

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY STATE NO.121 OF 2020

The State of Maharashtra
Through Officer incharge of
Police Station, Purna, Tq. Purna,
Dist. Parbhani.

.. Applicant

Versus

1. Shaikh Firzan @ Baba s/o Shaikh Yusuf
Age: 20 years, Occu.: Labour,
R/o. Qureshi Mohalla, Purna.
2. Mujahid @ Munju s/o Mehboob Qureshi,
Age: 22 years, Occu.: Labour,
R/o. Qureshi Mohalla, Purna,
Tq. Purna, Dist. Parbhani.
3. Mohd. Jahid @ Golu s/o Mohd. Taher,
Age; 25 years, Occu.: Labour,
R/o. Tilak Road, Purna,
Dist. Parbhani.

.. 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 : 12th 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 30.07.2020 passed by the learned Additional Sessions Judge-4/Special Judge, Parbhani in Special (POCSO) Case No.20 of 2015; thereby acquitting the respondents from the offence punishable under Sections 376(2)(i)(j), 354, 506 read with Section 34 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”).

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 in short is that the informant - victim reported to the police station about five months prior to lodging of the FIR that when she was with her mother, begging at Purna Railway Station, accused No.1 met her and took her mobile number. Thereafter, he was talking to her and giving promise to marry, thereafter he had taken her near a temple behind railway quarters and had forcible sexual intercourse with her. Thereafter, accused No.1 had gone to Parbhani at Urs around 10.00 p.m. on 13.02.2015. At that time, he had taken her mobile with him and, therefore, she called him and asked him to return the mobile. He therefore asked her to come to Purna. When she reached Purna around 11.00 a.m. on 14.02.2015, she remained on Platform No.4 till 6.00 p.m. Again accused No.1 had taken her behind the railway quarters and had forcible sexual

intercourse with her. It is her say that thereafter he called his three friends, who were unknown to her. Those three persons were attempting to commit rape on her and therefore when she shouted thereafter police came and the accused persons ran away.

4. After completion of the investigation, charge-sheet was filed against three accused. After the charge was framed prosecution has examined in all six witnesses to bring home the guilt of the accused. After considering the evidence on record and hearing both sides, the learned Trial Judge has acquitted all the accused persons on the ground that the prosecution has failed to prove that prosecutrix was 'child' as defined under Section 2(d) of the POCSO Act and the medical evidence is not supporting the ocular evidence in view of the fact that the hymen was intact.

5. It is to be noted that there is no documentary evidence to prove the age of the prosecutrix. She has been examined as P.W.2. She has given her age on the date of her deposition on 09.01.2020 as 20 years and the FIR has been lodged on 14.02.2015. At the time of FIR, she had given her age as 16 years. In fact, when she had given the statement to police, she had given her age as 18 years, but she says that it was wrongly recorded. P.W.4 Dr. Doli had examined victim and had referred victim for determination of age. The ossification test was conducted and it is stated that her probable age was 15 to 16.5 years. Accordingly, the age certificate has been given.

The radiologist has not been examined to prove as to how that report was given by PW.4 Doli. Relying upon the judgment of this Court in **Prashant Korwate Vs. State of Maharashtra, [2018 ALL MR (Cri.) 3909]**, when the X-ray plates were not produced on record, though radiologist was examined, it was held that evidence of radiologist cannot be relied to determine the age of the victim; it was held by the trial Court that the age of the victim in this case is not proved. It might be more than 18 years. We further say that only ossification test is not sufficient. Whatever age is derived it has +, – 2, therefore, the prosecution has failed to prove that she was child on the said date. Therefore, presumption under Section 29 of the POCSO Act cannot be invoked.

6. Now, as regards the offence under Indian Penal Code is concerned, the prosecutrix has examined herself. A conviction in case of rape can be based on the sole testimony of the prosecutrix, if it inspires confidence. Taking into consideration the cross-examination of the prosecutrix, the learned Trial Judge has come to the conclusion that her testimony is not inspiring confidence. There is no reason to take a different view. As regards medical evidence is concerned, it is stated that the hymen was intact and there was only two abrasions when the victim was examined by PW.4 Dr. Doli on 15.02.2015. Those abrasions were on left leg and to the right knee and right elbow. If it was a thorny bushes where she was allegedly

taken on 14.02.2015 then the nature of the injuries would have been different. Further, the incident is stated to have taken place after 6.00 p.m. and there is no evidence brought by the prosecution that there was sufficient light at the spot so that the other two accused could be identified. They were totally unknown to her. There was no test identification parade. Thus, we do not find any illegality or perversity in the acquittal. Application stands rejected.

[ABHAY S. WAGHWASE]
JUDGE

scm

[SMT. VIBHA KANKANWADI]
JUDGE