

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

**APPLICATION FOR LEAVE TO APPEAL BY STATE
NO.127 OF 2019**

The State of Maharashtra,
Through Police Station Officer,
Taloda, Dist-Nandurbar

...APPELLANT

VERSUS

1) Suresh Hurji Valvi,
Age-Major, Occu:Labour,

2) Alkabai Suresh Valvi,
Age-Major, Occu:Labour,

Both R/o-Mandaviamba,
Tq-Akkalkuwa, Dist-Nandurbar,

3) Devidas Mahadu Valvi,
Age-Major, Occu:Labour,
R/o-Pimpripada, Tq-Kukarmunda,
Dist-Tapi (Gujarat)

...RESPONDENTS

...
Mrs. V.S. Choudhari, A.P.P. for Appellant.
...

**CORAM: SMT. VIBHA KANKANWADI AND
S.G. CHAPALGAONKAR, JJ.**

DATE : 4th JULY, 2023

ORDER :

1. Present Application has been filed by the prosecution seeking leave to appeal under Section 378(1)(b) of the Code of

Criminal Procedure challenging the acquittal of respondents by the learned Additional Sessions Judge, Shahada in Sessions Case No. 8 of 2017 from the offence punishable under Sections 363, 366-A, 376, 504, 506 read with Section 34 of the Indian Penal Code and under Section 4 of the Protection of Children from Sexual Offences Act, on 20th March 2019.

2. We have heard Mrs. Choudhari, learned APP appearing for the State. With the able assistance of the learned APP, we have gone through the entire record which was before the learned trial Judge.

3. The prosecutrix in this case has given her age at the time of lodging the report, as 15 years and 3 months and given specific date of birth in her testimony. She has stated that she was knowing the accused persons, especially accused No.2 who is wife of accused No.1. She was alone in her house on 9th November 2016 and then accused No.2 asked her to accompany her to Ichaagavan village for a programme of Mata (Goddess) and therefore, prosecutrix left with accused Nos.1 and 2 on motorcycle driven by accused No.1. It is then stated that accused No.1 left accused No.2 near one village and then took the prosecutrix to further village and they went to the house of

accused No.3. She has specifically stated that accused No.1 had asked accused No.3 to go out of the house at night time and then accused No.1 had asked the prosecutrix for sexual favour which she declined, but then by giving threats to kill, accused No.1 had forcible sexual intercourse with her. On the next day accused No.1 left her at nearby village by giving some amount and asked her to go to her house. After coming to house she narrated the incident to the parents, who had then informed the said fact to the Deputy Sarpanch of the village and also to the reputed persons. As the time was consumed in that, report was not lodged immediately but then report has been lodged on 11th November 2016.

4. It appears that the learned trial Judge has not considered that the date of birth of the prosecutrix has been proved. Herein this case it appears that the headmaster of the school where the girl has taken education has been examined, but he states that the said date of birth has been got written in the school record on the basis of school leaving certificate of earlier school. At this prima facie stage, we would like to say that the date of birth can be brought on record or age can be brought on record by various means and therefore, it is now required to be seen as to whether on the basis of the testimony of the prosecutrix who has stated

her date of birth and whether mere denial thereof in the cross-examination was sufficient for the accused. It is also therefore, required to be gone into whether the learned trial Court was justified in holding that prosecution has failed to prove that prosecutrix is a child within the definition of Section 2(1)(d) of the Protection of Children from Sexual Offences Act (for short "the POCSO Act").

5. Even if for the sake of arguments it is taken that the girl was major, the consequence would be, the offence under the provisions of the POCSO Act may not have been proved, but then here the charge was for the offence under Section 376 and other Sections in the Indian Penal Code also. Therefore, the evidence needs to be re-assessed. The medical evidence appears to be supporting the ocular evidence of PW-1 the prosecutrix. Therefore, the case is made out to grant leave. Hence the 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) In Appeal, issue notice to the respondents, to be made returnable on 22nd August 2023.

(VI) Call Record and proceedings with paper-book.

(VII) Action under Section 390 of the Code of Criminal Procedure be taken against the respondents to the satisfaction of the trial Court.

[S.G. CHAPALGAONKAR]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

asb/JULE23