

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

APPLN. FOR LEAVE TO APPEAL BY STATE NO.94 OF 2018

**THE STATE OF MAHARASHTRA
VERSUS
KIRAN S/O. ABHIMAN THORAT AND ANR**

....
Mr. S. J. Salgar, APP for the applicant - State
....

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

DATE : 31.03.2023.

PER COURT :-

. The present application has been filed seeking leave to appeal under Section 378(1)(b) of the Code of Criminal Procedure to challenge the judgment and order dated 12.01.2018 passed by the learned Special Court (POCSO Act), Ahmednagar in Sessions Case No.132/2014 thereby acquitting both the respondents/original accused persons from the offence punishable under Sections 376(2)(i), 323, 504, 506 of the Indian Penal Code and under Sections 3, 4 of the Protection of Children from Sexual Offences (POCSO) Act, 2012.

2. Heard the learned APP at the stage of admission and we have gone through the copies of the deposition and other documents which were before the learned trial Judge, with the able assistance of the learned APP.

3. The prosecution story, in short, is that the prosecutrix who was aged 13 years and studying in 8th standard, was residing with her parents. Accused No.2 was residing nearby to the house of the prosecutrix. Accused No.1 used to pay visit to the house of accused No.2. The prosecutrix got acquainted with both the accused in such a way. The incident had taken place on 06.10.2013. The parents of the prosecutrix had gone out of the house and around 1.30 p.m. accused No.2 came to the house of prosecutrix. Accused No.2 informed the prosecutrix that she had talks with accused No.1 and the accused No.1 is in his house. The prosecutrix should go to the house of accused No.1 and do whatever he would say. Accused No.2 promised her that she would follow her. The prosecutrix thereafter went to the house of accused No.1 around 2.00 p.m. The accused No.1 made inquiry with her about her parents and then it is said that the accused No.1 had forcible sexual intercourse with the prosecutrix.

He had thereafter threatened her to kill if she discloses the incident to anybody. The prosecutrix thereafter returned home, however, due to fear, she did not inform the incident to her parents. She had seen accused No.1 eight days prior to the First Information Report (FIR) dated 29.01.2014 Exh.40.

4. After the offence was registered, the investigation was carried out, charge-sheet came to be filed with the Special Judge under the POCSO Act. Charge was framed and trial was conducted. Prosecution examined in all ten witnesses to bring home the guilt of the accused and after considering the evidence on record and hearing both the sides, the learned Special Judge has acquitted both the accused persons. Hence, the present application seeking leave to appeal.

5. It has been vehemently submitted on behalf of the applicant prosecution that the learned trial Judge has not appreciated the evidence properly. PW-1 is the prosecutrix and her testimony has been recorded after administering oath. She has reiterated the contents of her FIR Exh.40 in her examination in chief. Her cross examination was in fact in a routine way. Though there was an

attempt to challenge her age by way of certain questions in the cross, yet her date of birth which was stated by her in the examination in chief has been got proved by examining PW-7 Shaikh Iqbal who was serving as Clerk in the Health Department of Ahmednagar Municipal Corporation. The birth certificate has been produced at Exh.53. It would clearly show that she was aged 13 at the time of incident. She was forced by accused No.2 to go to the house of accused No.1. The said action on the part of accused No.2 was the outcome of the talks between accused No.2 and accused No.1 and therefore, accused No.2 ought to have been held guilty for committing offence under Section 109 of the Indian Penal Code. No doubt, there is delay in lodging the FIR, however, she has explained the said delay. Threats were given by accused No.1 to kill and therefore, she had not disclosed the incident to her parents, but when she had seen the accused eight days prior to the FIR, it appears that she realised that she should inform the incident to her parents. Accordingly, she had communicated the same to her parents. There was no reason to discard her testimony. It has been wrongly observed by the learned trial Judge that her testimony does not inspire confidence.

6. PW-4 is the father of the prosecutrix and he has supported the prosecutrix by saying that the prosecutrix had disclosed about the incident only eight days prior to the FIR.

