

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY STATE NO.151 OF 2018

The State of Maharashtra,
Through Police Inspector,
Pathardi Police Station,
Dist. Ahmednagar.

... Applicant.
(Orig. Complainant)

Versus

Ashok Sadashiv Walhekar,
Age : 55 Years,
R/o. Mohari, Tq. Pathardi,
Dist. Ahmednagar.

... Respondent.
(Orig. Accused)

...
Smt. V. S. Choudhari, APP for Applicant – State

...

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

DATED : 09th JUNE, 2023

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

1. This application for leave to file appeal is directed as a result of judgment and order passed by the learned Special Judge (POCSO Act), Ahmednagar in Sessions Case No. 424 of 2016, by which respondent herein is acquitted from charges under sections 376(2)(i)(1), 452 of Indian Penal Code (IPC) and under section 5(k) punishable under section 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act, 2012).

FACTS IN BRIEF GIVING RISE TO THE TRIAL

2. One Chimaji was residing with his wife and children. He had daughter (victim) who was differently abled i.e. she was unable to walk and talk. On 25.09.2016, while father took his goats for grazing, and his wife had been to civil hospital for accompanying her elder sister and while Nanasaheb (son) went to play out, victim alone was in the house. Precisely taking disadvantage of the same accused Ashok ravished the helpless child aged 15. Resultantly, her cousin Paraji Ban (PW-1) set law into motion, on the strength of which police registered Crime No. 409 of 2016 for above offences. Pathardi police station carried out investigation and after completing all procedural formalities, PW-5 Abhijit Shivthare, Dy.S.P. charge-sheeted accused.

3. Trial was conducted by learned Special Judge. On appreciating the oral and documentary evidence learned Judge reached to a finding that prosecution failed to prove the case beyond reasonable doubt against the accused and so vide his judgment dated 31.03.2018, he gave clean chit to the accused and thereby acquitted him.

4. Now, State intends to assail the above judgment and

order of acquittal by filing appeal and resultantly by way of instant application leave to do so is sought.

5. Learned APP initially appraised us about the status of all prosecution witnesses. She would specifically mention about the inherent natural disabilities of the unfortunate girl and would submit that accused, took disadvantage of the same to satisfy his perverse lust. It is pointed out that seeing her both parents and brother out of the house, he forced his entry in the house and committed sexual assault on the girl. Learned APP would point out that in support of its accusation prosecution had examined her father, brother, who had seen accused in their house with the girl in naked condition. That, victim was immediately referred to hospital for medial examination. Learned APP pointed out that it is fairly settled legal position that, not all times there could be signs and injuries of sexual assault, but learned trial court has misconceived and erroneously appreciated the available evidence and has failed to adhere too and follow settled law on the point of rape, more particularly, when the victim is a minor and a differently abled child. Learned APP further pointed out that accused was immediately arrested and he too was referred to medical examination. Statements of witnesses were recorded promptly. Father and brother of victim had categorically and

unflinchingly deposed about seeing accused with the girl in naked condition. She would submit that on behalf of victim her uncle had testified and as such there incriminating and reliable evidence. Therefore, it is her submission that in spite of availability of evidence of sterling quality, learned trial court unfortunately disbelieved the same and committed grave error in giving benefit of doubt to the accused. Lastly, she would submit that caliber of the evidence of prosecution being of higher quality, prosecution is sure that it would succeed in appeal and that there would be proper re-appreciation of entire evidence. Resultantly, she prays to allow the prayers.

6. We have carefully gone through the oral evidence adduced by prosecution in the trial court. Law is set into motion by cousin brother of the victim. It is emerging that victim is reported to be a differently abled child of 15 years, who was residing at Mohari along with her parents. It seems that on the fateful day, father had taken goats for grazing whereas mother had accompanied her sister who was pregnant. It is emerging that brother (PW-2) who had been to play outside claims that, he returned back in the house and saw accused as well as his sister in naked condition and accused lying over her, so he rushed to inform relatives. Thereafter, informant, his father, brother went to the

house and at that time they saw accused coming out of the house. Information was passed to police and cousin PW-1 Paraji lodged complaint.

7. To establish their case at trial, prosecution seems to have examined PW-1 Paraji, PW-2 brother Nanasaheb, panchas to the spot (Exh.35), Investigating Officers (PW-4 and PW-5), Gramsevak of the village (PW-6) on the point of birth certificate, medical papers, recovery panch.

