

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY STATE NO.56 OF 2018

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

.. Applicant

Versus

Laxman @ Lakhan Bhawan Ghanwat
Age: 21 years, Occu.: Agriculturist,
R/o. Pagori Pimpalgaon, Tq. Pathardi,
Dist. Ahmednagar

.. Respondent

...
Mrs. V. S. Choudhary, APP for the applicant – State.
...

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

DATE : 23rd March, 2023.

ORDER :- (Per Smt. Vibha Kankanwadi, J.)

. Present application has been filed under Section 378(1)(b) of the Code of Criminal Procedure seeking leave to file criminal appeal challenging the judgment and order dated 05.12.2017 passed by learned Additional Sessions Judge, Ahmednagar in Sessions Case No.327 of 2016 thereby acquitting the respondent/original accused from the offences punishable under Sections 376(2)(n), 306 and 506

of Indian Penal Code as well as Sections 3 and 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the “POCSO Act”).

2. Heard learned APP Mrs. V. S. Choudhary for the applicant - State for the purpose of admission. With the able assistance of the learned APP, we have gone through the material, which was before the learned Trial Judge.

3. The prosecution story in short is that the informant is blessed with two sons and a daughter. The informant is residing with her husband, who was serving as a waiter, her children and in-laws were residing at their native place. At the time of FIR i.e. on 27.02.2016, the daughter of the informant was studying in 10th standard. Informant alleged that when she had gone to Jalna along with her husband, around 9.00 a.m. on 16.02.2016 her husband received phone call on his mobile of their son informing that their daughter has consumed poison and she has been admitted to Nityaseva Hospital, Shevgaon by the cousin brother and others. Thereafter, the informant and her husband and other relatives visited the said hospital. The daughter was taking treatment in ICU and on that day, she was not in a position to speak. On the next date i.e. on 17.02.2016, she regained consciousness and at that time, the mother as well as

father asked her as to what had happened. The girl then disclosed that she had love affair with the accused and by giving promise to marry he had established physical relations with her between 03.01.2016 to 10.02.2016 in their house. Four days prior to 16.02.2016, accused told her that he will not marry her and even if her marriage is fixed, he would defame her and see that she doesn't get marry. Thereafter, the girl became angry and consumed poison which was the pesticide kept in the house around 8.30 a.m. on 16.02.2016. The statement of the girl was recorded by police on 17.02.2016, however, the mother and father of the girl had given affidavit on Rs.100/- stamp papers before a Notary of Pathardi on 18.02.2016 stating those things which were told by the girl to them. However, the entire thing has happened due to trifle quarrel and they have no complaint to make. It is alleged that after the girl would recover, the accused would marry her and taking into consideration her future, no complaint was registered. However, the girl expired around 11.30 a.m. on 22.02.2016. Father had gone to the police station, but gave it in writing that he has no complaint to make. It is stated that as they had lost their daughter, their mental condition was not proper and, therefore, they had given that kind of statement. However, after getting solace, on 27.02.2016 the FIR was lodged. On the basis of the said FIR, offence vide Crime No.76 of 2016 came to be

registered for the offence punishable under Sections 376, 306, 506 of Indian Penal Code as well as under Sections 3 and 4 of the POCSO Act.

4. After the completion of investigation, charge-sheet was filed. Prosecution has examined in all five witnesses to bring home the guilt of the accused. After considering the evidence on record and hearing both sides, the learned Trial Judge has acquitted the accused from all the charges. Hence, present application.

5. The learned APP submitted that the learned Trial Court has not appreciated the evidence properly. The prosecution has proved the FIR, dying declaration, cause of death and also the extensions have been given as to why the informant as well as her husband had given such affidavits. The delay caused in lodging the FIR was duly explained. A minor girl has lost her life due to the acts of accused, otherwise there was no reason for the girl to implicate the accused. Informant and her husband were, in fact, not even knowing about the love affair and, therefore, it can also be said that they were not having any reason for implicating the accused. As the evidence has not been properly appreciated and a hypertechnical approach has been adopted in serious offence under Section 376 of the Indian Penal Code and Sections 3 and 4 of the POCSO Act, the appeal deserves to be admitted by granting leave.

6. At the outset, we would like to consider the testimony of P.W.2 Prabhakar Zodge, who had recorded the dying declaration of the girl. Prior to that, we make it clear that accused has not much disputed about the age of the girl and she appears to be “child” as defined under Section 2(d) of the POCSO Act. P.W.2 Prabhakar Zodge has taken down the dying declaration and P.W.3 Dr. Vrushali Shekde is the medical officer on duty, who has given endorsement on dying declaration Exhibit-19. In her cross-examination, she has stated from the ICU papers, which she had with her, that there is entry at 9.00 a.m. on 17.02.2016 that the patient was stable. Even if we consider the said entry, it was in respect of stability and she admitted in the cross-examination that it is not mentioned that the patient was well oriented at that time. Consciousness and fitness to give statement are two different health conditions. P.W.2 Prabhakar Zodge has stated that after he recorded the dying declaration he had forwarded it to Police Station Pathardi and the covering letter has been produced at Exhibit-20. There is no explanation from P.W.4 A.P.I. Yogesh Kamale – the investigating officer as to why no offence was registered on the basis of dying declaration. There were allegations in the said dying declaration that the accused has committed forcible sexual intercourse with the girl. Therefore, even the police had not dealt with the matter seriously. Though the cognizable offence was

transpired, yet offence was not registered.

