

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

APPLICATION FOR LEAVE TO APPEAL BY STATE NO.48 OF 2020

The State of Maharashtra,
through Police Station Sadar Bazar,
Jalna Taluka & District Jalna.

..Applicant
(Orig. Complainant)

Versus

Shaikh Ashpak s/o. Sk. Umar
Age: 19 years, Occu.: Nil,
R/o.Balaji Galli, Gandhinagar, Jalna
Taluka and District : Jalna.

..Respondent
(Orig. Accused)

...
APP for Applicant : Mr.S.J.Salgare

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

DATE : 6th June, 2023

ORDER :-

1. Present application has been filed by the prosecution seeking leave under Section 378(1)(b) of the Code of Criminal Procedure to file appeal challenging the acquittal of the respondent - original accused in Special Case (Child) No.18 of 2017 dated 30-11-2019 by learned Judge, Special Court, Jalna, thereby acquitting the respondent from the offences punishable under Sections 363, 366-A, 376(2)(i), 376(2)(f), 376(2)(j), 376(2)(N) of the Indian Penal Code (IPC).

2. Heard learned APP for the applicant State and perused the

material which was available before the learned Special Judge.

3. Prosecution has examined in all seven witnesses to bring home the guilt of the accused including that of the victim, her parents, friend taking education with the victim, the Head Master of the School and the Police Officers. It has been the prosecution story that the age of the victim was below 18 years and therefore, she was a “child” within the definition under Section 2(1)(d) of the Protection of Children from Sexual Offences Act, 2012 (for short “POCSO Act”) on the date of alleged incident. The learned Special Judge has answered the said point in the negative and has held that she was not minor on the date of incident. The girl has stated her date of birth, however, *prima facie* scanning of the evidence at this state would show that the said date of birth has not been challenged in the cross-examination by the accused. The date of birth is also stated by the parents. However, it is to be noted that father **PW4** Subhash Nevandram Tekwani is stated to be the occupied father but mother **PW5** Hema Subhash Tekwani is the natural mother. Ofcourse the learned Special Judge has given reasons and raised doubt about victim being the daughter of **PW5** Hema Subhash Tekwani since the name has been changed after her marriage which appears to be the second marriage. The fact, however, remains is the appreciation of evidence of **PW2** Shantilal

Madanlal Wangota, Head Master of the School. It appears that the girl had taken admission in the Primary School of the same Institution and then at the Secondary level, it was also the School of the same Institution. The School record Exhibit-25 gives the same date of birth which the girl has stated. Under such circumstances, this fact is required to weigh as to whether independently it could have been considered by the learned Special Judge that there is evidence to prove the minority of the victim especially when the date of birth was not challenged at all in her cross-examination.

4. Another point that is also involved in this case is that the girl appears to be of the age of discretion and it appears to be a love affair. She had left two chits before leaving house and therefore, it is also required to be seen whether Sections 363 and 366-A of the IPC would be attracted under such circumstances or not if the leaving is voluntarily at the background that she was having love affair with the accused and in cross examination, she has admitted that there used to be quarrels between her parents, which was causing her mental disturbance. In other words she has stated that she was unhappy at the home. She has admitted that she was having understanding capacity what is good and what is bad for her. Definitely all these things have to be considered but it would then depend upon the conclusion as to

whether the victim can be said to be “child” within the definition under Section 2(1)(d) of the POCSO Act. Under such circumstances, we are of the opinion that application deserves to be allowed and leave to file appeal deserves to be granted. Accordingly, following order is passed :

ORDER

- (I) Application stands allowed.
- (II) Leave is granted to the prosecution to file Appeal.
- (III) Registry to register the Appeal.
- (IV) Appeal stands **admitted**.
- (V) Issue notice to the respondent to be made returnable on 20-07-2023.
- (VI) Call Record and Proceedings.
- (VII) Compliance under Section 390 of the Code of Criminal Procedure be made before the learned Judge, Special Court, Jalna. Respondent be released on bail till the conclusion of present appeal upon such terms and conditions as be deemed fit by the concerned trial Judge.

(**ABHAY S. WAGHWASE**)
JUDGE

(**SMT. VIBHA KANKANWADI**)
JUDGE