the prosecution for condoning the delay of 40 days caused in filing the criminal appeal for enhancement. Notice was served on the respondent/original accused, however, he remained absent. As such, the reasons for the delay are not contested and, therefore, delay stands condoned. Criminal application no.757 of 2018 stands disposed of.

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2. We would like to consider the criminal appeal under section 377 (1) of the Criminal Procedure Code filed by the state for admission. The respondent stood prosecuted before the learned Additional Sessions Judge, Osmanabad in Sessions Case no.64 of 2016 for the offence punishable under section 376 of the Indian Penal Code. After hearing both sides and perusing the evidence on record, the learned Judge of the Trial Court has acquitted the accused of the offence punishable under section 376 of the Indian Penal Code. However, convicted him for the offence punishable under section 354 (A) (i) of the Indian Penal Code and has directed him to undergo R.I. for 15 days and to pay fine of Rs.500/- (Rs. Five Hundred), in default to undergo S.I. for one week. It will not be out of place to mention here that the prosecution has challenged the acquittal of the respondent-accused under section 376 of the Indian Penal Code by filing an application for leave to file appeal under section 378 (1)(b) of the Criminal Procedure Code. However, by this appeal as aforesaid, the prosecution is seeking enhancement in the sentence. At the outset, after going through the impugned judgment, we are of the opinion that it is as cryptic as it is. The learned Trial Judge has arrived

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at the conclusion that as evidence suggest that accused committed act of physical contact and advanced an explicitly clear words with the victim on the day of incident. Offence under section 354(A)(i) of Indian Penal Code has been made out. In fact, it is not the prosecution case at all that the offence under section 354(A)(i) of the Indian Penal Code was committed. It is clear case of the prosecution that the offence has been made out under section 375 of the Indian Penal Code punishable under section 376 of the Indian Penal Code and, therefore, taking into consideration the evidence on record, we do not find that any case is made out for admitting the Criminal Appeal Stamp No.211 of 2018 under section 377 of Cr.P.C. for enhancement in the sentence.

3. Heard Mr. Kolpe h/f Mr. Deshmukh, for respondent.

4. With the help of both of them, we have gone through the evidence before the learned Trial Judge. We have already expressed that the impugned judgment is very much cryptic. The prosecution has examined in all five witnesses to bring home the guilt of the accused. PW-1 is the prosecurix, who was major on the day of the incident. PW 3 is her brother. The

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incident is stated to have taken place around 8 pm on 20.3.2016 when the victim had gone for answering nature's call around a Tamarind Tree in the village. She was returning from the call of nature and then, the accused went from the backside and by expressing that he loves her and want to marry her dragged her and had sexual intercourse. Cousin brother i.e. PW 3, who was going for the nature's call heard her noise and then rescued her. The incident was told by her to her parents and in clear terms both of them are accepting a fact that they have gone to the house of the accused for calling meeting of the respectable persons and those respectable persons had put a proposal that accused should marry PW-1. On the next day, when they again went to the house of the accused, the accused as well as his family members refused the proposal and, thereafter, she went to the police station Tamalwadi and lodged the FIR. Thus, it is noted that reason was given for lodging the FIR belatedly. What we could find from the cross-examination that suggestion was given that there was love affair and refused the proposal of marriage as accused was of tender age, false FIR has been lodged. Whether said explanation for the delay was acceptable or not has not

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been properly discussed but result of that delay appears to be at least in medical examination and as there was no resistance marks. The learned Trial Judge has rather held that the story is unacceptable. This point of view is required to be re-appreciated, because if it was a natural conduct on the part of the prosecutrix and her family members to wait for the proposal after the incident was told to the family members of the accused and in that process, if the struggle marks have vanished, then, whether the prosecutrix can be held responsible for the same is also a question that has to be pondered upon. At this stage, medical evidence rather supports the prosecution story. No doubt, girl is now married, but that should not be a point to show sympathy to the accused. Definitely case is made out for re-appreciating the evidence and, therefore, the criminal application no.55 of 2018 seeking leave to file appeal deserves to be allowed. Hence, the following order.

ORDER

- i. Criminal application No.757 of 2018 stands allowed and disposed off. Registry to register the criminal appeal under section 377 of Criminal Procedure Code.

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- ii. Criminal appeal Stamp No.211 of 2018 under section 377 of Criminal Procedure Code stands dismissed at the threshold.
- iii. Criminal Application no.55 of 2018 filed for leave to appeal under section 378 (1)(b) of the Criminal Procedure Code stands allowed.
- iv. Appeal stands **Admitted**.
- v. Call Record and Proceeding with paper book.
- vi. Issue notice to the respondent. Learned counsel Mr. Kolpe h/f Mr. Deshmukh waives service for accused.
- vii. Though respondent has appeared, there should be compliance under section 390 of Cr.PC.
- viii. Place the matter for further consideration alongwith Record and Proceeding, paper book and compliance on 11.8.2023.

(S. G. CHAPALGAONKAR, J.) (SMT. VIBHA KANKANWADI, J.)

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