

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY STATE NO.108 OF 2019

The State of Maharashtra,
Through Raver Police Station,
Tq. Raver, Dist. Jalgaon.

... Applicant

Versus

Salim Ismail Tadvī,
Age : 22 years, Occu. Nil,
R/o. Morwal, Tq. Raver,
Dist. Jalgaon.

... Respondent
(Orig. Accused)

...
Mr. A. V. Deshmukh, Advocate for Applicant - State.

...

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

DATED : 26th JULY, 2023

ORDER (PER ABHAY S. WAGHWASE, J.) :

1. By invoking section 378(1)(b) of the Code of Criminal Procedure (Cr.P.C.), State is intending to question the judgment and order of acquittal passed by learned Special Judge and Additional Sessions Judge, Bhusawal in Special (POCSO) Case No.8 of 2017, dated 25.01.2019, thereby acquitting respondent from charge under sections 366A, 376(2)(i)(n) and 306 of Indian Penal Code (IPC) and under section 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) and hence the leave application.

2. Learned APP would appraise us about the case of prosecution in trial court, that deceased, a girl studying in 9th standard and put up in hostel, was initially kidnapped and forcibly ravished after threatening. That, out of fear of defamation, she committed suicide by hanging herself. That, thorough investigation revealed that respondent herein is the perpetrator of crime. There was evidence regarding his involvement and therefore, respondent was duly charge-sheeted and made to face trial. It is pointed out that, in support of its case, prosecution had examined in all 16 witnesses, like father of deceased, panchas, independent witnesses, doctor, friends of deceased. Thus, there was ample evidence for substantiating the charges, however, it is submitted that learned trial court has failed to consider and appreciate the same and has thereby erred in acquitting accused on the ground that there was no prompt reporting, there is delay in recording statements of witnesses and that some witnesses are not examined. Similarly, on the ground of no corroboration, case of prosecution has not been accepted. Thus, according to learned APP, it is a fit case for re-appreciation and on examination of entire evidence and as prosecution has strong case and hopes of succeeding in the appeal, it is prayed that leave to file appeal be granted.

3. After hearing learned APP, we have gone through the papers. It is emerging that present respondent was made to face trial for charge of kidnapping and rape. According to prosecution, girl was minor and was studying in 9th standard. It is further emerging that she was studying as well as residing in a hostel at Raver. Evidence of the rector of hostel shows that, she and another girl, both had left the hostel to go to their native to visit an event of fair. However, the girl did not reach her father. She went later on after spending a night elsewhere, and she committed suicide by hanging herself to the tree near her house.

4. We have carefully gone through the testimony of PW3 Chabitai. Her evidence shows that deceased and one Wahida sought her permission, tendered leave application and proceeded towards Raver. This witness claims that she had sent one Rupesh Madhaavi, a Chowkidar, to confirm that the said girls reached their destination.

PW4 Ramesh - father claims that, on 31.12.2016, he learnt from his younger brother that deceased was kidnapped by accused and so he and one Noormohammad went to village Morvhal to the house of accused. There he found his daughter and she was weeping and thereby taken by father to their house.

Father claims that, deceased informed him that about she being forcibly taken from Raver bus stand by the accused in the boys hostel and raped. He claims to have pacified his daughter and on the next morning, she went to the field for eating guava fruit. Around 10:30 a.m., when he returned home, he learnt about suicide, and therefore, he informed police. According to him, accused kidnapped and raped his daughter and therefore he lodged report (Exh.30). Apparently, in spite of occurrence allegedly taking place on 31.12.2016, FIR is lodged on 02.01.2017. Why it took three days for father to lodge report is not explained. From his testimony, it is emerging that, father made inquiries with his own younger brother as well neighbour and even searched for the girl, but even no missing report is lodged by him that day. He further claims that, he received information from Noormohammad (PW8) and Kalusingh (PW7). However, both of them are giving contrary version to the version of father, as they both admit about accused not present in his house during search and only his daughter was present there. Friend of accused, who in his examination-in-chief spoke about accused bringing deceased to the hostel, his cross-examination shows that, he had not stated about deceased brought by accused to the hostel i.e. in his statement to police. Consequently it is material omission. Similarly, PW6 Arun an acquaintance of informant also speaks about one Surednra

giving information to father and they all coming to Pal and they all proceeding to the hostel to see them. However, according to him, in spite of search, accused and deceased were not found. Therefore, prosecution witnesses are not lending support to each other about kidnapping.

5. Though friend of deceased, namely Sheetal (PW10) is examined, she merely speaks of accompanying Wahida and deceased upto bus stand. Same is the version of Rupesh (PW11). Unfortunately, the girl Wahida who was said to be in the very company of deceased since leaving the hostel, is not examined by prosecution for the best reasons known to it.

6. In strict sense there is no evidence to attract charge of kidnapping as girl had left her hostel after seeking permission from the rector who was her lawful custodian and she had not reached her father's house, and therefore, she was not removed from his custody. Resultantly, required ingredients for attracting 366A are patently missing.

7. Investigating Officer admits that he did not gather birth certificate of victim and as such her age is also not ascertainable. Though medical evidence is brought on record, it is

not in favour of prosecution. Likewise, scientific evidence is also not connecting accused. Exh.20 a report was made to police on 01.01.2017 regarding suicidal hanging. However, even that day no report was lodged by father, who claims to be aware of kidnapping and rape from deceased daughter herself on 31.12.2017 itself. Therefore, with such quality of evidence, it is difficult to implicate accused. There are serious defects and infirmities.

Learned trial Judge seems to have considered and appreciated the entire evidence in correct perspective and has thereby rightly refused to accept the case of prosecution as proved. Therefore, on our appreciation of evidence, we are also of the similar view that, case is not getting proved beyond reasonable doubt. Resultantly, no purpose would be served by granting leave to file appeal with such weak and fragile evidence. Hence, for all above reasons, we refuse leave and proceed to pass following order :-

ORDER

The application is hereby rejected.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)