

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

APPLICATION FOR LEAVE TO APPEAL BY STATE NO.137 OF 2019

The State of Maharashtra
Through Officer-in-charge of
Police Station Pimpaldari,
Tal. Gangakhed, Dist. Parbhani

... Applicant
(Original complainant)

Versus

Somnath Limbnath Jogi (Ingle)
Age: 23 years, Occu: Service,
R/o. Ashiv, Tal. Ausa, Dist. Latur

Non-applicant/respondent
(Original accused)

....
Mr. R. D. Sanap, APP for the applicant
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**CORAM : SMT VIBHA KANKANWADI AND
Y. G. KHOBRAGADE, JJ.**

DATE : 19.04.2023.

ORDER (PER Y. G. KHOBRAGADE, J.) :-

By the present application under Section 378(3) of the Code of Criminal Procedure, the prosecution seeks leave to file appeal to challenge the judgment and order dated 18.03.2019 passed by the learned Special Court under the POCSO Act, Gangakhed, District Parbhani, whereby the non-applicant/accused has been acquitted for the charges under Sections 363, 366-A,

376(2)(i)(n) of the Indian Penal Code and under Section 5 and 6 of the Protection of Children from Sexual Offences (POCSO) Act, 2012.

2. With the able assistance of the learned APP Mr. R. D. Sanap, we have gone through the record and considered the prosecution story narrated in the F.I.R. as well as evidence produced before the learned trial Court from the point whether leave can be granted to the prosecution to file appeal. As per the provision of Section 228A of the Indian Penal Code, the identity of victim needs to be concealed including not disclosing names of her relatives.

3. In short, it is the case of prosecution that, the father of prosecutrix (PW-2) lodged a report on 14.09.2016 with concerned Police Station alleging that after he came to know about love affair of his minor daughter with the accused, he had sent his daughter (the victim) to the house of her maternal uncle. The victim informed her maternal uncle and his family members at about 3.00 p.m., on 11.09.2016, that she was going to attend nature's call and left the house, however, even after lapse of considerable time she did not return back. Therefore, his brother-in-law and family members had undertaken the search of the

victim in the vicinity, but she was not traceable. His elder brother-in-law (PW-3) noticed that victim was with one boy near the Bus Stand, when he returning from his field. He inquired with the victim as to why she is at that place, then she told him that she has come to meet her friend- Somnath. Thereafter, his brother-in-law (PW-3) asked the victim to return to house immediately and he proceeded towards his home. After getting the information about the victim, the brother-in-law of the informant and his family members immediately went to the Bus Stand and took search of the victim, however, she was not found. Thereafter said incident was informed by the maternal uncle to his brother-in-law (father of the victim) on mobile. The informant alleged that the accused had enticed her minor daughter without his consent. On the basis of said report Crime No.122/2016 was registered against the non-applicant/accused for the offences punishable under Sections 363, 366 of Indian Penal Code.

4. PW-9 PSI Shri Choudhary conducted investigation and traced out the victim and accused on 27.09.2016. On recording statement of the victim, it transpired that, the accused took her to Pune and other places and established physical relations with her. Therefore, offence under Section 376 as well as Section 5 punishable under Section 6 of POCSO Act came to be added to

Crime No.122/2016. During the course of investigation, the Investigating Officer issued letter for collecting CDR and SDR of mobile of accused, recorded statements of witnesses. The victim was referred for medical examination and her clothes were seized under seizure panchanama Exh.45. Non-applicant/accused came to be arrested and was got medically examined. The Investigating Officer seized clothes of accused under seizure panchanama Exh.40 and drawn spot panchanama Exh.59. The Investigating Officer has collected birth certificate of the victim and got recorded statement of victim under Section 164 of Cr.PC. through the learned J.M.F.C. Court No.2, Gangakhed. The collected samples of accused and victim were referred for Chemical Analysis (C.A.). After completion of investigation, the charge-sheet came to be filed against the accused.

5. On mandatory compliance of procedure, the learned trial Court framed the charge against the accused at Exh.17. The accused pleaded not guilty and claimed for trial.

