

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY STATE NO.133 OF 2020

The State of Maharashtra,
Through Police Inspector,
Shrigonda Police Station,
Tq. Shrigonda, Dist. Ahmednagar

.. Applicant

Versus

Kamlesh @ Sonya Bapu Ugale,
Age: 18 years, Occu.: Agriculture,
R/o. Gongarmala, Ghogargaon,
Tq. Shrigonda, Dist. Ahmednagar

.. Respondent

...

Mrs. V. S. Choudhari, APP for the applicant – State.

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

DATE : 3rd 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 04.07.2020 passed by the learned Additional Sessions Judge, Shrigonda, District Ahmednagar in Sessions Case No.10 of 2019; thereby acquitting the respondent from the offence punishable under Sections 376, 323, 506 of Indian Penal Code.

2. Heard learned APP Mrs. V. S. Choudhari 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 main submissions on behalf of the prosecution are that the learned Trial Judge has not appreciated the evidence properly. The victim in this case is deaf and dumb. Her examination-in-chief has not been properly recorded and the so called admissions given by her in her cross-examination have been considered when the learned Judge himself at the end of the deposition has stated that the witness has no mental capacity to understand the question. P.W.1 is the relative of the victim from the husband's side of the victim residing in the same village and P.W.4 is the mother of the victim. The incident was told by the victim to P.W.1 in the first place and thereafter, it was told to P.W.4. They both can understand the signs and whatever is verbally told by victim and on the basis of the said language, they understood that the victim was raped. Their evidence ought to have been given proper weightage by the learned Trial Judge. Therefore, the matter needs to be re-appreciated and even the matter can be remanded for recording the evidence of the victim afresh.

4. It will not be out of place to mention here that we had orally directed the learned APP to get the present health condition of the victim in order to ensure as to whether her evidence can be directed to be recorded afresh.

Upon her directions, PSI attached to Shrigonda Police Station appear to have met the victim and tried to interact, but the report which he has submitted categorically states that she will not be in a position to give evidence. Under the said circumstance, question of remand does not arise.

5. In a case of sexual assault, the main evidence would be of the victim lady. If we consider the testimony of P.W.3, it appears that initially the learned Trial Judge has not ensured to see whether the witness was competent to testify. The provisions of Section 118 and 119 of the Indian Evidence Act have not been complied with, but at the end the remark is made that the witness has no mental capacity to understand the questions. She has very less capacity to hear and reply and then it is said that help of special teacher P.W.2 was taken. In fact, it has not come on record as to whether P.W.3 victim had taken any special education so that she can understand the signs or the gestures by special teacher. Under the said circumstance, it will have to be held that P.W.3 victim was not a competent witness. Still, when the evidence has been recorded, it is to be noted that in the examination-in-chief, she does not say that the accused had sexual intercourse with her. She has stated that the accused had caught hold of her hand and fallen on her person. There was no attempt by the learned Trial Judge to get further elaboration. The cross-examination taken on behalf of the accused is then important wherein she had stated that she can

hear, she can speak little, she can understand what is good or what is bad, but then though she was married, she was unable to give the name of her husband, but still she says that she resided with her husband. She can cook. So the understanding capacity was then tested by the learned Advocate for the accused and then she says that when the accused had caught hold of her hand thereafter he immediately went away. She came home, took meal and went to sleep. That means she carried her normal pursuit after the alleged incident and did not inform the incident to anybody else. Here, she has not stated the date of incident, but as per the prosecution story the incident took place around 3.00 p.m. on 04.09.2018. PW.1 says that victim told her about the incident on 05.09.2018. The husband of the victim has not been examined and the relative of the husband of the victim has been examined i.e. PW.1. Therefore, we cannot give much importance to her testimony. Evidence of PW.4 the mother of the victim is of course hearsay. Under the said circumstance, we are of the opinion that the learned Trial Judge was justified in arriving at the conclusion that there is no cogent and conclusive evidence. We need not discuss the medical evidence from the perspective of examination of the victim, as the substantial evidence is not supporting the prosecution. Even if we take a reference of the same, PW.6 Dr. Vidya had examined the victim and she says that there was no fresh injuries on the person of the victim. At the time of medical examination of the victim, it is said that the husband of the victim was present. She was

married and, therefore, we cannot appreciate the other observations.

6. Learned APP has pointed out the evidence of P.W.5 Dr. Sangharsh Rajule, who had examined accused. He has stated that when the accused was brought for medical examination, the history that was stated by the police in the reference letter was sexual assault by accused on 04.09.2018. He also says that when he took history from the accused, accused told that he had sexual intercourse, but it was with consent. In the history it was also told by the accused that he had quarrel with the husband of the victim lady. We are afraid that we cannot appreciate the said point. The prosecution has not come with the case that the accused had given extra judicial confession to the doctor. In fact, the history can be asked to the victim not to the accused and, therefore, in all, the points those have been raised by the prosecution have no substance. Application therefore stands rejected.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm