

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

APPLICATION FOR LEAVE TO APPEAL BY STATE : 109 OF 2018

The State of Maharashtra,
Through Police Station
Taluka Omerga, District Osmanabad.

**... Applicant
(Ori. Complainant)**

VERSUS

Umesh Dattatraya Birajdar,
Age : 28 years ; R/o Behind
Mahatma Gandhi Vidhyalaya,
Omerga, taluka Omerga,
District Osmanabad.

**... Non Applicant/
Respondent
(Ori. Accused)**

...

APP for the Applicant – State :- Mr.S. J. Salgare

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

DATE : 10TH APRIL, 2023.

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ORDER : (Per Mr. Y. G. Khobragade, J.)

01. By the present application under Section 378(1) (b) of Cr.P.C., the prosecution is seeking leave to file appeal to challenge the judgment and order dt. 29.01.2018 passed by the learned Special Court, Omerga, District Osmanabad in Special (POCSO) Case No. 09/2014 and thereby acquitting the non-applicant / accused for the offences punishable under Section 376(1) of the Indian Penal Code read with Section 4 of

the Protection of Children from sexual Offences Act and under section 3(1) (xi) of The Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act.

02. As per the provisions of Section 228 A of the Indian Penal Code, identity of victim in rape (sexual offences) required to be concealed in all manner including names of her relatives and the School / College where the victim studied.

03. Heard learned APP Mr. S. J. Salgare at length. With the able assistance of learned APP Mr. S. J. Salgare, we have considered the prosecution story narrated in the F.I.R. as well as evidence which was placed before the learned Special Judge, from the point of view as to whether the leave can be granted to the prosecution to file the appeal.

04. In nut-shell, prosecution story is that the informant (P.W. 1) victim lodged report with Omerga Police Station on 21.05.2014, stating that her parents are residing at Pune and her grand-mother residing in small village. In the year 2013 she was studying in XI Std. while staying with grand-mother. She belongs to Mahar Community which is recognized Scheduled Castes. The accused belongs to

Maratha Community other than the Scheduled Casts. The non-applicant / accused, who residing in her lane was stalking her. In the month of January 2014, the accused asked her mobile number, but she refused to give cell number. But anyhow, the accused obtained her mobile number and gave her call from his mobile. He disclosed that he loves her and called her to meet him outside her college. He gave threat that, if she fails to meet him, he would visit at her house. Due to such fear, she met the accused nearby her college in February, 2014 at about 08.00 p.m. At that time the accused talked with her sweetly and assured to marry with her. Thereafter, the accused took her in open space towards eastern side of her college and committed forcible sexual intercourse. But due to fear she had not disclosed said fact to anybody. The victim further alleged that in the month of March- 2014, the accused had called her to his house by giving her threats. When she had visited his house, at that time, his friends Vishwajeet Manohar and Satish were present. Thereafter the accused committed forcible sexual intercourse with her in his house. She had not disclosed the incident to anybody, due to fear. After examination was over, she went to her parents' house in Poona. Thereafter she had given phone call to the accused and asked him for marriage, but the accused told her that, he does not know her and she

should not tell the incident to anybody. Therefore, she disclosed said fact to her parents. Thereafter she lodged First Information Report. On the basis of said report, offence vide Crime No. 150/2014 was registered with concerned Police Station against the accused for the offences punishable under Sections 376(1), 506 of the Indian Penal Code read with Section 4 of the Protection of Children from Sexual Offences Act and under Section 3(1) (xi) of The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.

05. The Investigation Officer Rakesh Kalasagar (P.W.7) referred the prosecutrix P.W.1 for medical examination and had drawn spot panchanama Exhibit 56. The statements of witnesses were recorded. The statement of prosecutrix got recorded under Section 164 of the Cr.P.C. through the Judicial Magistrate First Class, Omerga. The accused came to be arrested under arrest panchanama. During the course of investigation, the Investigation Officer collected medical reports and C.A. report. On completion of investigation, charge-sheet came to be filed against the accused.

06. The learned trial Court framed charge at Exhibit 28 against the accused for the offences punishable under Sections 376(1), 506 of the Indian Penal Code read with

Section 4 of the Protection of Children from Sexual Offences Act and under Section 3(1) (xi) of The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. The accused pleaded not guilty and claimed for trial.

