

JPChavan

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

913 APPLN. FOR LEAVE TO APPEAL BY STATE NO.77 OF 2018

THE STATE OF MAHARASHTRA
VERSUS
SONYA @ SONA GORAKH VAIRAGAR

...

APP for Appellant State : Mrs. V. S. Chaudhari

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

DATE : **5th April, 2023**

ORDER:

1. The present application has been filed by the prosecution seeking leave under section 378 (1)(b) of the Criminal Procedure Code to file criminal appeal challenging judgment and order dated 05.12.2017 passed by the learned Additional Sessions Judge, Newasa, District Ahmednagar in Sessions Case No. 12 of 2016 thereby acquitting the respondent/original accused from the offence punishable under section 328, 376 (i) & (n) of Indian Penal Code and sections 3 & 4 of Protection of Children from Sexual Offences Act, 2012.

2. Heard Mrs. V. S. Chaudhari, learned APP for the State. With her able assistance, we have gone through the documents which were before the learned trial judge.

3. It is to be noted that the prosecution has examined in all 9 witnesses to bring home the guilt of the accused. PW-3 is the victim-child. She has given her age at the time of deposition as 15 years and in

the cross examination, we do not find that it was challenged in any manner. In her examination-in-chief, she has also given the date of birth and stated that she was taking education in 9th standard at that time. Her date of birth has been proved through PW-5 Pandharinath Shelke who was the Incharge Headmaster of the school and we found that as regards the date of birth is concerned, he was not asked any question in the cross. Therefore, there was sufficient evidence before the learned trial judge to hold the victim as 'child' as defined under section 2(d) of the POCSO Act.

4. PW-2 is the mother of prosecutrix and PW-3 is the prosecutrix. Definitely, the mother has told about incident on the basis of information given by PW-3. PW-3 states that on the day of incident, her examination was going on. There is no facility of toilet in the school and therefore, she had gone to nearby bushes for answering nature's call. At that time, the accused pressed her mouth, specially nose with handkerchief containing some intoxicant, as a result of which, she felt drowsiness. She then states that the accused taken her lifted nearby the structure called temple and had committed rape on her. She then stated that from that place also she was taken by accused in the sugarcane field where she was again raped by the accused. She has then stated that she was then taken to the backside of her house and dropped there. There is detailed cross examination.

5. At this stage we would like to say that the prosecution examined two Doctors. PW-6 Dr. Ravi is the Medical Officer who had examined the victim first. He found the victim under the influence of sedative drug and it is specifically stated that such sedative drug might

be inhaled, orally taken or through IV or in any other mode. There appears to be some corroboration to the statement of victim about making her inhalation some intoxicant. However, it is to be noted that there is evidence of PW-7 Dr. Kishor who is Gynecologist, who had examined the victim. He stated that the girl had told him about rape on her but then he says that he had not found any scratch mark, struggle mark, abrasion on her body including private part. But then he says that on the examination of vagina, he found, tear at 3 and 6 O'clock position but he had given opinion that the girl had sexual intercourse in the past but she did not have sexual intercourse within the period of one or two days immediately before examination. Now it is to be considered as to whether the ocular evidence would prevail or medical evidence when there is conflict. When the girl says that she was compelled to inhale sedative, whether she was in position to resist and whether that can be the point which can be considered by the medical officer to arrive at such conclusion is required to be gone into. The legal position stands that even the sole testimony of prosecutrix can be the basis for conviction, if it inspires confidence. Under such circumstance, whether in this case, the testimony of PW-3 inspires confidence or not is definitely required to be gone into.

6. Since we are assessing the evidence only for the purpose to see whether the case is made out to grant leave, we do not want to consider the other evidence on record at this stage. Definitely, the case is made out to grant leave. Hence, following order:

O R D E R

- (i) The application stands allowed.

- (ii) The prosecution is allowed to file appeal to challenge the impugned order acquitting the respondent. Registry to verify and register appeal.
- (iii) The appeal is **admitted**.
- (iv) Issue notice to the respondent, returnable on 23.06.2023.
- (v) Call record and proceedings with paper-book.
- (vi) Compliance under section 390 of the Criminal Procedure Code should be made to the satisfaction of the trial court.

(Y. G. KHOBRAGADE, J.)

(SMT. VIBHA KANKANWADI, J.)