

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

APPLICATION FOR LEAVE TO APPEAL BY STATE NO. 181 OF 2018

The State of Maharashtra,
Through Police Inspector,
Kopargaon Police Station, Tq. Kopargaon
District Ahmednagr. ... **Appellant**

VERSUS

1. Dattu @ Bhuja Arun Pawar,
Age 22 years,
2. Arun Shivram Pawar,
Age 50 years
3. Sou. Asha Arun Pawar,
Age 44 years,
All r/o Shivaji Nagar,
Dahegaon Bolka, Tq. Kopargaon,
District Ahmednagar ... **Respondents**

Mr. R. D.Sanap, APP for the appellant-State

CORAM : SMT. VIBHA KANKANWADI AND
Y. G. KHOBRAGADE, JJ.

DATE : 20.04.2023

ORDER (Per Y. G. Khobragade, J.):

1. The present application has been filed by the prosecution under section 378(1) (b) of the Criminal Procedure Code, seeking leave to file appeal challenging the judgment and order dated 18.04.2018, passed by the learned Additional Sessions Judge, Kopargaon, Dist. Ahmednagar in Sessions Case No.56 of 2017; thereby acquitting the

respondents/ accused from the offence punishable under section 363, 366, 376 and 342 of the Indian Penal Code and section 3 r/w section 4 of Protection of Children from Sexual Offences Act, 2012 in Crime No. 135/2016, registered with Kopergaon Police Station, District Ahmednagar.

2. Heard Mr. R. D. Sanap, learned APP for the State and with his able assistance, we have gone through the documents on record which were before the learned trial judge for the limited purpose of considering whether leave can be granted to file appeal against the order of acquittal.

3. In nutshell, the prosecution story is that, the informant (PW-1) lodged a report with Kopergaon Police Station on 24.11.2016 alleging that respondent/accused No. 1 to 3 are residing near her house. Only one House is situated in between her house and house of accused persons. The accused persons are her relatives. In the year 2016, she was 16 years old. On 14.11.2016, at about 8.00 p.m., she had gone to the house of her neighbour for watching T.V. At that time said neighbour, his sister and three daughters were present. Her three younger sisters and brother were also watching TV with her. At that time, accused No.1 came to the house of neighbour and called her out of house. The accused proposed her for marriage by saying that he likes her but she told him that by relation he is her grandfather and therefore

she refused said proposal. But then, the accused held her hand and forcibly took her to his house. At that time, accused nos. 2 and 3 were present in their house. Accused Nos. 2 and 3 shown their willingness to accept her as their daughter-in-law and requested her to stay in their house. The victim further alleged that in that night, the accused forcibly kept her in their house. Thereafter accused No.1 removed electric bulb, created darkness in the house, committed sexual intercourse with her in between 10.00 to 11.00 p.m. and detained her for whole night. On next day i.e. on 15.11.2016, in the morning, accused No.1 took her by walk up to Highway and therefrom by ST Bus, brought her at Kopergaon S.T. stand. Then, by another bus, he took her to Sinner and then to village Saykheda. According the victim, she and accused reached at ST Stand Saykheda at about 2.00 p.m. Thereafter, accused went away by leaving her alone at the S.T. Stand Saykheda. She made phone call to her father from cellphone of one passenger and narrated the incident. Then, her father made phone call to one Navnath (PW-3) and asked him to get her back. Accordingly, PW-3, with his wife, came to ST Stand Saykheda and brought her (victim) at their house. Then, on next day, PW-3 dropped the victim at her parental house. She then narrated incident to her parents. On which basis of said report, Crime No. 135/2016 was registered against the accused persons.

4. API Shri Pappu Kadri- Investigating officer (PW-7) had immediately referred the victim for medical examination and arrested the accused under arrest panchanama. The accused No.1 was referred for medical examination. The investigating officer had seized the clothes of the victim and accused and drawn spot under seizure panchanama. The spot panchanama was drawn. The blanket and carpet from the spot of incident were seized. Investigating officer visited the places with the accused, where he had taken the victim and drawn panchanamas. Statements of witnesses were recorded. All seized articles were sent for chemical analysis and collected medical certificates of the accused and victim. Statement of victim under section 164 was got recorded through the Judicial Magistrate, First Class, Kopergaon. On completion of investigation, charge sheet came to be filed against the accused.

5. The learned trial court framed charge at Exh. 14 against the accused for the offence punishable under section 363, 366, 376 and 342 of the Indian Penal Code and section 3 r/w section 4 of Protection of Children from Sexual Offences Act, 2012 and recorded the plea of the accused. The accused pleaded not guilty and claimed for trial.

6. In order to bring home guilt of the accused, the prosecution has examined total seven witnesses i.e. PW-1 Victim at Exh. 24, PW-2 mother of victim at Exh. 27, PW-3- Navnath, relative of victim at Exh.

29, PW-4 Deoram Jadhav- Panchwitness to spot panchanama, seizure Panchanama at Exh.30, PW-5 Dr. Kundan Gaikwad, medical officer who examined the victim and the accused, at Exh. 34, PW-6 Prabhakar Verpe, Headmaster of the school of victim at Exh. 42 and PW-7 I.O. API Pappu Kadri at Exh. 45.

7. Besides testimonies, the prosecution relied on documentary evidence i.e. FIR Exh. 25, spot Panchanama Exh. 31, Medical report of accused Exh. 35, medical report of accused Exh. 36, Seizure Panchanama Exh. 46 in respect of clothes of accused were seized, seizure Panchanama Exh. 32 in respect of cloths of victim, Panchanama Exh. 33, request letter Exh. 47, referral letter Exh. 48 under which clothes were sent for chemical analysis, statement of victim under section 164 of Cr.PC. Exh. 26, extract of school admission register Exh. 43 and school leaving certificate of victim Exh. 44.

8. After conclusion of the prosecution evidence, statements of the accused under section 313 of Cr.PC. were recorded and incriminatory evidence was put to the accused. The defence of the accused is that due to old enmity they have been falsely implicated in the crime. After hearing, the learned trial court passed the judgment and order on 18.04.2018 and acquitted the accused for the offence punishable under section 363, 366, 376 and 342 of the Indian Penal Code and section 3 r/w section 4 of Protection of Children from Sexual

Offences Act, 2012. Being dissatisfied with the findings recorded by the learned trial court, the prosecution has filed the present application seeking leave to file appeal.

9. The learned APP, in vehemence, submitted that the prosecution has proved its' case beyond reasonable doubt by examining seven witnesses and testimonies of all the witnesses are in corroboration, however, the learned trial court failed to appreciate the evidence in positive manner and wrongly disbelieved the prosecution witnesses. The learned APP further canvassed that the prosecution examined PW-1 victim and PW-6 Headmaster of the victim's school and proved the date of birth of the victim as 12.04.2000 and the offence of sexual assault occurred on 14.11.2016. On the date of incident, victim was 'child' within the meaning of section 2(1)(d) of the POCSO Act.

10. The burden to prove that the victim was minor/child on the date of incident was on the prosecution. The prosecution examined PW-1 victim at Exh. 24. The prosecution failed to bring on record the date of birth of the victim from her mouth. The prosecution examined PW-6 Headmaster of school in which victim had studied. PW-6 produced original school leaving certificate of the victim of Zilla Parishad Primary School on which basis admission of victim had secured admission in his school. As per testimony of PW-6, the victim was admitted in 5th Standard on 15.06.2011 in his school, but there is no entry in the

school register who had accompanied with the victim at the time of admission. Date of birth of the victim is recorded in school leaving certificate Exh.44 and school admission register Exh.43 as 12.04.2000 on the basis of school leaving certificate issued by Z.P. Primary school. In cross examination, PW-6 admitted that at the time of admission of victim, no birth certificate was produced and he was not the headmaster of the school when the victim was admitted in the school. So also, there is no reference in admission register Exh. 43 on which basis the date of birth of victim was recorded. Thus, it is evident that the prosecution failed to produce birth certificate of the victim PW-1 maintained under the provisions of the Birth and Death Registration Act. The prosecution failed to produce matriculation or equivalent certificate of the victim. The prosecution relied on Exh. 40, extract of school register Exh. 43 and School leaving certificate Exh.44. However, the testimony of PW-6 would show that while admitting victim PW-1 in 5th Standard, no proof in respect of date of birth of victim was produced. The prosecution has failed to prove primary school leaving certificate of the school in which the victim had studied.

11. Section 12(3) in The Juvenile Justice (Care and Protection of Children) Rules, 2007 reads as under:

"12. Procedure to be followed in determination of age-
(1)....

(2)....

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining—

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

certificates, if available; and in the absence whereof;

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law."

12. In the case of **Shaikh Feroz Shaikj Jainoddin Vs. State of Maharashtra and another (2011 ALL MR (Cri) 538)**, it has been held that school leaving certificate issued by later school is not a substantial proof of date of birth. The coordinate bench of this Court in case of

Sandip Kisan Waghe Vs. State of Maharashtra, reported in 2014 All MR (Cri) 1169, found that the evidence of date of birth with school first attended must be brought on record to prove the date of birth of the victim.

13. As per ratio laid down in the case of **Jarnail Sing. Vs. State of Haryana (2013 AIR (SC) 3467)**, the age of a child can be proved, by adopting one of the options available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the first option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would

conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion.

14. In the case **State of Maharashtra Vs. Ramesh Babulal Rewtkar, (2017 ALL MR (Cri) 3980)**, the coordinate bench of this court found that while school record was based on the leaving certificate issued by the primary school, no data from primary school was brought on record; it was held that such proof of date of birth is not acceptable. In the case in hand, the victim PW-1 has not stated her date of birth. Extract of school register Exh. 43 and School leaving certificate Exh. 44 do not refer date of birth of the victim PW-1 on the basis of birth certificate issued by a Public Authority. Birth certificate has not been produced on record. Precisely, for this reason, the learned trial court has found that the prosecution failed to prove that at the time of incident, victim PW-1 was below the age of 18 years. We therefore, find substance in the said finding that she was not 'child' within the provisions of Sec.2 (d) of POCSO Act.