07. In order to bring home the guilt of accused, the prosecution has examined P.W. 1 victim at Exhibit 37, P.W.2 Sanjay Manikrao Kshirsagar at Exhibit 48, P.W.3 Sambhaji Shivaji Heble at Exhibit 49, P.W. 4 -father of victim at Exhibit 56, P.W. 5 -Rahul Mohanrao Sonwane – the Headmaster of School of victim at Exhibit 59, P.W. 6 Dr. Swapna Vijay Rakhonde at Exhibit 78 and P.W. 7 -Investigation Officer Mr. Rakesh Kalasagar at Exhibit 82.

08. After conclusion of trial, the learned trial Court explained incriminating evidence under Section 313 of Cr.P.C. to the accused. The defence of accused is of total denial.

09. Learned trial Court passed impugned judgment and order on 29.01.2018 and acquitted the accused /non-applicant for the offences punishable under Sections 376(1), 506 of the Indian Penal Code, read with Section 4 of the Protection of Children from Sexual Offences Act and under

Section 3(1) (xi) of The Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act.

10. In order to prove the offence under Section 4 of the Protection of Children from Sexual Offences Act, the burden lies upon the prosecution to prove that on the day of offence, the victim (P.W.1) was minor within the meaning of Section 2(d) of the Protection of Children from Sexual Offences Act. In order to ascertain the age of victim, the prosecution examined the victim (P.W.1) at Exhibit 37. P.W.1 says that accused had committed sexual intercourse with her firstly, in the month of February, 2014 and secondly in the month of March. It is then required to be considered as to what was her age at that time. She has deposed that her date of birth is 04.06.1998. The prosecution examined P.W. 4 the victim's father at Exhibit 56, who deposed that date of birth of his victim daughter (P.W.1) is 04.06.1998. At the time of lodging the F.I.R., age of his daughter -victim was 15 years old.

11. The prosecution examined P.W. 5 Rahul Sonwane, the headmaster of the victim's School at Exhibit 59. P.W. 5 deposed that on 23.06.2010, the victim (P.W.1) was admitted in 8th Standard and he made entry in General School

Admission Register at Sr. No. 2531 and issued School Leaving Certificate (Exhibit 60) in favour of the victim (P.W.1). As per entry in admission register, the date of birth of victim (P.W.1) is 04.06.1998 and the victim is belonged to Hindu -Mahar Community. The defence tried to bring in cross-examination that in the month of April-2014, the victim (P.W.1) passed XI Standard and the victim (P.W.1) wrongly described her age of 15 years in F.I.R. P.W. 5 admitted in his cross-examination about not knowing whether at the time of first admission in the primary school, documentary proof of birth of date of victim (P.W.1) was given or not.

12. In the case of ***State of M.P. Vs. Anoop Singh in Criminal Appeal No. 442 of 2010***, the Hon'ble Apex Court observed as under :-

12. This Court in the case of Mahadeo S/o Kerba Maske Vs. State of Maharashtra and Anr., (2013) 14 SCC 637, has held that Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is applicable in determining the age of the victim of rape. Rule 12(3) reads as under:

“Rule 12(3): In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –

(a) (i) the matriculation or equivalent certificates, if

available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year. and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.”

13. This Court further held in paragraph 12 of Mahadeo S/o Kerba Maske (supra) as under:

“Under rule 12(3)(b), it is specifically provided that only in the absence of alternative methods described under Rule 12(3)(a)(i) to (iii), the medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of the

juvenile in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of the ascertaining the age of a victim as well.” (Emphasis supplied) This Court therefore relied on the certificates issued by the school in determining the age of the prosecutrix.

In paragraph 13, this Court observed:

“In light of our above reasoning, in the case on hand, there were certificates issued by the school in which the prosecutrix did her V standard and in the school leaving certificate issued by the school under Exhibit 54, the date of birth has been clearly noted as 20.05.1990 and this document was also proved by PW 11. Apart from that the transfer certificate as well as the admission form maintained by the Primary School, Latur, where the prosecutrix had her initial education, also confirmed the date of birth as 20.05.1990. the reliance placed upon the said evidence by the Courts below to arrive at the age of the prosecutrix to hold that the prosecutrix was below 18 years of age at the time of occurrence was perfectly justified and we do not find any grounds to interfere with the same.”

