

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

APPLICATION FOR LEAVE TO APPEAL BY STATE NO.20 OF 2021

The State of Maharashtra,
Through Police Station Incharge,
Police Station, Sadar Bazar, Jalna,
Dist-Jalna.

...APPLICANT

VERSUS

- 1) Sujitkumar S/o Motilalji Lohar,
Age-29 years, Occ:Labour,
R/o-Rushabhadeo Bha. Kherwada,
Dist-Udaipur (Rajasthan State),
- 2) Radhabai Chatarsing Hiwale,
(Abated since dead),
- 3) Ajit S/o Ashok Nirmal,
Age-29 years, Occu:Labour,
R/o-Bori, Tq-Ambad, Dist-Jalna,
- 4) Subhash S/o Yadav Bhoi,
Age-65 years, Occu:Labour,
R/o-Borkheda, Tq-Chalisgaon,
Dist-Jalgaon,
- 5) Suresh S/o Santosh Shivade,
Age-23 years, Occu:Labour,
R/o-Wakod, Jamner, Dist-Jalgaon.

...RESPONDENTS

...
Mrs. V.S. Choudhari, A.P.P for Applicant.
...

**CORAM: SMT. VIBHA KANKANWADI AND
S.G. CHAPALGAONKAR, JJ.**

DATE : 5th JULY, 2023

ORDER [PER SMT. VIBHA KANKANWADI, J.] :

1. Present Application has been filed by the prosecution seeking leave to appeal under Section 378(1)(b) of the Code of Criminal Procedure challenging the acquittal of the respondents by the learned Judge, Special Court, Jalna in Special Case (Child) No.63 of 2017 of the offence punishable under Sections 363, 366, 366-A, 373, 376(n) read with Section 34 of the Indian Penal Code and of the offence punishable under Sections 4 and 17 of the Protection of Children from Sexual Offences Act (for short "the POCSO Act"), on 15th December 2020.

2. We have heard Mrs. Choudhari, learned APP appearing for the State. With the able assistance of the learned APP, we have gone through the entire record which was before the learned trial Judge.

3. The gist of the submissions on behalf of the learned APP is that the learned trial Judge has not appreciated the evidence properly. A serious offence has been committed. The minor girl, who, due to her poverty, was doing labour work with original accused No.2 Radhabai (case got abated against her before the learned trial Court itself); had taken the prosecutrix to Pune with

accused No.3, under the pretext that a suitable match would be found for her. Accused No.2 had taken disadvantage of the poor financial condition of the girl and even without taking consent from her family members she was literally sold by accused Nos. 4 and 5 to accused No.1. Accused No.1 had performed marriage with her and had sexual intercourse with her without her consent. The custody of the child prosecutrix was with accused Nos. 2 to 5 as the guardian still they have committed the said offence. The prosecutrix had supported her story and gave the entire account of the incident which had taken place with her. The girl was found at Rajasthan. That means possibility of such racket cannot be ruled out. Some of the accused involved in the entire racket are still absconding. The wrong appreciation of evidence has led to the miscarriage of justice in the form of the acquittal of the respondents and therefore, re-appreciation is required.

4. Informant PW-1 is the father of the victim. He has five daughters and two sons. Two of his daughters were married. The victim used to reside with the married sister. At the time of First Information Report (for short "the FIR") she was below 17 years of age. However, victim was working as a domestic servant with

accused No.2, who used to reside in PWD colony. The married sister of victim told father on 29th August 2017 that the victim is missing since the earlier day i.e. 28th August 2017 as she has not returned home. Thereafter the informant took search of the victim with his relatives but the victim could not be traced out. Then informant got the information from the victim's friend that she has received phone call from victim and the victim has given a mobile number and had asked her to give that mobile number to her father who would contact her. Then father contacted the victim. Victim told that accused No.2 Radhika had taken her to Aurangabad on Scooty. Thereafter some unknown persons caused her to sit in the car and on the day of said conversation she was in Rajasthan. She told that she wants to come back and she was crying. Thereafter the informant and his relatives went to the house of accused No.2 and questioned her. Thereupon accused No.2 gave them assurance that she would bring the victim within three to four days. However the victim did not return till 15th September 2017 and therefore informant again made inquiry with accused No.2. Accused No.2 then told that she does not know anything about the victim and threatened that the informant should not come to her house otherwise she would commit suicide by holding him responsible. The brother-in-law of

the victim then contacted the victim on the same mobile phone whereupon the same story was narrated. Under that circumstance the FIR came to be lodged vide Crime No. 598 of 2017 for the offence punishable under Sections 363 read with Section 34 of the Indian Penal Code.

