

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY STATE NO.280 OF 2019

The State of Maharashtra,
Through Police Station Officer,
Jalkot Police Station,
Tq. Jalkot, Dist. Latur.

... Applicant
(Orig. Prosecution)

Versus

1. Pandurang @ Panda
S/o. Dnyanoba Vajeere
Age : 18 years, Occu. : Labour,
2. Fatru @ Hasratali S/o. Isaq Munjewar,
Age : 19 years, Occu. : Labour,

Both resident of Gavhan, Tq. Jalkot,
Dist. Latur.

... Respondents
(Orig. Accused)

...
Mr. A. V. Deshmukh, APP for Applicant - State
...

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

DATED : 10th JULY, 2023

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

1. Aggrieved by the judgment and order of acquittal passed by learned Additional Sessions Judge, Udgir acquitting present respondents from charges under sections 376-D, 363, 366, 341, 506, vide judgment and order dated 29.08.2019, State has preferred instant application for grant of leave to file appeal.

2. Learned APP took us through the evidence of victim - prosecutrix (PW-3) and would submit that her testimony inspires confidence. Respondents, after threatening and intimidating her, subjected her to forcible sexual rape. Medical evidence supported occurrence. That, victim is shown to be a minor and therefore provisions of the Protection of Children From Sexual Offences Act, 2012 (POCSO Act) were attracted. It is submitted that, therefore when law is fairly settled that sole testimony of prosecutrix is itself sufficient to fix responsibility, learned trial Judge ought not to have acquitted both present respondents. That, law on rape has not been correctly appreciated. The prosecution has examined in all 13 witnesses. Said evidence is unfortunately disbelieved. Therefore, there is need for re-appreciation of the evidence. Hence, impugned judgment under challenge being illegal and perverse, it is submitted that, State wants to challenge the same and hence he prays for leave.

3. We have heard learned APP. We have visited the prosecution evidence and we have also gone through the impugned judgment. In the light of nature of charge, it is to be seen whether victim is shown to be a minor.

PW3 victim gave evidence that she is in 8th standard. PW4 mother deposed that victim daughter was studying in 8th

standard at Atnoor. However, from the judgment under challenge, we have noticed that issue about exact age of the victim has not been dealt and decided by learned trial Judge. It seems that victim PW3 has stated that on 04.09.2013, when she was going to school, accused intercepted her. She has alleged that she was gang raped by taking turns by accused persons. She claims that she did not inform anyone in the home as she was threatened by accused. Subsequently, when her mother questioned why she is not attending school, she allegedly informed her about the incident with her.

4. Though prosecution has examined PW1 and PW2, to whom victim is stated to have disclosed the incident, they have unfortunately not supported prosecution. However, PW4 mother in her evidence has stated that her daughter, while going to school, was forcibly taken by accused persons to a spot, namely "*Bhangyacha Kalva*" and she was raped. PW6 sister of victim has also stated that, when her mother asked her sister why she was not attending school, she told about the incident dated 04.09.2013. PW5 maternal uncle of victim also deposed that he learnt from his sister about the incident with his niece and the matter was reported to police. PW12 Shaikh Sajiya Sultana, examining doctor stated that, she examined victim and found her hymen to be ruptured.

5. We have carefully gone through the judgment under challenge. In para 12 of the judgment, learned Judge seems to have observed that, minor victim had supported the prosecution version. However, emphasis seems to have been led on testimonies of PW1 and PW2 who have not supported prosecution story. Likewise, statements of these two witnesses under 164 of Cr.P.C. are also taken into account. While appreciating the statement under section 164 of Cr.P.C. of victim, learned trial Judge has observed that, her such statement creates reasonable doubt. The alleged application (Exh.44) at her instance also seems to have been taken into account for accepting the case of prosecution. According to learned trial Judge, the discrepancies in the version of prosecutrix, i.e. substantive evidence, FIR and statement under section 164 of Cr.P.C., are not satisfactorily explained. Similarly, it is observed that there is no incriminating medical evidence.

6. In our considered opinion, such approach adopted by learned trial Judge is not in consonance with the settled legal position while appreciating the testimony of victim of rape. Here, there are allegations of gang rape. Mere failure to promptly report itself is not sufficient to discard victim's testimony. We are not convinced with the observation of the learned trial Judge that

there is discrepancy in the evidence, more particularly, statements under section 164 of Cr.P.C. Substantive evidence of the victim was crucial along with medical evidence. Such evidence has not been appreciated as required under law.

7. Therefore, it is a fit case for re-appreciation and re-analysis of entire evidence in an appeal. It being a fit case for admission, in our opinion, prayers raised herein are granted. Hence, we proceed to pass following order :-

ORDER

- (i) 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) Action under section 390 of the Code of Criminal Procedure be taken against the respondents to the satisfaction of the trial court.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)