13. As per the testimony of P.W. 5, the prosecutrix P.W.1 was admitted in XI Standard and left the School and accordingly issued leaving certificate Exhibit 60, which appears that in the month of March-2013 the prosecutrix passed S.S.C. Examination. Therefore, the prosecution was having ample

opportunity to file matriculation certificate of the victim (P.W.1) to prove victim's date of birth. The victim (P.W.1) was admitted in XI Standard in the school of PW 5, but prior to that the victim was admitted in another school and on the basis of School Leaving Certificate issued by previous School, the victim was admitted in 8th Standard. Therefore, it appears that the prosecution failed to bring the substantial evidence to prove date of birth of victim (P.W.1). Further, as per the testimony of P.W. 6 Medical Officer Dr. Swapna Rakhonde, opinion in respect of age of victim (P.W.1) was sought from Dr. Rankhamb and as per medical examination victim's age was determined about 16 to 18 years and issued certificate Exhibit 81. The rule of '+' or '-' 1 would be applicable and in that case, the rule favouring the accused will have to be taken.

14. The learned trial Court considered the case of ***Shaha Nawas Vs. State of U.P. and others, 2011 AIR SC 3107***, wherein it has been held that,

“the school leaving certificate is valid proof. The Hon'ble Court further observed that there was entry of birth in the high school mark sheet of X class, the school leaving certificate of first join in the school is proved. In the present facts and circumstance neither first admission school certificate is filed nor X class mark sheet is filed hence I come to

conclusion that the observations are not helpful to prosecution case.

Then it is clear that the required certificate of the birth as per rule 12(3)(i) to (iii) are not brought on record by the prosecution, it became necessary to take in to consideration, the medical opinion about the age of the prosecutrix which is last option.”

Therefore, considering the evidence available on record as well as the ossification test, it appears that at the time of examination of the victim (P.W.1) she was more than 18 years old and the prosecution failed to prove that the prosecutrix (P.W.1) was minor at the time of incident. She was not ‘child’ as defined u/s. 2 (d) of POCSO Act, hence, offence under said Act have not been made out.

15. In order to prove the offence under Section 376(1) of Indian Penal Code, burden was cast upon prosecution that, in the month of February and March 2014, the accused had committed forcible sexual intercourse against the prosecutrix. As per the testimony of P.W. 1 in the month of February 2014, the accused called her behind her college at about 08.30 to 09.00 p.m. Accordingly, she visited there and met the accused. Thereafter, the accused first committed sexual intercourse with her in open space behind her college. The prosecutrix further deposed that in the month of March-2014 the accused again called her at his house and at that

time friends of accused Vishwajeet Manohar and Satish were present there and the accused committed forcible sexual intercourse with her after those friends had left the house of accused. Prosecution failed to examine Vishwajeet Manohar and Satish.

16. It appears that statement of prosecutrix under Section 164 of Cr.P.C. recorded by the learned Judicial Magistrate First Class at Exhibit 43. However, while recording statement under Section 164 of Cr.P.C., the victim P.W. 1 disclosed that in the month of February -2014 the accused met her at Ashtavinayak Colony and committed sexual intercourse with her. The said place is different. Therefore, there is material contradictions.

17. The prosecution examined panch witnesses to the spot panchanama (P.W. 2 and P.W.3), but they have not supported the case of the prosecution and the Investigating Officer P.W.7 admitted in his cross-examination that the spot of incident shown towards southern side of National Highway No.9. The Investigating Officer P.W.7 admitted about spot of incident was written as 'northern side of road' in the second line of panchanama. Therefore, there is contradiction and does not prove the spot panchanama beyond reasonable doubt.

18. The prosecution examined P.W. 6 Dr. Swapna Rakhonde at Exhibit 78. However, as per her testimony, she did not find any injuries or signs of sexual violence on private part of the victim (P.W.1). The C.A. reports (Exhibit 34) also does not support prosecution story. Therefore, the theory of forcible sexual intercourse is not supported by medical evidence also.

19. Prosecution has failed to prove that accused had done forcible sexual intercourse with victim, much less only because she belongs to Scheduled Caste. Merely because both of them are from different caste, we cannot infer offence under Atrocities Act.

20. Learned trial Court passed the impugned judgment and order on 29.01.2018, after considering the oral and documentary evidence as well as various case laws discussed therein, then acquitted the accused; which does not require interference at the hands of this Court. No substantial grounds are set out to interfere with the such findings. Therefore, we do not find this to be a fit case to grant leave to file appeal, hence, the application deserves to be dismissed.

21. Accordingly, the application for leave to file appeal is hereby dismissed.

(Y. G. KHOBRAGADE, J.) (SMT. VIBHA V. KANKANWADI, J.)

shp/-