

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

**APPLICATION FOR LEAVE TO APPEAL BY STATE NO. 96 OF 2018**

THE STATE OF MAHARASHTRA  
VERSUS  
SANJAY S/O. JAYSING GIRASE

...  
Advocate for Appellant/State : Mr. A.V. Deshmukh  
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**CORAM : SMT. VIBHA KANKANWADI &  
Y.G. KHOBRADE, JJ.**  
**DATE : 31<sup>st</sup> March, 2023**

**ORDER :- (Per: Y.G. Khobragade, J.)**

1. By the present application under Section 378(i)(b) of the Cr.P.C. the prosecution is seeking leave to file appeal against the order of acquittal of the respondent-accused passed by the learned Additional Sessions Judge, Nandurbar on 23.01.2018 in Sessions Case No.4 of 2016 thereby acquitting the accused for the offence punishable under Section 376(1) (2), 506 of the I.P.C. and under Section 4 of the Protection of Children from Sexual Offences Act (hereinafter referred as POCSO Act).

2. Heard learned APP Mr. A.V. Deshmukh at length. With the able assistance of learned APP, we have considered the prosecution story narrated in the FIR as well as evidence which was placed before the learned trial Court

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 minor prosecutrix lodged a report on 09.01.2016, with Police Station (Upnagar) Nandurbar alleging that, the respondent-accused visited at her residence on 26.12.2015 at about 6.00 p.m. His visit was in connection of purchase of house for her mother. Accused stayed in the night time in their house. Prosecutrix was sleeping with her mother in one room after taking dinner; whereas, the respondent-accused slept in another room. She woke up for drinking water at about 3.00 am, and went near the fridge but at that time the respondent-accused suddenly pulled her and laid her on bed. The accused gagged her mouth and removed her salwar and top up to her breast and committed forcible sexual intercourse with her. Thereafter, the accused threatened her not to disclose said incident to anyone. Thereafter, she went back to her mother and slept. The prosecutrix further alleged that, when her mother had gone for bath at about 8.00 a.m. and when she was sleeping, at that time also the accused committed forcible sexual intercourse with her and threatened to kill her and her mother, if she discloses said fact to anyone. She got frightened due to those threats. Subsequently, as she felt pain in her private part, therefore, on 09.01.2016, she narrated said incident to her mother. Thereafter, she with her mother visited Police Station (Upnagar), Nandurbar

and lodged First Information Report. On the basis of said report a Crime No.4/2016 was registered against the accused for the offence punishable under Section 376(1) (2), 506 of the I.P.C. and under Section 4 of the POCSO Act.

4. The Investigating Officer-PW8-Wasiyoddin Kazi conducted investigation and referred the victim for medical examination to Civil Hospital, Nandurbar. The Investigating Officer visited at the spot of the incident and drawn spot panchanama and seized clothes of victim and arrested the accused on 10.01.2016. The accused was also sent for medical examination at Civil Hospital, Nandurbar and on interrogation, clothes of accused came to be seized under seizure panchanama. The statement of prosecutrix under Section 164 of the Cr.P.C. came to be recorded through the JMFC, Nandurbar. The Investigating Officer collected medical examination report, as well as, school record of the victim and found that on the day of the incident the victim was minor. On completion of investigation charge-sheet came to be filed against the accused for the offence under Section 376(1) (2), 506 of the I.P.C. and under Section 4 of the POCSO Act. Accordingly, the learned Special Court framed charge at Exh.19 against the respondent-accused. The accused pleaded not guilty and claimed for trial.

5. In order to bring home the guilt of the accused the prosecution examined in all eight witnesses. Besides the oral testimony, the prosecution

has proved (Exh.35) the statement of victim under Section 164 of the Cr.P.C., spot panchanama (Exh.38), a letter dated 10.01.2016 (Exh.43) under which the victim was referred for medical examination, medical examination report (Exh.44), findings of Medical Officer (Exh.45), memorandum panchanama (Exh.53), recovery panchanama of clothes of accused.

6. On conclusion of prosecution evidence, the statement of the accused came to be recorded under Section 313 of the Cr.P.C. The defence of the accused is of total denial and of his false implication. According to the accused, he was having love affair with the mother of victim - PW1 since 2000 and PW1-mother of victim and himself had visited Nandurbar on 26.12.2015 for purchase of house. He had shown some houses to the victim's mother. He went to his village around 7.00 p.m., and victim's mother went at her village. Victim's mother had demanded amount of Rupees Five Lakhs from him for purchasing the house but he did not fulfill the said demand, hence, false report is lodged against him. The victim with her mother-PW1 met him at Shahada near Bhakardevi Ice Cream on 03.01.2016, and again demanded money from him. At that time also, he refused to pay the money to them, then victim's mother threatened to falsely implicate him.

7. Learned trial Court passed the impugned judgment and order on 23.01.2018, and acquitted the accused from the offence punishable under Section 376(1) (2), 506 of the I.P.C. and under Section 4 of the POCSO Act.

Being aggrieved by said judgment and order, the prosecution seeks leave to file appeal.

8. On perusal of testimony of the PW2-victim it appears that, on 26.12.2015, at about 6.00 p.m., the respondent/accused visited her house and stayed overnight in her house. After dinner, she, her mother-PW1 slept in one room and the accused slept in another room. In early morning at about 3.00 a.m., she woke up for drinking water and went near the refrigerator for taking water bottle, but the accused pulled and gagged her mouth all of a sudden. Then removing her cloths forcibly, committed rape on her. Thereafter, she went and slept with her mother. So also, at about 8.00 a.m. when her mother-PW1 went to have bath, the accused again committed sexual intercourse with her and threatened to kill her, if she discloses said fact to anyone. She narrated said incident to her mother-PW1 after about eight days. Victim has admitted in her cross-examination that, her mother-PW1 had gone to her office on 26.12.2015, and returned at about 12.00 p.m. Thereafter, she was with her mother in their house rest of the day. The PW1-victim's mother has deposed that, she had gone to Nandurbar on 26.12.2015, for searching house, as she intends to purchase one. She met accused there, who showed her 2 to 3 houses till 7.00 to 7.30 p.m. Thereafter, the accused told victim's mother that they would come next day morning and he would stay at her

house. Therefore, she and accused returned to her house at about 8.00 to 8.30 p.m., and the accused stayed at her house.