6. In order to bring home the guilt of accused, the prosecution examined in all nine (9) witnesses viz; PW-1, father of victim / informant at Exh.22, PW-2 victim at Exh.26, PW-3 brother-in-law of the informant at Exh.27, PW-4 Narayan (relative

of accused) at Exh.29, PW-5 Dr. Swati Phad Medical Officer at Exh.37, PW-6 Gavlan Gutte, panch to the cloth seizure panchanama of victim at Exh.44, PW-7 Head Master of Zilla Parishad Primary School of victim, PW-8 Lavkush Nilewad, Gramseval at Exh.55 and PW-9 Shri N. B. Choudhary, Investigating Officer at Exh.58. The incriminatory evidence was put to accused in the form of questions and his statement under Section 313 of Cr.P.C. came to be recorded. Defence of the accused is of total denial and his false implication in the crime.

7. Since the prosecution alleges about subjecting the minor victim to sexual intercourse; it is necessary to determine whether the victim was minor within the meaning of Section 2(d) of the POCSO Act on the day of committing offence.

8. PW-1 father of victim testified that date of birth of his daughter is 11.04.2001. At the relevant time his daughter was studying in 10th standard and she was 15 years old. As per the testimony of PW-2 victim, her date of birth is 11.04.2001. She was admitted in Zilla Parishad Primary School in first standard. PW-7 Head Master of Zilla Parishad Primary School of the victim deposed that as per the official school record and application for admission, date of birth of victim is 11.04.2001 and proved

admission application Exh.47 and school leaving certificate Exh.48. PW-8 Gramsevak, Lavkush Nilewad deposed at Exh.55 that his office maintained the record in respect of birth and death. As per the birth certificate Exh.56, victim's, date of birth is 11.04.2001. The accused has disputed correctness of date of birth of victim. According to the accused, victim was more than age of 18 years at the relevant time.

9. It appears that Exh.47 is the application for admission in primary school. Exh.48 is the extract of school register, Zilla Parishad Primary School. Both these documents as well as the birth certificate issued under the Birth and Death Registration Act, birth date of victim is recorded as 11.04.2001. However, Exh.47 Admission Form, depicts that it does not bear signature of victim's parents. PW-7 admitted in his cross examination that prior to taking admission in first standard in his school, the victim was not admission in that school. The victim and her father have not deposed that the victim was studying in kindergarten prior to taking admission in first standard. Further, PW-7 admitted that he does not know on basis of which document, date of birth of victim was recorded in Exh.47. Admittedly, the birth certificate Exh.56 issued by PW-8 Gramsevak, however, the entry described in Exh.56 does not reveal as on which date said entry was taken in

Grampanchayat record. The birth certificate Exh.56 does not bear registration number. The column meant for the date or registration of birth is blank. PW-8 failed to produce original birth registration register to prove exact date of birth of the victim.

10. It is well settled principle of law that the birth certificate of victim could take place of better proof over other documents. The prosecution tried to prove birth certificate (Exh.56) of the victim maintained by the Grampanchayat under the Birth and Death Registration Act. However, birth certificate Exh.56 does not reflect about registration of date of birth. Therefore, date of birth of the victim appearing in school leaving certificate Exh.48 cannot said to be correct. The admission form Exh.47 does not bear signature of parents of the victim. The victim has not taken kindergarten education, but her signature is appearing on Exh.47. How and under what circumstance, signature of a minor was taken on admission form, has not been explained by Head-Master. Under all these circumstances, it cannot be said that the documents Exh.47, 48 as well as birth certificate Exh.56 are reliable documents. Therefore, prosecution has failed to prove that on the day of occurrence of incident, the victim was minor within the meaning of Section 2(D) of the POCSO Act.

