

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
APPLN. FOR LEAVE TO APPEAL BY STATE NO.72 OF 2018

The State of Maharashtra

.. Applicant

Versus

Murlidhar Ramchandra Shinde

.. Respondent

...
Mr. R. V. Dasalkar, APP for the applicant – State.
...

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

DATE : March 24, 2023.

ORDER :-

1. Present application has been filed by the State under Section 376(1)(b) of the Code of Criminal Procedure to seek leave to appeal to challenge the judgment and order dated 26.12.2017 passed by the learned Additional Sessions Judge, Newasa, Dist. Parbhani in Sessions Case No.65 of 2016, thereby acquitting the respondent/original accused for the offences punishable under Sections 376(f)(i) of Indian Penal Code and under Section 3 and 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the "POCSO Act").

2. With the help of learned APP, we have considered the evidence which was before the learned Trial Judge and we are considering the

present application from the point of view as to whether leave can be granted to the prosecution to file the appeal.

3. The prosecution story in short is that the informant is the neighbour of the accused. Informant is having daughter aged 7. She has friend who resides in the neighbourhood. They both were taking education in 2nd standard when the FIR was lodged on 29.08.2016. It is contended that on 27.08.2016 around 6.00 p.m. when the informant returned from work, her daughter told her that when she along with her friend were playing in front of the house around 4.00 p.m., the accused asked them to come to his house for playing swing. They both went in his house and thereafter he had asked them to remove their nickers as well as ask them to lie on the ground. The accused who was then 62 years old had removed his Dhoti and then it was told that he was moving his hand from the body of the girls. They shouted and ran from the house of the accused. The informant informed the said fact to her husband as well as the friend's mother. They all went to the house of the accused, however, he was not in the house. For a considerable time he did not return and therefore, the informant went to the police station and lodged the report.

4. It appears that the prosecution has examined in all nine witnesses to bring home the guilt of the accused. Both the victims have been examined, so also the brothers of both the victims have

been examined as P.W.7 and P.W.8. They were the eye witnesses to the fact that the girls were taken by the accused to his house.

5. After considering the evidence on record, it appears that the learned Trial judge has not followed the proper procedure and acquitted the accused taking into consideration the fact that in the statement under Section 164 of the Code of Criminal Procedure, the girls have given different version. However, it is to be noted that the said statements of the witnesses under Section 164 of the Code of Criminal Procedure came to be exhibited during the course of examination-in-chief and there was no reference to the same in the cross-examination. Under such circumstance, whether the learned Trial Judge was justified in making use of those statements of the accused, is a question. Another sorry state of affairs which has to be noted is that at many places, the learned Trial Judge has disclosed the identity of the victims and even their family members. He has referred Section 33 of the POCSO Act at many occasions, but it appears that he has ignored Section 33(7) of the POCSO Act. Further, we would like to say that the identity is not only the name of the particular victim but it can be so gathered from the relatives also and, therefore, it ought to have been observed by the learned Trial Judge that the identity of the victims is not disclosed in any manner. In the impugned judgment, it is stated that the charge was framed for

the offence punishable under Section 376(f)(i) of Indian Penal Code and it appears that the learned Trial Judge had not even considered whether such Section exists. We have considered the Indian Penal Code prevailing in 2016 because there is amendment in 2018 and in the present case, the date of offence is 27.08.2016. At the cost of repetition, we say that there was no Section 376(f)(i) of Indian Penal Code in 2016 also. If it was to be taken as 376(2)(f), then it was in respect of a person, being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, who commits rape on such woman, would be arrayed as accused. As the accused was neighbour, he cannot be said to be the person in a position of trust or authority, nor he was the relative or a guardian or teacher of the victims. No doubt defect in framing of charge *per se* will not vitiate the trial. Section 215 of the Code of Criminal Procedure prescribes that no error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice. Apparently this Section may be available to the accused but still it reflects how the judge would have approached the matter.

6. The injury certificates of the girls would show that there was no external sign of injury and there was no injury to the external genitals. The hymen was intact. The other Section under which the accused was prosecuted was Sections 3 and 4 of the POCSO Act. Whether the prosecution had proved the lesser offence or not is also required to be considered taking into consideration the evidence on record and, therefore, we feel that case is made out to grant leave to the prosecution to file the appeal. Accordingly, leave is granted to the State to file appeal. The Application for Leave to Appeal by State No.72 of 2018 stands allowed.

7. Registry to register the appeal.

8. The said appeal is **admitted**.

9. Action under Section 390 of the Code of Criminal Procedure be taken against the respondent to the satisfaction of the Trial Court.

10. Issue notice to the respondent, to be made returnable on 05.06.2023.

11. Call record and proceedings with paperbook.

[Y. G. KHOBRAGADE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm