

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

8 APPLICATION FOR LEAVE TO APPEAL BY STATE NO. 278 OF 2019

The State of Maharashtra,
Through : Police Inspector,
Kotwali Police Station,
Ahmednagar.

... Applicant

Versus

Ishwar Natha Talekar,
Age : Major, Occ: Nil,
R/o : Saisurya Hospital,
Sakkar Chowk Road,
Ahmednagar,
Taluka and District Ahmednagar.

... Respondent
[Orig. Accused]

.....
APP for Applicant-State : Mr. A. V. Deshmukh
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**CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

DATED : 10 JULY 2023

PER COURT :-

1. Present application has been filed seeking leave under Section 378(1)(b) of the Code of Criminal Procedure [Cr.P.C.] to file an appeal challenging the acquittal of the respondent by the Special Judge under the Protection of Children from Sexual Offences Act, 2012 [POCSO Act]/Additional Sessions Judge, Ahmednagar in Special Case No. 265 of 2017 from the offences punishable under

Sections 376(2)(f)(i)(n), 504 and 506 of the Indian Penal Code [IPC] and Sections 4 and 6 of the POCSO Act on 19.09.2019.

2. Heard learned APP Mr. A. V. Deshmukh. With his able assistance, we have gone through the entire material which was before the learned trial Judge.

3. Prosecution story in short is that the prosecutrix, aged 15 years, was studying in Mission Girls Home at a different place than where her parents and younger brother were staying. Her date of birth is 29.04.2002. She used to visit her parents in holidays. Accused is the cousin brother of her father and he used to reside with his wife and daughters in the same town. The niece of the accused aged 11 years was also studying in the same school where the prosecutrix was taking education and her parents were the neighbours of the parents of the prosecutrix. The prosecutrix and the niece of the accused used to visit the house of the accused whenever they used to go to visit their parents. The prosecutrix and the niece of the accused had gone to the house of their parents on 12.04.2017 after their summer vacation had started. Thereafter, in the evening on 16.06.2017, the prosecutrix was at home. Accused came to her house on motorcycle. The parents of prosecutrix as well as the niece of the accused were at

home and then accused asked the prosecutrix and his niece to accompany him to his house and therefore they went along with him. The wife of the accused was at home. She told that she would return after washing utensils. It is the prosecution story that the accused had also gone out of the house and then prosecutrix and niece of the accused were in his house. Accused returned around 9.00 to 9.30 p.m. and asked his niece to stay outside the house. Accused bolted the door from inside and then, had forcible sexual intercourse with the prosecutrix. Thereafter, wife of the accused came and she had raised hue and cry after she had peeped him from the net of the door, as a result of which, accused opened the door. There was quarrel between the accused and his wife. As it was late night, the prosecutrix and the niece of the accused stayed in the house of the accused. On the next day around 10.00 a.m. accused told the prosecutrix and his niece that he would drop them and therefore, they went along with him on motorcycle. Accused thereafter stopped the vehicle near an abandoned house. When asked as to why he has stopped the vehicle there, he told that there is a shortcut. The door of that house was opened and the prosecutrix was forced to go inside and the niece was forcibly asked to stay outside. On that place also the accused had raped the prosecutrix and threatened that she would be defamed in the relatives. Due to fear, she did not disclose the incident to

anybody. The school started from 18.06.2017. Therefore, she went to school with her mother. She then disclosed that she started vomiting and dysentery on 31.08.2017. She was taken to Government Hospital and thereafter, the school teachers asked her as to whether she had sexual intercourse with anybody and then she disclosed everything to the school teachers. It was then told to her that she was pregnant and then, after her parents were informed, the school authorities and the parents took her to police station and lodged the report.

4. After the investigation was over, chargesheet was filed. The prosecution has examined in all nine witnesses to bring home guilt of the accused. After hearing both sides and perusing the evidence on record, the learned Special Judge has acquitted the accused from all the charges. Hence, the present application.

5. At the outset, we would like to say that there appears to be not much objection from the side of the accused regarding the age of the prosecutrix. Her birth date has been proved by examining PW9 Kishor, who is the Clerk from the Ahmednagar Municipal Corporation. Therefore, it can be certainly said that the prosecutrix is a “child” within the definition of Section 2(1)(d) of the POCSO Act. That is not the only criteria that is required, but even if she would be

a child, her testimony should be convincing. The prosecution should rule out the possibility that she is a tutored witness and before her sole testimony can be said to be relied upon, there has to be an attempt by the prosecution to support its case by cogent evidence, when the prosecution story itself suggests that the story could be certainly supported by the evidence. Here, the niece of the accused has been examined, however, she has turned hostile. Except the testimony of the prosecutrix, there is no other evidence in respect of the incident. The medical evidence in the form of PW6 Dr. Bhawlesolar would show that she found that there was local injury fourchette at 6.00 o'clock position, old hymen tear and abrasion. It is to be noted that the prosecutrix was medically examined on 01.09.2017 and the alleged incident is stated to have taken place on 16.06.2017. So, certainly even if there were injuries on the prosecutrix, they could not be related to the date of the incident. Unfortunately, the age of the injury has not been stated by PW6 Dr. Bhawlesolar. Therefore, the said medical evidence cannot be said to be supporting the prosecution story.

6. As regards the prosecutrix PW2 is concerned, in her examination-in-chief, she has given the same story as per her FIR, however, the explanation that has been tried to be given for delay in

lodging the report is absolutely not convincing. At the outset, when she says that, as regards the incident alleged to have taken place on 16.06.2017, wife of the accused had raised hue and cry and then accused had opened the door, the wife of the accused could have been examined by the prosecution to support the story. If such incident would have happened, then certainly the wife of the accused would not have allowed the prosecutrix to stay in her house whole night and also till 10.00 a.m. on the next day and would not have allowed the prosecutrix and the niece to go with the accused on his motorcycle.

7. Therefore, this story is absolutely not convincing. Again, on both the occasions, the niece of the accused is stated to be present, who was constrained to stay out of the house, but she is not supporting the prosecutrix. Another aspect that has to be considered is as per the FIR, the prosecutrix is giving an impression that she became pregnant because of the act of the accused, but in her cross-examination, in clear terms, she has admitted that it was the false report. She has admitted that she ran away from the school after recess on 23.06.2017. She was searched by an employee of the hostel and then was brought back. Thereafter, the school authority had made inquiry with her and at that time, she did not give name of the

accused. She admits that when her school reopened on 18.06.2017, her mother had gone to drop her. She could have definitely disclosed the incident to her mother. Further, in her cross-examination she has admitted that when the marriage of her elder sister was performed, the accused had acted as the mediator and due to poor financial condition of her father, the accused had borne the entire expenses of the marriage of the elder sister. She has also admitted that her father was in the habit of drinking liquor. Therefore, taking into consideration all these aspects, the possibility that the child was tutored and forced to lodge a report against the accused at the behest of her father to avoid the repayment of the amount cannot be ruled out. The reasons given by the learned trial Judge for acquitting the accused are absolutely not perverse. There is no necessity to interfere and grant leave to the prosecution to file appeal. The application for leave to appeal by State stands rejected.

[ABHAY S. WAGHWASE, J.]

[SMT. VIBHA KANKANWADI, J.]

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