

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

14 APPLICATION FOR LEAVE TO APPEAL BY STATE NO.115 OF 2020

The State of Maharashtra
Through Officer In-charge of Police Station,
Gangakhed, Tq. Gangakhed, Dist. Parbhani.

... Applicant

... Versus ...

Haribhau @ Dattarao Manikrao Shinde,
Age 35 yrs., Occ. Agri.,
R/o Wazur, Tq. Purna, Dist. Parbhani.

... Respondent

...

Mr. S.J. Salgare, APP for applicant

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

DATE : 26th JUNE, 2023

ORDER : (PER : SMT. VIBHA KANKANWADI, J.)

1 Present application has been filed by the prosecution seeking leave under Section 378 (1)(b) of the Code of Criminal Procedure, 1973 to file appeal challenging the Judgment of acquittal dated 04.09.2020 passed by learned Special Judge and Additional Sessions Judge, Parbhani in Special

(POCSO) Case No.21/2017, thereby acquitting respondent – original accused from the offence punishable under Section 376(2)(f)(i)(n) and 506 of the Indian Penal Code, 1860.

2 Heard learned APP Mr. S.J. Salgare for the prosecution and with his help we have gone through the record which was available before the learned Special Judge.

3 Here, though we are aware about the fact that the identity of the victim is required to be not to be disclosed, however, in certain peculiar circumstances it becomes difficult to hide the entire identity, especially the relationship and, therefore, to that extent only we are disclosing what is the relationship between certain witnesses and the accused. Here, the victim – informant is the daughter of the accused. She has contended that on 19.01.2017 she along with other relatives were rolling papad on account of marriage of daughter of her maternal aunt at village Wazur around 12.00 noon. Her mother had gone to another village, as her father had expired. Accused came to meet the victim and told that he would drop her at the place where her mother has gone, but she refused and told that the mother had met her a day before and she wants to go to school. Yet, upon the insistence of the father she packed her clothes and then the accused fetched a two

wheeler from another person. Though the victim was crying, the father forced her to accompany him. They were proceeding on motorcycle, but when they went ½ k.m. ahead, the vehicle was taken on kachcha road. When she asked him about the same, he told that he wants to pluck green gram. Father took her in Jowar crop field and by giving threat he committed rape on her by undressing himself as well as her. She again sat on the motorcycle of the father and after another village near a canal again the father had committed sexual intercourse with her by taking her in Jowar crop. Thereafter they went to another place where he wanted to purchase chappal. They went into a shop, but he did not purchase the chappal there and around 4.00 p.m. they reached her grandfather's house. She could not find her mother there but the accused left her at that place. Her mother came there at about 6.00 p.m. and then she narrated the entire incident. Thereafter the First Information Report was lodged.

4 After the investigation the charge sheet was filed and prosecution has examined in all 12 witnesses to bring home the guilt of the accused. After hearing both sides and perusing the evidence the learned Trial Court has acquitted the accused. Hence, the present application.

5 Here, it is to be noted that the Trial Court has held that the prosecution has failed to prove that victim – informant is “child” within the

meaning of Section 2(1)(d) of the Protection of Children from Sexual Offences Act, 2012. We have scanned the evidence to that effect. The first and the foremost question that may arise is – when the accused is father, how we can challenge the age of the child. In the cross-examination of the mother it has come on record that the date of birth, that was given at the time of admission in the school by her, was approximate. Prosecution though examined the school official to prove the date of birth as per the school record; yet, in view of the said admission by the mother - PW 7, it cannot be said that the said date as per the school record is a conclusive proof. Rather it has come on record that, that date is approximate date. The Trial Court, therefore, was justified in giving finding that the prosecution has failed to prove that the informant was child under Section 2(1)(d) of the POCSO Act and, therefore, the provisions of POCSO Act cannot be made applicable to the facts of the case.

6 Here, the testimony of the informant is utmost necessary. It can be seen from the testimony of the informant as well as her mother that the relations between the accused and PW 7 are not cordial since many years and, therefore, PW 7 and children were residing separately and even after she had made separate arrangements for the informant and kept her in the house of PW 10 at Wazur for education purpose. At the costs of repetition,

we would say that PW 7 was residing at a different village than PW 6 informant and PW 6 was residing in the house of PW 10. The reason why PW 7 and accused were residing separately was that accused was residing at Gangakhed by performing marriage with a lady and he has three daughters from the said lady. PW 7 has not in clear terms stated since when she is residing separately, but from her examination-in-chief the period would be more than 10-12 years. It can also be seen from her examination-in-chief itself that though the accused has performed the second marriage, she has not obtained divorce from him. Rather she says that after she had resided with her children at Pokharni for about 10-12 years, accused went there and requested for cohabitation and then all of them went to Wazur and started residing. Accused resided with them for about eight months in a rented premises. However, then, she says that after admitting the victim to school at village Limla, which was nearby Wazur, she went back to Pokharni and, therefore, she was kept at the place of maternal uncle of accused. PW 10 is the said maternal uncle. It gives a picture that PW 10 was made a local guardian and his testimony would show that he did not find it objectionable to allow victim-informant to be sent with father on that day. The situation, which the informant has told that she was not ready to go with her father and she was crying, all these things have not been stated by PW 10. The fact remains is that the relations between the parents were not cordial and,

therefore, the mother making use of the child cannot be ruled out.

7 We may not go much into the details of medical report though PW 5 Dr. Swati Phad has been examined because what she has found non violating sexual intercourse on the victim. The medical evidence is always corroborative in nature and as regards the offences of rape are concerned, the conviction can be based solely on the testimony of the prosecutrix, if it inspires confidence. Here, the testimony of the victim is not inspiring confidence, because she had stated that the act was committed twice at a different place and even they had gone to a chappal shop. If at all such incident would have happened, she would have raised alarm at the time of alleged crime. She was aged 16 plus. She could have refused to go and could have ran away from the place. She does not speak about the resistance offered, when the incident is stated to have been committed in an open field. The person, whose two wheeler was stated to have been fetched by accused, has not been examined by the prosecution. Under such circumstance, the sole testimony of the prosecutrix cannot be believed. There is no perversity in the findings recorded by the Trial Court. Application, therefore, stands rejected.

(S.G. Chapalgaonkar, J.)

(Smt. Vibha Kankanwadi, J.)

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