

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

APPLICATION FOR LEAVE TO APPEAL BY STATE NO. 229 OF 2018

The State of Maharashtra
Through: Police Sub Inspector,
Nagar Taluka Police Station, Ahmednagar,
District Ahmednagar.

... Applicant

Versus

1. Atul Namdev Kape
Age: 29 years, Occu. : Nil,
R/o Shahunagar, Kedgaon,
Dist. Ahmednagar.
2. Dipali Balasaheb Jadhav
Age: 18 yrs, Occu. Education,
R/o Kedgaon, Dist. Ahmednagar.
3. Pappu @ Vinod Waman Halande
Age: 32 years, Occu. Labourer,
R/o Daroli Rihe, Tq. Mulshi,
District Ahmednagar.

... Respondents.
[Ori. accused]

...

Mr. A. M. Phule, APP for the Applicant-State.

...

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

DATE : 14.06.2023

ORDER (PER ABHAY S. WAGHWASE, J.) :

1. This application for leave to file appeal is on behalf of the State which intends to question the judgment and order of acquittal passed by learned

Additional Sessions Judge, Ahmednagar dated 29.06.2018 by which accused nos. 1, 2 to 3 i.e. respondents herein have been acquitted from the charges under Sections 376, 363, 366, 212, 201, 323, 504, 506 r/w 34 and under Section 4 of the Protection of Children from Sexual Offences Act, 2012 [POCSO].

Brief background giving rise to the sessions case

2. Father of victim approached Nagar Taluka Police Station informing that his victim daughter studying in 12th standard, left the house to go to collage on 11.12.2016, however she did not return. She was searched for but was not found. During search, he received mobile call informing that the caller was Atul Kape and further told that his daughter is with him and they are going to perform marriage and not to worry. Therefore informant father made inquiries about accused no.1 Atul and that time father of accused denied knowing details and whereabouts of his son. Again on 12.12.2016, said Atul Kape made telephone call and conveyed well being of both himself and the victim. Therefore, on 13.12.2016, he approached Nagar Taluka Police Station and lodged report.

3. Investigation was carried and police teams were dispatched in search of victim and accused and they both were found at Chakan wherefrom they were

brought to Ahmednagar. When statement of victim was recorded, she informed that accused no.1 called her under the pretext of showing property documents and took her initially Supa and then to Bhugaon and from there to various other places and he had forcible intercourse with her. After completing investigation, accused were chargesheeted and tried by learned Additional Sessions Judge, who on appreciating oral and documentary evidence, came to the conclusion that prosecution has failed to prove the charges beyond reasonable doubt and thereby acquitted the accused.

4. Such order is now sought to be challenged by preferring appeal, for which instant leave application has been pressed into service.

5. Learned APP would point out that offence is serious. There are allegations about kidnapping a minor and then committing rape on her. It is pointed out that medical evidence suggests that victim is minor. Therefore, under such circumstance, it was not open for learned trial Judge to draw inference about consent or no consent of the victim. He invited our attention to the FIR Exhibit 44 at the instance of father and would submit that it is clear that victim was in custody of parents. She was lured on the pretext of showing some property documents and she was thereby removed from the lawful custody. Therefore clear offence of kidnapping was made out. It is pointed out that victim herself has given detail statement about she being lured and taken

to various places and committing forcible intercourse with her. Medical evidence has supported sexual assault after criminal intimidation and therefore all charges were duly proved but learned trial court failed to consider and appreciate the same and hence learned APP prayed for leave to prefer appeal.

6. We have carefully examined the papers and evidence before the learned trial court. It seems that, to support the accusations prosecution has examined in all 7 witnesses including victim and medical expert. Here, testimony of father and victim assumes importance. Therefore we visited such evidence and put the same to minute scrutiny. It appears that sum and substance of testimony of PW2 father is that his daughter was studying in 12th standard. On 11.12.2016, the girl did not return from college. While search was being done, he has received a call from accused Atul informing that victim is with him. Therefore he lodged report Exhibit 44. Though he is subjected to lengthy cross-examination, except minor omissions, the core of evidence about daughter to be minor, being taken away from custody of father has not been rendered doubtful.

7. Thereafter we have visited the testimony of victim at exhibit 33. We find her stating that she was studying in 12th Commerce. She narrated that accused Dipali is her cousin. Said Dipali informed her about a boy watching her and

liking her. She had passed mobile number of victim's mother to accused Atul and he started giving miscalls and thereafter making calls to talk with the victim. Her evidence shows that there were conversations during which accused told her that he has several properties and therefore victim claims that she wanted to get it verified and so he called her at Supa. She claims that she accompanied accused on his motorcycle and thereafter he took her to several places and she also testified about accused having sex against her will, wish and consent.

8. In support of age of victim, prosecution seems to have gathered bonafide certificate from college and victim was also got examined at the hands of medical expert i.e. PW6. Dr. Khan. In his evidence at Exhibit 66, he spoke about victim to be around age of 16 years to 18 years. Another medical expert PW7 Dr. Nuzhat opined about possibility of sexual intercourse with the victim.

9. There are other witnesses examined by prosecution like pancha to seizure of clothes as well as motorcycle and the Investigating Officer.

10. We have carefully gone through the judgment under challenge also. It seems that learned trial Judge has observed in para 11 that bonafide certificate reflected the date of birth of victim as 1999 i.e. 19.04.1999. Further, learned trial Judge has accepted the submissions raised by defence that the

entry in the school record is irrelevant in view of Section 35 of the Evidence Act for ascertaining the age. Ruling of the Hon'ble Supreme Court in the case of *Jabar Singh v. Dinesh & another* ; (2010) 3 SCC 757 is also taken into account. Learned trial Judge seems to have discarded birth certificate Exhibit 34 observing that mere production of Exhibit 34 is itself not sufficient to arrive to a conclusion regarding date of birth of victim holding that the authority issuing it or furnishing it has not been examined. In para 15, discussion seems to have been made regarding evidence of Doctor Khan and Dr. Kate and learned trial Judge seems to have accepted the ossification test for determination of age and held that age of the victim could be 19 years and has held that when two inferences are surfacing, then the one beneficial to the accused has to be accepted. In our opinion, *prima facie* such observations are incorrect.

11. When the girl spoke about being lured and removed from lawful custody of her parents, *prima facie* it was the case of kidnapping the minor. However, learned trial judge has held that victim herself, on her own, left the company of her parents and therefore offence of kidnapping is also not made out. Similarly, as stated above, learned trial court has opined that testimony of victim shows that she was a consenting party. In our opinion, when the victim was shown to be minor, it was in-appropriate to bring in theory of consent.

12. Therefore, taking into account the observations, findings and reasons, which we find to be on the basis of incorrect appreciation of evidence and against settled law, in our considered opinion, here, prosecution has succeeded in making out a case for grant of leave to file appeal. Hence, we pass following order:

ORDER

- I. The application stands allowed.
- II. Leave is granted to the prosecution to file Appeal.
- III. Registry to register the Appeal.
- IV. Appeal stands **admitted**.
- V. Call record and proceedings.
- VI. Compliance under Section 390 of the Code of Criminal Procedure be made before learned Additional Sessions Judge, Ahmednagar. Respondents be released on bail till the conclusion of present appeal upon such terms and conditions as be deemed fit by the concerned Trial Judge.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)