9. In her statement under Section 164 of the Cr.P.C. (Exh.35), the victim PW2 has stated almost the same story but her substantive evidence is not in corroboration with the report FIR and statement recorded under Section 164 of the Cr.P.C. Therefore, the case of the prosecution itself creates doubt. The evidence of PW5-Medical Officer – Dr. Nita Gangurde is on the point of medically examining PW2-victim on 10.01.2016 and proving medical report (Exh.14). He had collected the samples for chemical examination. There was no fresh injury to the private part of the victim, but there was old tear of hymen and therefore, it was opined by PW 5 that victim was subjected to sexual intercourse. The said opinion cannot be taken as conclusive proof to support the testimony of victim. In this case, Medical Officer could not have opined as to how old the said tear of hymen was. The victim has been medically examined after about 8 days. Therefore, unless there would have been immediate examination of the victim, it could not have proved the nexus between the incidence. Medical evidence is always corroborative in nature. When the substantive evidence is not trustworthy, we cannot rely of corroborative evidence.

11. Further the samples of blood, vaginal swab, nail clippings and pubic hair of the victim examination report (Exh.61) shows that the blood

group of the victim is 'B' and no semen was detected in the sample of pubic hair and vaginal swab of the victim so also no blood or tissue matter were detected on sample of nail clippings. So also, no blood stain or semen stains were found either on the clothes of the victim Article A - black colour top, Article B – black colour leggings and grey colour underwear of the victim so also on clothes of the accused. Therefore, theory of forcible sexual intercourse on part of the accused with the victim-PW2 is not in corroboration.

12. In order prove the offence under Section 4 of POCSO Act, prosecution should prove that on the day of incident the victim-PW2 was minor within the meaning of Section 2(d) of the POCSO Act. In order to prove victim's age, the prosecution examined victim's mother-PW1 at Exh. 25. The PW1-victim's mother deposed that, in the year 2015, the victim-PW2 was studying in 11<sup>th</sup> std. On perusal of FIR, as well as (Exh.35) statement recorded under Section 164 of the Cr.P.C. it appears that, victim fail to give her date of birth. During the course of investigation PW8-Investigating Officer has collected school leaving certificate (Exh.56) from victim's school just prior to incident and also collected school leaving certificate of Primary School of the victim at (Exh.65). As per school leaving certificate victim's date of birth is 16.02.2000. However, evidence of the PW1-mother appears that, the victim passed H.S.C. examination and was pursuing B.A. in the year 2015. The PW1 further deposed that in the year 2015 her daughter was in 11<sup>th</sup> std. but in

cross-examination/PW2 denied that the victim was above 18 years at the time of incident. The prosecution has not examined concerned officers of the school to prove school leaving certificates and birth date of the victim PW2. Mere exhibition of those certificates will not amount to proof thereof. The evidence of the Investigating Officer does not suggest about making inquiry in respect of age of the victim and no school register was produced on which basis birth date of victim was recorded in school leaving certificate. It is well settled principle of law that, school leaving certificate by itself is not substantial proof in respect of birth date as it is not a public record within the meaning of Section 35 of the Evidence Act. The prosecution failed to examine the register maintained under the Registration of Births and Deaths Act.

13. In the case of **Gurudas Pendor V/s. Stae of Maharashtra; 2015 ALL M.R. (Cri.) 4494**, wherein Coordinate Bench of this Court relied on the case of *Jabar Singh V/s. Dinesh and Anr.; (2010) 3 SCC 757* and held that the entry in admission form school record, register, school leaving certificate is not relevant under Section 36 of the Evidence Act for determination of age. So also, as per the ratio laid down in the case of **Sandip Janaji Konde V/s. State of Maharashtra; 2016 (3) Mh.L.J. (Cri.) 766**, the school leaving certificate would be admissible by virtue of Section 35 of the Evidence Act and if it is satisfied that the entry in school leaving certificate is based on three conditions:

- i) The entry that is relied upon must be one in a public or other official book register or record.
- ii) It must be an entry stating a fact in issue or relevant fact.
- iii) It must have been made by a public servant in discharge of his official duty or any other person in performance of a duty specially enjoined by law.

14. However, in the case in hand the evidence of the prosecution witness fails to prove the birth date of the victim PW2 and there is no ossification test of the victim for determination of her age. Therefore, in absence of corroborative piece of evidence, it cannot be held that, on the day of incident, the victim-PW2 was 'minor' within the meaning of section 2(d) of the POCSO Act. Nonetheless the evidence of prosecution witnesses does not suggest that, the respondent-accused committed the alleged act with the victim PW2. Therefore, considering the oral as well as documentary evidence available on record, the learned trial Court passed the impugned order and acquitted the accused for the offence punishable under Section 376(1) (2), 506 of the I.P.C. and under Section 4 of the POCSO Act, which does not appear perverse, illegal, bad in law and no grounds are set out to admit the appeal, hence, it deserves to be dismissed at the threshold. Accordingly, application stands dismissed.

[Y.G. KHOBRAGADE, J.]

[SMT. VIBHA KANKANWADI, J.]