15. PW1 Victim has deposed that, she had gone to the house of her neighbour for watching T.V. at about 8.00 p.m. on 14.11.2016. At that time said neighbour, his sister and three daughters were present. Her three younger sisters and younger brother were also watching TV with her. At that time, accused No.1 came in front of house of neighbour

and called her out of the house. Then accused no.1 marriage proposal before her by saying that he likes her but she told him that in relation he is her grandfather and denied said proposal. But then, the accused caught her hand and took forcibly to his house. At that time, accused nos. 2 and 3 were present. Accused Nos. 2 and 3 disclosed her about their intention to accept her being their daughter-in-law and requested her to stay at their house. The victim stated that the accused No.1 forcibly kept her in his house. Thereafter, accused No.1 removed electric bulb, created darkness in the house in between 10.00 to 11.00 p.m. and committed sexual intercourse with her and detained her for the night. On next day i.e. on 15.11.2016, in the morning, the accused No.1 took her by walk up to Highway and therefrom by ST Bus, brought her at Kopergaon S.T. stand. Then, by another bus, he took her to Sinner and then to village Saykheda. According to the victim, she and accused reached at ST Stand Saykheda at about 2.00 p.m. and thereafter, accused went away by leaving her alone at the S.T. Stand Saykheda. Thereafter, she made phone call to her father from cellphone of one passenger and narrated the incident. Thus, on considering testimony of the victim, if the accused had removed the victim from her neighbor's house and kept her in his house overnight, in that situation the victim's parents could have been alert and they would have searched for the victim. But evidence of prosecution witness is very much silent on this aspect. Nonetheless, as per testimony of the victim, her three younger

sisters and brother were also watching TV with her. Under this circumstance, if the victim had gone out of the neighbour's house, in such a situation her siblings could have seen her while leaving the neighbour's house. The prosecution has not examined neighbour to testify about visit of victim for watching TV in his house. Prosecution has also not examined any of the sisters and brother of the victim to support her contention. Though mother has been examined, she was admittedly not present in the house of neighbour. How the mother and other family members kept silence when victim had not returned to house, when her siblings might have returned, is not explained in her testimony. In other words, why they had not started search of the victim immediately is a question, which raises doubt over the story.

16. As per testimony of PW-1 that on 15.11.2016, in a broad day light, she was taken from her village by walk to bus stand then by bus to Kopergaon and then to Saykheda bus stand. However, her evidence does not reveal about raising voice while she was taken from one place to another that too in public transportation. Further, as per testimony of PW-1 victim, on 14.11.2016, about 10.00 to 11.00 p.m., the accused removed electric bulb, created darkness and committed sexual intercourse with her and accused nos. 2 and 3 who are parents of accused no.1 were present in the house. This is unnatural. Even if we accept that accused No. 2 and 3 might be having desire that their son

should marry victim, but it is unimaginable that they would support the son in unlawful act of rape. Therefore, testimony of victim does not appear trustworthy. Prosecution has examined PW 3 Navnath, who had brought victim from Sykheda bus stand. However, his testimony will prove a portion of the fact, that too dependent on the story told by victim. Therefore, victim went to said village is a fact, but it is not proved that accused No. 1 had taken her there forcibly.

17. PW-4 medical officer Dr. Kundan deposed that on 24.11.2016, he examined the victim and found that victim was under menstruation and on genital examination, vagina admits two fingers without any pain. He did not collect sample of pubic hair and vaginal swab and accordingly issued medical certificate Exh. 35. As per testimony of PW-5, medical officer, on the same day, at about 9.45 p.m., he examined the accused and issued medical certificate Exh. 36. PW-5 Medical officer has admitted in his cross examination that he had not found any visible injury on the person of the victim or on her private part. He further admits that the victim was under menstruation and no symptoms of sexual intercourse were found by him. Therefore, the medical evidence is not corroborating ocular evidence.

18. The report of the Chemical Analyst regarding analysis of carpet and blanket under seizure panchanama Exh. 31, clothes seized

under panchanama Exh. 46 is also not helpful to support the story of the victim.

19. Therefore, considering the evidence of prosecutrix as well as evidence of medical expert and CA report, it appears that, either the victim was consenting party for such alleged incident or no such incident took place. The prosecution failed to bring corroborative evidence. The sole testimony of victim cannot be relied, especially when prosecution has failed to prove that she was 'child' on the day of alleged incident. Learned trial court passed the impugned judgment and order on 18.04.2018 and acquitted the accused for the offence punishable under section 363, 366, 376 and 342 of the Indian Penal Code and section 3 r/w section 4 of Protection of Children from Sexual Offences Act, 2012. The findings recorded by the learned trial court do not appear to be perverse. No case is therefore made out for intervention of this court. Hence, the present application is liable to be dismissed. Accordingly, it is dismissed.

(Y. G. KHOBRAGADE, J.)

(SMT. VIBHA KANKANWADI, J.)

JPChavan