

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.44 OF 2020

DYANDEV S/O TRIMBAK UKIRDE
VERSUS
THE STATE OF MAHARASHTRA

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APPLICATION FOR LEAVE TO APPEAL BY STATE NO.112 OF 2020
WITH
CRIMINAL APPEAL NO.845 OF 2023

THE STATE OF MAHARASHTRA
VERSUS
DNYANDEV S/O TRIMBAK UKIRDE

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Mr. D. B. Gaikwad, Advocate for appellant in Criminal Appeal No.44 of 2020 and for respondent in Criminal Appeal No.845 of 2023.
Mr. S. D. Ghayal, APP for the respondent – State in Criminal Appeal No.44 of 2020 and for appellant – State in Criminal Appeal No.845 of 2023 and ALS No.112 of 2020.

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

DATE : 19th October, 2023.

ORDER :-

. Learned Advocate for the appellant – original accused submits that he has no instructions from his client and, therefore, he seeks to withdraw his appearance. It is to be noted that the appellant is in jail and his appeal challenging his conviction under Section 307 of Indian Penal Code is pending. Therefore, issue notice to the appellant/original accused

informing him that his Advocate Mr. D. B. Gaikwad has sought discharge and, therefore, whether he want to engage Advocate of his choice with his own expenditure or whether he want legal aid at the State exchequer to represent him in Criminal Appeal Nos.44 of 2020 and 845 of 2023. The notice of appellant/original accused is made returnable on 30.11.2023.

2. As regards Application for Leave to Appeal by State No.112 of 2020 is concerned, it 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 16.12.2019 passed by the learned Special Judge (POCSO Act), Aurangabad in Special Child Prot. No.12 of 2017; thereby acquitting the respondent from the offence punishable under Sections 363, 366-A, 376(2)(j), 307 of Indian Penal Code and under Section 3 punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (for short "POCSO Act").

3. Heard learned APP Mr. S. D. Ghayal for the applicant – State. With the able assistance of learned APP, we have gone through the record, which was before the learned Trial Judge.

4. The respondent faced trial for the offence punishable under Section 363, 366-A, 376(2)(j) and Section 307 of Indian Penal Code as well as Section 4 and 6 of the POCSO Act. It will not be out of place to mention

here that the respondent has been held guilty of committing offence punishable under Section 307 of Indian Penal Code and has been sentenced to undergo rigorous imprisonment for five years and to pay fine of Rs.2500/- in default to undergo rigorous imprisonment for six months. The separate appeal by original accused challenging the said conviction is pending before this Court, so also the prosecution has filed appeal for enhancement in the sentence under Section 377(1) of the Code of Criminal Procedure. The present application is restricted to the acquittal of accused from the offence punishable under Section 363, 366-A, 376(2)(j) of the Indian Penal Code and under Section 4 and 6 of the POCSO Act.

5. The necessary details of the prosecution story are that the victim/prosecutrix lodged first information report with Karmad Police Station on 26.10.2016. She had contended that she is from a village in Madhya Pradesh and two years prior to the FIR, she had come to Karmad for labour work along with her parents. The accused was also doing labour work and they got acquainted with each other. The same resulted in love affair, consequently in the physical relations. After completion of work, she had gone to her native place, however, the accused fetched her from her village and brought her to Pundlik Nagar, Aurangabad. They stayed together for about seven months and they had regular sexual intercourse with each other. On the date of FIR, she was carrying pregnancy of four

months. It is her story that on 25.10.2016 around 9.00 p.m., she told accused that she has desire to meet her parents, but accused opposed and he took her to a field behind slum in Karmad, gave slaps and tried to throttle her with a string. She became unconscious and it appears that the accused left her there. After regaining consciousness, she came to one Hotel Jaibhavani on Jalna – Aurangabad road and narrated the incident to the owner, who had taken her to police station and then lodged the report.

6. The investigation was carried out including the DNA test. The prosecution has examined in all eight witnesses to bring home the guilt of the accused and as aforesaid accused has been convicted for the offence punishable under Section 307 of Indian Penal Code only. Perusal of the evidence would show that there was no age proof collected and adduced to prove that P.W.1 victim was child on the day of incident. If prosecution fails to prove that the victim is child as defined under Section 2(1)(d) of the POCSO Act, then the provisions of POCSO Act will not be applicable. If it is not proved that the girl was minor, we will have to presume that she was major ever since two years prior to the FIR. She had come along with parents to Karmad for labour work, got acquaintance with accused and fell in love with him. Even at that time according to her they had sexual intercourse. The learned Trial Judge therefore justified in holding that the act was consensual and, therefore, neither the offence under the POCSO

Act is proved beyond reasonable doubt, nor we can bring it under the Indian Penal Code Sections, as the act appears to be voluntary. She was residing with the accused for a considerable time and was indulging in the sexual intercourse.

7. At the cost of repetition, we would say that we are not making any comments on the merits of the part of the case under which the accused has been held guilty of committing offence punishable under Section 307 of Indian Penal Code, as both the appeals are pending.

8. Under the said circumstance, Application for Leave to Appeal by State No.112 of 2020 stands rejected.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm