

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

APPLICATION FOR LEAVE TO APPEAL BY STATE NO.237 OF 2018

The State of Maharashtra,
Through Police Station Officer,
Sarankhed.

... Applicant
(Orig. Prosecution)

Versus

Ankush Mogesing Bhill
Age : 19 years, Occu. : Education,
R/o. Mimbora, Tq. Shahada,
Dist. Nandurbar.

... Respondent
(Orig. Accused)

...
Smt. V. S. Choudhari, APP for Applicant - State
...

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

DATED : 17th JULY, 2023

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

1. As State intends to question the judgment and order of acquittal passed by learned Additional Sessions Judge, Shahada, Dist. Nandurbar, dated 06.08.2018, thereby acquitting respondent from charge under sections 376, 363, 366-A of Indian Penal Code (IPC) and section 4 read with section 3(a) of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act), instant leave has been sought.

2. Taking us through the evidence and charge-sheet,

learned APP would submit that offence is serious. Victim was a minor and school going girl. That, during Ganapati festival, she was out of the house, but did not return and so was searched. That, it was learnt that, she was in the company of present respondent, who had given false promise of marriage and had taken her to Surat and therefore, report was filed. It is pointed out that mother has given evidence in that regard in her evidence at Exh.19. That, to establish the offence, prosecution had also examined very victim as PW3 Pratibha, who deposed about her age and education. That, victim deposed that accused took her expressing love and threatened to kill her, if she does not perform marriage. That, he took her to various places and had sexual intercourse with her. Learned APP submitted that, victim clearly deposed about forcible sexual intercourse. Therefore, it is submitted that, in the light of evidence of informant and victim herself, offence was clearly made out, but learned trial Judge failed to consider and appreciate the evidence. That, medical evidence was also supporting the allegation of sexual intercourse, but learned trial Judge overlooked such evidence. Testimony of independent witness PW5 Ritesh has not been correctly appreciated and for all above reasons, it is submitted that, judgment which is full of perverse findings, is now sought to be challenged by filing appeal and hence the prayers are sought to be granted.

3. After hearing the learned counsel, we have examined the evidence on record. First, it is to be shown victim is a minor and a child falling in the definition of POCSO Act. Evidence of victim and her mother assumes significance in the light of nature of charge. According to mother, date of birth of the victim was 01.10.1997. According to mother, she was studying in 10th standard. Unfortunately, except testimony of mother, there is no documentary evidence in the form of birth certificate or school record. No efforts are made to substantiate the age even when the girl was said to be taking education. From the answers given by mother, while under cross-examination, more particularly in para 10, it is emerging that there is clear admission that mother is unable to state in which year her daughter's admission was taken. In further cross-examination, in para 11, she has admitted that her daughter was already married and had a child. She further admitted that during the incident, marriage of her daughter was already fixed. Likewise, even answered given by victim herself (PW3), more particularly in paragraph 8 of cross-examination, it is evident that she got married in May 2016 and she admitted about her age to be 22 years. According to her, she studied only 5th standard and directly in 2014, he took admission in 9th standard. She admitted that, date of birth given by her mother is merely to

see that her education does not get spoil and that such date is wrongly mentioned. Surprisingly, She herself is unable to give her own date of birth.

4. In the light of above quality of substantive evidence, prosecution seems to have been miserably failed, at the outset to establish that victim was child and therefore provisions of POCSO Act does not get attracted. Testimony of victim clearly suggests that she is more than 18 years of age, a married person and she had willingly accompanied respondent at various places and whatever encounters took place which cannot be said to be forceful one. Rather, there is element of consent.

5. Therefore, in the light of such evidence on record, no other view than that is adopted by learned trial Judge can be taken. Available evidence has been correctly appreciated. No perversity whatsoever is brought to our notice so as to grant leave. Consequently, we proceed to pass following order:-

ORDER

(i) Application for leave to appeal by State stands rejected.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)