

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY STATE NO.127 OF 2018

The State of Maharashtra
Through Police Station Officer,
Police Station Ajintha,
Aurangabad.

.. Applicant

Versus

Sadanand Gulabrao Gavhane
Age: 30 years, Occu.: Agri.,
R/o. Pimpaldari, Tal. Sillod,
Dist. Aurangabad.

.. Respondent

...

Mr. A. V. Deshmukh, APP for the applicant – State.

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**CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

DATE : 6th July, 2023

ORDER :-

. Present application has been filed under Section 378(1)(b) of the Code of Criminal Procedure seeking leave to file an appeal challenging the judgment and order dated 12.12.2017 passed by the learned Additional Sessions Judge-7, Aurangabad in Special (POCSO) Case No.67 of 2015; thereby acquitting the respondent from the offence punishable under Sections 366, 376 of Indian Penal Code and under Sections 4, 6, 8 and 12 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the “POCSO Act”).

2. Heard learned APP Mr. A. V. Deshmukh for the applicant – State. With the able assistance of learned APP, we have gone through the record, which was before the learned Trial Judge.

3. The prosecution story in short is that the accused had kidnapped the minor victim from the lawful guardianship of her maternal uncle and then taken her to various places including the place from Karnataka and by keeping her in a lodge as well as rented premises, committed sexual intercourse with her without her consent, falsely introducing her as his wife.

4. It appears that initially the offence came to be registered against the accused with Ajintha Police Station for the offence punishable under Section 363 of Indian Penal Code. The mobile phone of the accused was put on surveillance by the police. The location of the same was shown at Gangapur, Taluka Afzalpur, District Gulbarga in Karnataka. Thereafter the accused and the victim searched there and brought to the to the police station. After making inquiry with the victim, offence under Section 366, 376(j) and (n) of Indian Penal Code and under Sections, 3(a), 4, 5(1), 6, 8 and 12 of the POCSO Act came to be added. The investigation was completed and the charge-sheet was filed before the learned Special Judge, under the POCSO Act.

5. After framing charge, trial was conducted. The prosecution has

examined in all twelve witnesses to bring home the guilt of the accused. Considering the evidence on record and hearing both sides, the learned Special Judge has acquitted the accused from all the charges. Hence, present application.

6. In the nutshell, the learned APP submits that the learned Trial Judge has not appreciated the evidence properly. In order to prove that the victim is “child” within the definition of Section 2(1)(d) of the POCSO Act, the prosecution had not only examined the victim herself, who had given her birth date in the FIR, P.W.2 her grandfather, P.W.3 her brother, but also placed reliance on the admission register of the school where the victim had taken education. The said register and the record came to be proved through P.W.8 – the Head Master of the school of the victim. The learned Trial Judge has not considered the said record under Section 35 of the Indian Evidence Act and committed error. If the victim is held to be the child within the definition of the POCSO Act, then her consent would be no consent at all for any act. She has specifically stated that she was called by the accused to accompany him by giving threats. Though it may appear that she had not tried to take help of the other people, with whom she got acquaintance during this journey, yet the mentality of the girl ought to have been considered. She was not knowing any other person than the accused himself, who was taking disadvantage of her situation. By expressing that

he loves her, he has taken disadvantage of her minority. The prosecution in fact had proved the offence beyond reasonable doubt, but for the reasons which are required to be re-appreciated, there is miscarriage of justice. He, therefore, prayed for grant of application and admitting the appeal.

7. At the outset, we would like to consider the point of age of the victim first, as it goes to the root of the case. The victim has told her age in her FIR, which is as per her school record, but that is not sufficient to hold her as child within the definition of POCSO Act. Important point to be noted is that she was knowing the accused since she was studying in 10th standard. She herself and accused were very fond of Bhajan and Kirtan. She admits that accused was residing near her house and she had not noticed that accused was misbehaved with anybody. She has not stated that when she started talking with accused, she had disclosed either her date of birth or age to the accused. That means it was love to the imagination of the accused. Under such circumstance, it was necessary for the prosecution to bring a concrete evidence. Interesting point to be noted is that her birth date could have been better proved by examining her father or mother, but here, in this case, mother or father, have not been examined for the reasons best known to the prosecution. PW.2 and PW.3 are the brothers of the mother of the victim. They both have not stated the age of the girl or her birth date in their examination-in-chief. The age is then tried to be brought

on record through the school record, which was got to be proved through PW.8 Sanjay Jadhav. He has stated that as per the school record the victim's birth date is 30.05.1997, but in his cross-examination, he admitted that at the time of admission, they used to take the birth certificate issued by the local authority or discharge certificate from the hospital, where the child is born. What has been produced by him with the admission register Exhibit-57 is the Pravesh Patrak i.e. application for admission Exhibit-58. It appears that the victim was aged 6 years at that time. The name of the guardian is different than the name of the father of the victim, but it appears that the said person was the grandfather (mother's father) of the victim. Why said grandfather has not been examined is also a question. Merely by saying that in the admission form separate column is made as affidavit stating that the date of birth is correct, will not be the sufficient compliance. Here, in this case, there is no evidence to show where the girl was born and why her birth was not registered with the Grampanchayat or the Municipal Corporation or the Municipal Council. It is not clear as to whether she was born in hospital or at home and still some deliveries take place in the house in rural areas. Therefore, there was no sufficient explanation and documentary support to the admission register and therefore, it has been rightly observed by relying upon the decision in ***Sunil Baban Gadhave and others Vs. State of Maharashtra, [2016 ALL MR Criminal 4307]*** that the school record cannot form sole clinching proof to

determine the age. Here, there is no attempt to get her age determined by medical examination. When there is no cogent evidence to rely on the school record, the learned Trial Judge has rightly held that the prosecutrix is not a child as defined under the POCSO Act and, therefore, the provisions of POCSO Act cannot be made applicable.

8. The evidence of the girl would show that at no point of time she had resisted the accused. There is evidence to the fact that even before she could leave the house of her guardian, she had deleted the call records of the accused. She had not taken that mobile with her. Under the said circumstance, she was the only person, who could have deleted the said record. She had taken her purse and Aadhar card with her. The said Aadhar card has also not been seized as it appears from the record. This appears that she had planned to flee away with the accused and as aforesaid when she is not a child, the learned Trial Judge has held that she is the consenting party. It also appears from her cross-examination that she was residing in Dharmashala and lodge, but at no point of time, she had made complaint with anybody. This is the additional factor that has been considered by the learned Special Judge. There is no perversity or illegality in acquitting the accused. Hence, the application stands rejected.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm