

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

911 APPLICATION FOR LEAVE TO APPEAL BY STATE NO.80 OF 2020

THE STATE OF MAHARASHTRA

VERSUS

GOPAL SUNIL MOHITE

...

Mr. S.J. Salgare, APP for applicant

...

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

DATE : 05th OCTOBER, 2023

ORDER : (PER : SMT. VIBHA KANKANWADI, J.)

1 Present application has been filed by the prosecution seeking leave under Section 378 (1)(b) of the Code of Criminal Procedure, 1973 to file appeal challenging the Judgment of acquittal dated 01.06.2020 passed by learned Special Judge, under POCSO Act, Jalna in Special Case (child) No.146/2019, thereby acquitting respondent – original accused from the offence punishable under Section 376(3) of the Indian Penal Code, 1860 and under Section 3 punishable under Section 4 of the Protection of Children

from Sexual Offences Act, 2012.

2 Heard learned APP Mr. S.J. Salgare for the prosecution and with his help we have gone through the record which was available before the learned trial Judge.

3 The main points for submission on behalf of the prosecution are that the learned trial Judge has not appreciated the evidence properly. The age of the victim is 13 years and the father of the victim had produced the birth certificate issued by the local authority in respect of birth date of the girl. Still the learned Special Judge raised questions as regards the age of the girl is concerned. The victim has stated as to what was done with her by the accused and the medical evidence corroborates her deposition. It is to be noted that the date of birth of the victim has been doubted and the learned Special Judge has given the findings in negative that the victim is child as defined in Section 2(1)(d) of the POCSO Act in October, 2019. If we consider the testimony of the victim herself i.e. the cross, there is absolutely no challenge to the age that was told by her. In support of the birth certificate issued by the Gramsevak, Grampanchayat Office, Goshegaon, Tq. Bhokardan, Dist. Jalna which the learned Special Judge considered as having presumptive value under Section 35 of the Indian Evidence Act still went on

to consider whether the register that was brought by the Gramsevak is genuine or not. This aspect needs to be re-appreciated. The age of the girl that was told was 13. It could not have been of the age of majority even if we consider the grace to be given of (+) (-) and, therefore, this aspect is also again will have to be re-appreciated. Further, the reasons stated in para No.14 i.e. the circumstances found to be doubtful by the learned Special Judge are required to be re-tested as to whether on the basis of them whether any benefit can be given. The discussion at many places goes on footing that the girl is major and was capable of giving consent. If the point that whether she was child on the date of offence is re-appreciated, then question of giving consent does not arise. Therefore, case is made out to grant leave. Hence, the following order.

ORDER

- 1 Application stands allowed and disposed of.
- 2 Leave is granted to the prosecution to file Appeal.
- 3 Registry to register the Appeal.
- 4 Appeal stands **Admitted**.

5 Call Record and Proceedings.

6 Action under Section 390 of the Code of Criminal Procedure be
taken against the respondent to the satisfaction of the trial Court.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)

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