11. In order to constitute the offence under Section 363, 366, it was necessary on the part of the prosecution to prove that on the day of incident the victim was below the age of 18 years and was removed without consent of her parents. Though in his examination-in-chief, PW-1- father has supported his FIR, he had come to know about the incident from his brother-in-law. In his cross examination, PW-1 has admitted that, his daughter was in love with the non-applicant / accused. He has not stated that accused had played any active role in allegedly enticing the victim. Possibility therefore, cannot be ruled out that the victim had left her maternal uncle's place on her own accord, due to the love affair.

12. PW-2 victim has deposed at Exh.26 that she got acquainted with the accused, who was on visiting term at the house of his foster sister situated in front of her house in State of Gujarat. On 11.09.2016, she was studying in 10th standard. She was residing at the house of her grand-parents and maternal uncle. On 11.09.2016 at about 12.30 noon, when she visited Renuka Devi temple, at that time the accused met her. Thereafter the accused promised her for marriage and took her at Bus Stand. Thereafter, the accused took her to Gangakhed, Latur and Pune.

Further the accused took her at the house of his foster sister at Pune. Subsequently she and accused went at the house of one Barber who was acquainted with the accused and stayed there for 2 - 3 days with the accused. During that period the accused had committed sexual intercourse with her for five times. Thereafter on 26.09.2016 the uncle of accused and his brother-in-law Nagesh took them at his native and brought her at the Police Station.

13. In cross examination, PW-1 admitted that there were people in Renuka Devi temple. The victim admitted that her father PW-1 was opposing love affair between her and accused. Therefore, it appears that victim and accused had taken that extreme step. The victim had accompanied the accused from one place to another. However, the PW-2 appears to have not raised voice. It indicates that she had voluntarily went with accused as she was major at that time.

14. Since we have concluded that victim appears to be major at the time of incident, we would like to rely on the decision in ***S. Varadarajan Vs. State of Madras - 1965 AIR 942***, wherein the Hon'ble Supreme Court held thus:

“Where a minor girl, alleged to be taken away by the accused person, had left her father's protection knowing and having capacity to know the full import of what she was doing and voluntarily joined the

accused, it could not be said that the accused had taken her away from the keeping of her lawful guardian within the meaning of Section 361 of the Indian Penal Code (Act XLV of 1860). Something more had to be done in a case of that kind, such as an inducement held out by the accused person or an active participation by him in the formation of the intention, either immediately prior to the minor leaving her father's protection or at some earlier stage. If the evidence failed to establish one of these things, the accused would not be guilty of the offence merely because after she had actually left her guardian's house or a house where her guardian had kept her she - joined the accused, and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place."

The ratio of this case is perfectly applicable to the case in hand. The conduct of victim itself falsifies prosecution story.

15. To constitute the offence punishable under Section 376 of I.P.C., the prosecution has examined PW-5 Dr. Swati at Exh.37. PW-5 had examined the victim PW-2 on 27.09.2016. She had taken the history of sexual assault from the victim (PW-2) wherein, she narrated that, the accused committed sexual intercourse with her prior to 5 - 6 days for 2 - 3 times. The PW-5 Medical Officer had found rapture of hymen of victim and her private part admitted one to two fingers and was of the opinion that victim was habitual to sexual intercourse. PW-5 Medical Officer admitted in her cross examination about not mentioning age of hymen tear. Even if we consider that there was sexual

intercourse between victim and accused; as afore-said, she appears to be major and had voluntarily gone with accused. Therefore, possibility cannot be ruled out that the said sexual intercourse was by her consent. Further evidence of the prosecutrix does not suggest that by putting her under the fear of death or to cause hurt, the accused committed forcibly intercourse with her. The ingredients of Clause-6 of Section 375 of Indian Penal Code are not attracted.

16. Learned Judge of the Special Court passed impugned Judgment and Order on 18.03.2019, acquitting the accused for the offence under Sections 363, 366-A, 376(2)(i)(n) of the Indian Penal Code and under Section 5 and 6 of the Protection of Children from Sexual Offences (POCSO) Act, 2012 is justifiable. It does not appear perverse. No case is made out to grant leave to file appeal. Accordingly, the application stands dismissed.

[Y. G. KHOBRADE, J.]

[SMT. VIBHA KANKANWADI, J.]

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