5. The search for the victim was taken and on 29th September 2017 she was found in the State of Rajasthan with accused No.1. Accused No.1 came to be arrested. Thereafter the role of other accused persons came to be revealed and they were also arrested. Statements of witnesses were recorded. Documents were collected and after completion of the investigation, charge-sheet was filed.

6. After the committal of the case, the trial was conducted and after hearing both the sides and perusing evidence on record, the learned trial Judge has acquitted accused No.1 and 3 to 5 from all the charges. As aforesaid, the case stood abated as against accused No.2.

7. At the outset, we would like to say that unless and until it is proved by cogent evidence that victim in this case was a child,

no offence can be said to have been proved under Section 363 of the Indian Penal Code and under the provisions of POCSO Act. Even as regards the other Sections in the Indian Penal Code are concerned, unless it is proved that whatever act has been done was without consent of the girl, those Sections will not be attracted. It is therefore, required to be seen as to whether age of the girl is proved. Perusal of the testimony of PW-2, victim would show that she has not given her date of birth. It is stated by her father PW-1 that the date of birth of the victim is 15th June 2000 and it is stated that she was admitted in the school, of which school leaving certificate has been produced. PW-4 was the employee of the school, who had maintained the school register. He has stated that the birth date of the victim in their school record was taken on the basis of admission form with affidavit of the victim's father. Here we would like to say that when it is said that the victim was born on 15th June 2000, by that time it was the primary duty of every Gram Panchayat to record the birth that takes place within its jurisdiction. PW-4 does not give any explanation as to why they had not called upon the victim's father to bring the record from the Gram Panchayat / Nagar Palika wherever they were staying at that time. Why there was necessity to take affidavit from PW-1, is a

question. The affidavit of the father cannot be the proper basis on which the date of birth can be taken note of. The investigating officer has not insisted for ossification test and determination of the age of the victim. The said school register cannot be taken as conclusive evidence in respect of date of birth of the victim.

8. The said fact about date of birth can also be seen from another angle. PW-2, the victim in her cross-examination has admitted that before performance of her marriage she had signed some documents. When she reached Rajasthan and met with accused No.1, she had talked with accused No.1 before marriage. She had handed over signed documents to the person who performed her marriage with accused No.1. She has claimed ignorance as to in whose possession the documents were prior to the act of handing over of those documents by her to accused No.1. She has also admitted that she had given different surname as well as name of the father to accused No.1. In clear terms she says that while representing accused No.1 she told her age as 21 years and also stated that she was residing at Aurangabad. That means voluntarily she has given different information and even shared the documents with accused No.1.

Her statements under Section 161 as well as Section 164 of the Code of Criminal Procedure as well as her examination-in-chief are totally silent as regards giving such documents to accused No.1. The said fact was within her knowledge, yet not explained. It also depicts that accused No.1 had taken precaution to see that the girl is major and then he has performed the marriage. Therefore, on both counts it cannot be stated that the prosecution had proved that the girl was 'child' within the meaning of Section 2(1)(d) of the POCSO Act. When the prosecution has failed to prove the said fact, question of application of provisions of the POCSO Act to the present case will not arise. No offence can be said to have been proved as punishable under the provisions of the POCSO Act, beyond reasonable doubt.

9. The corollary of the above point is that the girl was major and therefore Section 363 of the Indian Penal Code will not get attracted and after going to Rajasthan and having talks with accused No.1 the girl approved him and then performed marriage. The question of consent or information to her parents or siblings will not arise and even if they were not informed, yet it does not amount to offence.

10. Another fact to be noted is that though the prosecution has examined eleven witnesses, yet none of them say that the girl was sold. There is no direct or circumstantial evidence on the said point. Therefore, it cannot be said that there was human trafficking.

11. As aforesaid, when the girl is held to be major, performing voluntarily marriage with accused No.1, ingredients of Section 375 of 373 of the Indian Penal Code will not arise. In her cross-examination the girl has stated that accused No.1 kept physical relations with her by treating her as his wife. She has no grievance against accused No.1 and she is ready to go with him. The girl has also stated that still she has desire to stay with accused No.1. She has further stated that during her stay at Rajasthan with accused No.1 he had treated her well and even on the day on which her testimony was recorded, she was accepting him as her husband. When this feeling was still existing on the date of her deposition, there was no question of any act by accused No.1 against the consent of the girl.

12. There is no evidence against accused Nos. 3 to 5 elaborately stating about the role played by them.

13. The learned trial Judge has properly scanned the evidence and acquitted the accused and therefore, no interference is required and the Application deserves to be rejected.

14. The Application stands rejected.

[S.G. CHAPALGAONKAR]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

asb/JULY23