7. Even if we consider the dying declaration (Exhibit-19) as it is, it does not fulfill the ingredients of offence under Section 306 of Indian Penal Code. The scope and ambit of Section 107 of Indian Penal Code and its co-relation with Section 306 of Indian Penal Code has been explained by catena of judgments by the Hon'ble Supreme Court as well as various High Courts. In ***S. S. Chheena Vs. Vijay Kumar Mahajan, (2010) 12 SCC 190***, the Hon'ble Supreme Court observed that :-

“25. Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained. The intention of the legislature and the ratio of the cases decided by this Court is clear that in order to convict a person under Section 306 IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and that act must have been intended to push the deceased into such a position that he committed suicide.”

8. Further, the Hon'ble Supreme Court recently in ***Mariano Anto Bruna Vs. Inspector of Police, [2022 SCC Online SC 1387]***, observed that in order to convict an accused under Section 306 of Indian Penal

Code, the state of mind to commit a particular crime must be visible with regard to determining the culpability. Further note has been taken on the decision in ***Ude Singh & Ors. Vs. State of Haryana, (2019) 17 SCC 301***, wherein it has been observed that :-

“16.1 For the purpose of finding out if a person has abetted commission of suicide by another, the consideration would be if the accused is guilty of the act of instigation of the act of suicide. As explained and reiterated by this Court in the decisions above-referred, instigation means to goad, urge forward, provoke, incite or encourage to do an act. If the persons who committed suicide had been hypersensitive and the action of accused is otherwise not ordinarily expected to induce a similarly circumstanced person to commit suicide, it may not be safe to hold the accused guilty of abetment of suicide. But, on the other hand, if the accused by his acts and by his continuous course of conduct creates a situation which leads the deceased perceiving no other option except to commit suicide, the case may fall within the four-corners of Section 306 IPC. If the accused plays an active role in tarnishing the self-esteem and self-respect of the victim, which eventually draws the victim to commit suicide, the accused may be held guilty of abetment of suicide. The question of *mens rea* on the part of the accused in such cases would be examined with reference to the actual acts and deeds of the accused and if the acts and deeds are only of such nature where the accused intended nothing more than harassment or snap show of anger, a particular case may fall short of the offence of abetment of suicide.

However, if the accused kept on irritating or annoying the deceased by words or deeds until the deceased reacted or was provoked, a particular case may be that of abetment of suicide. Such being the matter of delicate analysis of human behaviour, each case is required to be examined on its own facts, while taking note of all the surrounding factors having bearing on the actions and psyche of the accused and the deceased.”

9. Thus, after taking note of the legal requirement in respect of offence under Section 306 of Indian Penal Code, here in the present case, we do not find that the accused had played any active role. No doubt, the act of rape would certainly amount to tarnishing a self esteem of a lady, but again the question would come that even if we accept that the rape was committed, whether the accused had anticipated or had the intention that the prosecutrix in this case should commit suicide, would be a question. There is no positive evidence in this respect.

10. Another aspect to be noted is that as per the FIR as well as testimony of P.W.1 - informant it would reveal that oral dying declaration was also given to the informant by the deceased around 12.00 noon on 17.02.2016. Still, she did not lodge any report, nor her husband had lodged a report with the police. Rather they both had given affidavit on Rs.100/- stamp papers by swearing before the

Notary on 18.02.2016 stating that they have no complaint to make. It is painful to note that though they have stated everything in the said affidavit also and even after coming to know that rape was committed on their minor daughter and she has tried to commit suicide, they have termed it as an act due to trifle quarrel. If the parents themselves have not looked at the facts and utmost severity, we expect least from anybody. The explanation that they were under impression that after the girl would recover, the accused would marry her, would be easy to be told at a later point of time. In those affidavits Exhibit-10 and 12, they have not stated as to who had given that promise. We are aware of the fact that in such cases of rape, the girl and the girl's family would be reluctant to approach the police station. They would be afraid of being defamed on that count, but here there is no positive evidence to show that after getting the said information, the informant and/or her husband had contacted the accused and there was any promise from the side of the accused which prompted them to take such action. Therefore, from this angle also we do not find that there is evidence either for the offence of rape or abetment of suicide. The prosecution has also not stated that after the dying declaration Exhibit-19 was reduced into writing, the police officer had requested the medical officer to examine deceased physically from the point of view of rape victim.

11. The postmortem report does not suggest the case of rape and it appears that the girl died after about six days. The parents in this case were unaware about the love affair and then in the dying declaration it has been stated that she was ravished between 03.01.2016 to 10.02.2016 in their house itself. The parents used to be in the field for the purpose of work. In fact, in this case, the girl was 16 years of age taking education in 10th standard that means she was not even of marriageable age, still she says that as the accused who was then 21 years old had given promise to marry and then the sexual intercourse had taken place. At the cost of repetition, we would say that except the dying declaration Exhibit-19, there is no other evidence.

12. As aforesaid, prosecutrix died after about 6 days of treatment. The postmortem report does not suggest the case of rape. Thus, from both the angles, if we consider the facts, then in spite of having chance to get the medical evidence, there was no attempt by the investigating agency and, therefore, keeping aside the technical aspect about proof of dying declaration, accused cannot held guilty of committing offence under Section 376 of Indian Penal Code or even under Sections 306 and 506 of Indian Penal Code. In the matter wherein the prosecutrix is alive her sole testimony can be believed, if it is inspiring confidence to convict an accused for the offence

punishable under Section 376 of Indian Penal Code. Taking into consideration all these aspects though the learned Trial Judge has given some different reasons, but the conclusion is correct. Under such circumstance, no case is made out to disturb or interfere with the said findings. No case is made out for grant of leave. Application stands rejected.

[Y. G. KHOBRAGADE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm