

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY STATE NO.140 OF 2019

The State of Maharashtra
Through Police Station Bhoom,
Through XYZ.

.. Applicant

Versus

1. Kailas Mohan Mane,
Age: 26 years, Occu.: Agri.,
2. Indubai Raghunath Mane,
Age: 40 years, Occu.: Agri.,
3. Urmila Rajendra Ajbe,
Age: 45 years, Occu.: Agri.,
4. Bhimabai Mohan Mane,
Age: 50 years, Occu.: Agri.,
5. Nana Sikandar Shinde,
Age: 60 years, Occu.: Agri.,
6. Shivaji Mohan Mane,
Age: 31 years, Occu.: Agri.,
7. Asmita @ Rani Shivaji Mane,
Age: 27 years, Occu.: Agri.,

All R/o Wadachiwadi, Tq. Bhoom,
Dist. Osmanabad.

.. Respondents

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Mr. A. M. Phule, APP for the applicant – State.

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

DATE : 11th October, 2023

ORDER [Per Smt. Vibha Kankanwadi, J.] :-

. Present application has been filed under Section 378(1)(b) of the Code of Criminal Procedure seeking leave to file an appeal challenging the judgment and order dated 28.02.2019 passed by the learned Special Judge, Bhoom in Special (POCSO) Case No.07 of 2018; thereby acquitting the respondents from the offence punishable under Sections 376, 376(2)(i), 376(2)(k), 366-A, 323, 504 read with Section 34 of Indian Penal Code, under Section 4 and 8 of the Protection of Children from Sexual Offences Act, 2012 (for short "POCSO Act") and under Section 9, 10 and 11 of Prohibition of Child Marriage Act, 2007.

2. Heard learned APP Mr. A. M. Phule for the applicant – State. With the able assistance of learned APP, we have gone through the record, which was before the learned Trial Judge.

3. The prosecution story is that the victim was minor and was residing with paternal grandmother and sister. Her father had passed away about ten years prior to the incident. Her mother and sister resides at a different place. She had gone to school on 08.07.2017 and after the school was over, she came to house. Her mother had come at weekly bazaar and asked her to come along with her, but she refused and told that she would ask her

grandmother. Then mother told that she has already taken permission from grandmother and thereafter the victim, her mother and sister proceeded in milk carrier vehicle. On the second day, she was asked by her mother whether she wants to marry, she refused. She was then called by a lady for lunch. Therefore, P.W.3 victim with her cousin sister went to the house of the said lady. There accused No.1 had come on motorcycle. He took her forcibly and the said cousin sister to Beed and she was kept in a house of a person with whom he was acquainted. Cousin sister was then dropped at another place. She was frightened and, therefore did not ask any question. On the second day i.e. on 11.07.2017 the other accused along with accused No.1 came and took her to the temple of Lord Khandoba. She was forced to wear a Saree and she was asked to marry accused No.1. Accused No.1 put garland and Mangalsutra on her and the marriage was performed. She was then brought to village after having a lunch in a hotel. In the village leet, she stayed with accused No.1 for about 8 days. Thereafter, her mother came and took her to the house of accused No.1. The function of *Solava* was performed after 8 to 15 days. She was not ready for sexual relationship with accused No.1. At that time, the mother of accused No.1 asked her as to why then she has performed marriage. Accused No.1 had forcible sexual intercourse with her. On the next day when she refused, he assaulted her. She then went to her mother's house, where accused No.1 came. Then after some days when it was found by her that her mother was also with accused

No.1, she gave message to her grandmother. Though grandmother met her, she did not take her with her. Thereupon also the victim was abused by her mother and accused No.1 as to why she had informed the fact to grandmother. On 12.11.2017, she gave phone call to the grandmother saying that she is being harassed. At that time, her uncle came and took her to Bhoom Police Station. Thereafter, she lodged the report.

4. After the investigation, charge-sheet was filed. It appears that prosecution examined in all nineteen witnesses to bring home the guilt of the accused. After considering the evidence on record, the learned Trial Judge had acquitted all the accused persons.

5. It appears that many witnesses have turned hostile, who were the panchas, however, in this case, it appears that the learned Trial Judge has not dealt the matter with sensitivity. The victim was alleging that she was forced to marry, which was a child marriage and even the mother of the victim has been made as accused No.3. The same Advocate who was representing accused No.1 was also representing accused Nos.3 to 7. It is hard to believe that a mother does not know the date of birth of the child or if the mother is illiterate, she does not know the age of the child. The prosecutrix P.W.3 has given her birth date as 04.09.2003, which does not appear to be challenged by accused No.3 in proper sense because there is no other date of birth suggested posing it to be the correct birth date.

Further, it does not appear that in her statement under Section 313 of the Code of Criminal Procedure, accused No.3 had given either the correct birth date or correct age of the prosecutrix. Still, the learned Trial Judge appears to have drawn a conclusion that the age of the girl is not properly proved, though the school leaving certificate has been produced and, therefore, the said aspect requires re-appreciation. If it is held that the prosecutrix is a child as defined in Section 2(1)(d) of the POCSO Act, then the equation would differ. The medical evidence is also required to be revisited, because it is stated that there was no external injury, but here in this case the medical examination itself is belated. What has been observed by the medical officer is the absence of hymen. Whether the testimony of the prosecutrix was inspiring confidence or not was the main question and, therefore, taking into consideration the manner in which the trial has been dealt with, it requires re-appreciation and, therefore, the application deserves to be allowed.

6. The application stands allowed.
7. Registry to register the appeal.
8. The said appeal stands **admitted**.
9. Issue notice to the respondents, returnable on 06.11.2023.
10. Call record and proceedings.

11. Action under Section 390 of the Code of Criminal Procedure be taken against the respondents to the satisfaction of the Trial Court.

[ABHAY S. WAGHWASE]
JUDGE

scm

[SMT. VIBHA KANKANWADI]
JUDGE