8. We have carefully gone through the oral and documentary evidence on record before trial court. Here, in our opinion, evidence of PW-2 Nanasaheb (brother of victim) is very crucial, as it is he who claims to have spotted accused sleeping in naked condition over his sister, who too was said to be naked. PW-1 informant was made known about the same by this witness. According to him, his evidence is at (Exh.29). He is a child witness. According to him, he is 14 years of age and is a student. Exhibit-29 shows that finding the child aware of meaning and importance of oath, it was administered to him by the learned trial Judge. In substantive evidence child witness has categorically stated that by birth his sister aged 15 was physically deaf and dumb and mentally disabled. Regarding incident he deposed that,

it took place on 25.09.2016. His mother had been to civil hospital, and father had taken goats for grazing. He and his sister were only present in the house. Being Sunday he stated that he went to play in front of Marathi school and after playing upto 1.30 p.m., he returned home and he noticed that the house door was in closed condition and so he pushed him. He claims that, he noticed his sister and accused were in naked condition and accused was sitting over the person of his sister, so he ran shouting to the house of his uncle and informed them and they all came back. At such time, accused was seen coming out of the house wearing payjama. He stated that his sister was lying in front of the door with blood stains on the left side thigh. Thereafter, father was summoned and police was approached. His statement was also got recorded under section 164 of Cr.P.C., which he identified to be at Exh.30.

It seems that child is subjected to extensive cross. All suggestions of false implication are flatly turned down by the child.

9. Apart from above evidence, prosecution had adduced the testimonies of PW-2 informant, panchas, Gramsevak and police officials.

10. It is astonishing to find that, here medical experts, i.e. doctors who allegedly examined the victim are surprisingly not

made witnesses. Only examination papers are placed on record. As to why examining doctor is not made to step into witness box does not seem to have been questioned even by the learned trial Judge. Resultantly, in absence of evidence of medical expert trial seems to have been proceeded and even concluded.

11. We have also gone through the impugned judgment under challenge. It seems that learned trial Judge has accepted the prosecution evidence on the point of minority of the victim and has held the victim to be a child within the definition of section 2(d) of POCSO Act. As regards to inherent disabilities of the victim child is concerned, it shows that investigating machinery attempted to get her statement recorded through expert teacher of dumb and deaf School, Pathardi. It is observed in the Judgment in para 20 that in spite of visit by the said experts to record her statements, victim being 100% mentally and physically disabled, her statement could not be recorded. Letter to that extent issued by headmaster of the school is taken into consideration. Resultantly, learned trial judge has concluded that the statement of victim could not be recorded and that prosecution had not made attempts to get her evidence recorded before the court. Hence, learned trial judge opined that material evidence of the victim is not available.

12. It transpires from the the judgment that after evaluating testimonies of PW-1 Paraji and PW-2 Nanasaheb and after hearing both the sides, learned Judge has devoted paragraph 27 of his judgment on the provisions of 118 of Indian Evidence Act regarding competence to a child to testify and thereafter dealt with substantive evidence of PW-2 Nanasaheb and made some observations in paragraph 28 of the judgment.

13. In our opinion, learned trial Judge has not applied settled legal position while appreciating testimony of a child witness. Undue importance seems to have been given to insignificant and immaterial omissions.

14. Similarly, the observations made in paragraph 34 of the judgment are also incorrect and on the basis of improper appreciation. It ought to have been borne in mind that penetration itself proves offence of rape, but law has gone to the extent of now holding that, contrary is not always true, i.e. even if there is no penetration, it does not necessarily mean that there is no rape. Courts are expected to examine the evidence of prosecution in its entirety and then see its cumulative effect to determine whether offence of rape has been committed or it is a case of criminal sexual

assault or mere outraging of modesty. It ought to have been considered by the learned trial Judge that PW-2 Nanasaheb brother claims that he had seen blood on the left thigh of his sister. Such material ought to have been appreciated properly. Rather, here it is apparent that crucial aspect has not been taken into consideration by the learned trial Judge. Mere opinion (Exh.40) regarding no injury and absence of positive opinion regarding forceful sexual intercourse is straightaway excepted, further holding that the same does not corroborate testimony of PW-1 Paraji and PW-2 Nanasaheb.

15. In our view, such appreciation and observations cannot be allowed to be sustained while appreciating evidence of a case involving serious offence of rape. Resultantly, taking into account such quality of judgment, quality of evidence available on record, we are convinced that prosecution deserves an opportunity to take up the matter to the next level, i.e. by filing appeal. Hence, finding it a fit case application deserves to be allowed and leave to file appeal deserves to be granted. Hence, we pass following order :-

ORDER

- (i) Application stands allowed.
- (ii) Leave is granted to the prosecution to file Appeal.

(iii) Registry to register the Appeal.

(iv) Appeal stands **admitted**.

(v) Call record and proceedings.

(vi) Compliance under section 390 of the Code of Criminal Procedure be made before learned Special Judge (POCSO Act), Ahmednagar. The Respondent be released on bail till the conclusion of present appeal upon such terms and conditions as be deemed fit by the concerned trial Judge.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)