7. The testimony of PW-10 Dr. Surekha - Medical Officer who had examined the prosecutrix would show that upon the medical examination of the prosecutrix, she had noticed that there was old rapture of hymen, irregular margin and therefore the Medico Legal Certificate Exh.62 suggest that there was possibility of sexual assault on the prosecutrix. There was only one question in her cross examination and she has answered that there was no external injury that was noticed by her on the person of the prosecutrix. The medical examination was belated and therefore external examination did not reveal any external injury. However, the internal injury has been noticed. There was sufficient evidence before the learned trial Judge to hold both the accused guilty of committing offence as per the charge framed against them. However, as the perverse finding is given, the appeal deserves to be admitted after grant of leave.

8. At the outset, we would like to say that in the cases for the offence punishable under Section 376 of the Indian Penal Code

and the POCSO Act, the testimony of the sole victim would be sufficient to convict the accused, however, the testimony should in fact inspire confidence. It appears that the trial Court was of the opinion that the testimony of PW-1 was not inspiring confidence and therefore, we are required to consider prima-facie at the stage of admission, as to whether the trial Court was so justified. The entire prosecution story is narrated in the earlier paragraphs, therefore, just to avoid the repetition, we are not reproducing the same. But, it can be seen from the FIR as well as the examination in chief of the prosecutrix that she is silent on the point that since when she was knowing accused No.1. She might be knowing accused No.2 since many years prior to the incident as she was residing in the neighborhood. However, it is not made clear by her that the relationship between her and the accused No.2 was of such a nature that she used to believe accused No.2 and could have acted as per the say of accused No.2 without even thinking about the same. We have taken the note of the fact that she was studying in 8th standard at that time. We also make it very clear that there appears to be no much dispute about the age of the prosecutrix, rather there is sufficient evidence on record to show that she was aged 13. But still the fact

remains that unless there would have been such a bond even with the neighbour that such neighbour could be blindly followed, then only a person may not question the neighbour for any of the acts directed or requested to be done. The prosecutrix has stated that her parents had gone out of the house and she was alone. The question arises as to why she could not have told accused No.1 that since the parents have gone out and she is alone, she will not go to the house of accused No.1 or would go to his house only after informing the parents after their return. In her cross examination she has admitted that she had not asked accused No.2 the reason for which she was called by accused No.1 at his house. Such behaviour for a girl aged 13, is not inspiring confidence.

9. Another fact to be noted is that the prosecutrix has stated about the forcible sexual intercourse against her wish by the accused No.1, but then she states that due to the threats given by the accused No.1, she did not disclose the incident to anybody. In her cross examination she has stated that she continued her normal pursuit after the incident and only when she saw accused No.1 eight days prior to the FIR, she decided to disclose it to her parents. Here, whether to accept that such threat was really given or not, what was

the intensity of that threat, has to be gathered from the circumstances. She has not stated that after the alleged incident dated 06.10.2013 till eight days prior to the FIR she had not seen accused No.1. She has also not stated that as to whether she had contacted accused No.2 after the incident or not. If she had not seen accused No.1 during the said period, then she ought to have realised earlier that there was no threat to her life and then she could have disclosed the said fact to her parents. No doubt, it has not come on record that there was any reason to implicate the accused persons, but that is not the sole criteria to consider the entire evidence.

10. PW-4, the father of the prosecutrix though stated about the disclosure, it is to be noted that he does not say that he was also knowing accused Nos. 1 and 2 much prior to the incident. He says that his daughter was knowing accused Nos. 1 and 2. The cross examination is not satisfactory, but the fact remains is that what was the bonding between the parents and the prosecutrix has not come on record.

11. As regards the medical evidence is concerned, though PW-10 says that she has noted the old rapture of hymen and on that

basis she was saying that sexual assault cannot be ruled out yet she could not have been sure about how old the said rapture was. Admittedly the medical examination is belated.

12. In the above said circumstances and reasons, we conclude that the trial Court was justified in arriving at a conclusion that the sole testimony of the prosecutrix has not inspired confidence. The acquittal of both the accused is legal and absolutely not perverse. No grounds are made out for granting leave to appeal. Hence, the application stands rejected.

[Y. G. KHOBRADE, J.]

[SMT. VIBHA KANKANWADI, J.]

SMS