



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

917 APPLN. FOR LEAVE TO APPEAL BY STATE NO.43 OF 2024

The State of Maharashtra

..Applicant

**Versus**

Vikas Raosaheb Magre

..Respondent

.....

Addl. P P for Applicant / State : Shri. S. D. Ghayal

Advocate for the Respondent : Shri. Suhas R. Shirsat

...

CORAM : R. G. AVACHAT AND  
NEERAJ P. DHOTE, JJ.

Dated : February 23, 2024

**PER COURT :-**

. This is the Application for Leave to Appeal by the State against the Judgment and order dated 17.11.2018 passed by Special Judge (POCSO Act), Aurangabad acquitting the Respondent in Spl. Case (POCSO Act) No.9/2017 for the offence punishable under Sections 363, 376 (2) of the Indian Penal Code with Section 3/4 of the Protection of Children from Sexual Offences Act, 2012.

2. We have heard learned Addl. P P Shri. S. D. Ghayal for the State and learned Advocate Shri. Suhas R. Shirsat for the Respondent.

3. We have also perused the papers on record and the testimony of the Victim. What is seen is that there was love affair

between the Victim and the Respondent. The Victim eloped with the Respondent. In her cross-examination she categorically admitted that after she left the home till returning at the police station, no physical relation had taken place between her and the Respondent. It is further seen from her cross-examination that the case was filed by her family members. The aspect of age of Victim has been properly dealt with by the learned Trial Court. The learned Trial Court in the impugned Judgment observed thus:

“19. So far as argument advanced as already discussed that the defence side pointed out that the prosecutrix on her own accord and consent herself joined accused on that day, however during the time when she was with him no physical relations came in between them. Further the defence relied upon evidence on record and submitted that prosecutrix needs to be held in the age of discretion as satisfactory evidence of her age is not forthcoming. Therefore, by keeping in mind this aspect let us enter into appreciation of evidence.

So far as examination-in-chief of prosecutrix PW1, it reveals that she has categorically stated that on that day accused by making call called her out of home of her maternal uncle and particularly nearer to Masjid and when she joined him he asked her to flee away with him and hence by rickshaw then accused took her at Jatwada, they spent the night in the hilly area and therein accused committed forcible rape over her.

However, if we considered overall cross-examination of prosecutrix there remains no any doubt that she herself on her own accord left home of her maternal uncle and joined the accused. In this respect she has stated that accused made a call on mobile of her maternal uncle and asked her to join him and thereupon she left the home and joined the company of accused. It further reveals that thereupon by engaging auto they reached at Jatwada in the day hours and took pleasure ride by foot therein and then stayed in the said area. Therefore there appears merit in the argument advanced by learned defence counsel that prosecutrix herself on her own accord accompanied with the accused. While dealing with this aspect it cannot be overlooked that in plain words prosecutrix further admitted that there was love relations with accused and her parents were against them and therefore, they sent her for living at the home

of maternal uncle. The prosecutrix proceeded one step ahead and stated that she used to talk with accused from the phone of her friend. It sufficiently disclosed intimacy, love in between accused and the prosecutrix.

20. Now coming towards another aspect i.e. sexual assault. True that prosecutrix in examination-in-chief stated that accused forcibly committed the rape. However, it is necessary to consider other evidence which includes evidence of medical officer, C.A. reports etc., to ascertain the truth. In this respect at the outset it is necessary to mention that during cross-examination prosecutrix herself specifically admitted that during the aforesaid period physical relations were not came in between them. Even for the sake of prosecution we have decided to consider other evidence, then it reveals from the evidence of PW4 Dr. Pardeshi that only on the ground of condition of hymen she has opined possibility of sexual intercourse. It cannot be overlooked that Dr. Pardeshi herself then admitted that hymen can be ruptured by any physical exercise. Moreover, as hymen was seems to be old torned, possibility of physical contact prior to the incident also cannot be overlooked. Therefore, though PW No.4 Dr. Pardeshi opined about possibility of intercourse with confirmity it cannot be observed that during aforesaid period accused forcibly committed rape over the prosecutrix. It is pertinent to note that evidence of Dr. Pardeshi disclosed that there were no signs of exercising force particularly external or internal injuries. Therefore actually it cannot be observed that accused forcibly committed rape over the prosecutrix during aforesaid period. Even for the sake of prosecution we have decided to consider C. A. reports Exhs. 38 to 40, still with certainty nothing can be said regarding sexual assault over prosecutrix during aforesaid period as her genital organ disclosed that neither semen nor blood was found. Taking into consideration this position in my mind, it cannot be observed that accused committed forcible rape over the prosecutrix or did sexual assault with her.

21. Now coming towards other evidence. As discussed earlier in the light of evidence of prosecutrix herself evidence of PW2 her maternal uncle need not be separately considered as the prosecutrix herself admitted that she left the home on that day.

22. Now coming towards material aspect as to whether on the basis of available evidence it can be observed that accused has committed the offence under Section 363 of the Indian Penal Code as he took away prosecutrix with him. In this respect there is no material on record showing that accused was aware that prosecutrix was minor on that day. Even for the sake of prosecution we have decided to consider evidence regarding her age then it reveals that PW3 Headmaster, wherein prosecutrix was student has proved extract of admission register Exh.24, showing her date of birth as 05.07.2002. No doubt, on the basis

of date of birth it can be observed that prosecutrix was minor on the date of incident. However, it is pertinent to note that Exh. 24 is not a record from Local Authority. On the other hand, during cross-examination PW3 Headmaster admitted that on the basis of earlier school record i.e. school leaving certificate aforesaid date of birth came to be recorded in the record of his school. Therefore, conclusively it cannot be observed that the date of birth of the prosecutrix is 05.07.2002. Even for the sake of prosecution we have considered another extract of admission register Exh.49, still as source of information regarding date of birth is not satisfactorily forthcoming, it need not be looked into.

Apart from evidence of PW3 prosecution has further examined PW5 Dr. Patekar who had conducted ossification test to determine age of prosecutrix. It reveals from his evidence that her himself and his colleague examined prosecutrix and on the basis of examination opined that her age was on that day 15 to 16 years. He has further proved certificate Exh.34 to that effect. However, again it is necessary that it is an opinion only and not a conclusive proof. In my mind, therefore by considering marginal error if we looked towards the present matter then taking into consideration conduct of prosecutrix her nature of understanding it needs to be observed that she was at the age of discretion. This is being the position it cannot be observed that accused kidnapped minor prosecutrix.”

4. It is submitted across the bar that the Victim has married and the Respondent has also married, separately.

5. In view of the above, we do not see any merit in the Application for Leave to Appeal by State and proceed to pass the following order:

#### ORDER

(i) The Application for Leave to Appeal by State stands dismissed.

( NEERAJ P. DHOTE, J. )

( R. G. AVACHAT, J. )

GGP