

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

APPLN. FOR LEAVE TO APPEAL BY STATE NO. 199 OF 2019

**THE STATE OF MAHARASHTRA
VERSUS
NILESHBHAI GURJIBHAI GAVIT (GAMIT) AND ANOTHER**

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Mr. N.S. Tekale, A.P.P. for applicant State.
Mr. Mukul S. Kulkarni and Mr. P.P. Patni,
Advocates for respondent Nos.1 and 2.

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**CORAM : NITIN B. SURYAWANSHI AND
SANDIPKUMAR C. MORE, JJ.**

DATED : 21 JULY 2025

ORDER:-

1. By this application under Section 378 (1) (b) of the Code of Criminal Procedure, prosecution seeks leave to file appeal against the judgment and order of acquittal passed by learned Sessions Judge, Nandurbar in Sessions Case No. 1 of 2017.
2. Respondents/accused alongwith child-in-conflict with law (Sejal) were charged for commission of offences punishable under Sections 363 read with Section 34, 376 (1) (i) read with Section 34 of the Indian Penal Code, Section 3(A) punishable under Section 4 and Section 16 (2) (3) punishable under Section 17 of the Protection of Children from Sexual Offences Act ("POCSO Act", for short). It is alleged by prosecution that a report was lodged by the victim, aged about 15 years, on

19.11.2016, alleging that on 18.11.2016 at about 7.00 p.m. she alongwith her sister, maternal aunt Shila and friend Sejal had gone to attend a Meeting of Christian community. She was sitting alongwith her friend Sejal in the meeting at backside. At about 8.00 p.m. Sejal received phone call of somebody and thereafter she asked victim to accompany her for a walk. Therefore alongwith Sejal she came out of the Meeting and they walked for some distance. She noticed two boys standing near motorcycle. Victim was not knowing them. One of them was Sandip, friend of Sejal. Sejal forcibly made her to sit on the motorcycle. The motorcycle was thereafter stopped near one tree and they all alighted from the motorcycle. Sejal asked the victim to wait and thereafter Sejal and her friend proceeded somewhere. Sandip's friend asked the victim whether she will marry him. She refused for the same. Then he forcibly threw her on the floor, removed her leggings and committed rape on her. She shouted, but nobody came there for her help. Thereafter Sejal and her friend Sandip came there. Victim narrated the incident to Sejal. Sandip's friend stated that now she is of no use and asked to take her away. Thereafter Sejal and her friend Sandip took her to her house at about 10.30 p.m. She narrated the incident to her mother. Her mother enquired with Sejal about those two boys, but she

did not tell anything. Thereafter victim became unconscious. Victim's parents called Sejal to their house and again enquired with her as to where she had gone with the victim and who those two boys were, but she did not tell anything. Thereafter Sejal slept with the victim during night. On 19.11.2016 at about 7.00 a.m. Sejal went to her house. Victim's mother woke her up. Blood stains were noticed on her clothes by her mother. Inquiry was again made with Sejal. Thereafter the victim went to Government Hospital, Songad for treatment alongwith maternal uncle and mother. There they were told that it is a police case, and therefore, they returned to police station and lodged the report.

3. Accused were charged as aforesaid and trial of Sejal was separated. In support of its case, prosecution examined 12 witnesses. After assessing the prosecution evidence, trial Court acquitted the accused. Hence, the application seeking leave to file appeal.

4. Heard learned A.P.P. for the State and learned advocate for accused.

5. Learned A.P.P. submitted that trial Court has not assigned any reason as to why the evidence of victim (PW-1) is

disbelieved. He submits that it has come in the medical evidence that hymen was torn, which supports the case of prosecution of rape. He submits that the trial Court has ignored presumption under Sections 29 and 30 of POCSO Act, and therefore, this is a fit case to grant leave to file appeal. In support of his submission, he relied on the judgment in the case of *State of Maharashtra vs Gopal : 2020 SCC Online Bom 4339*.

6. Per contra, learned advocate for respondents/accused supported the judgment of acquittal. By pointing out admissions of victim, medical evidence and lacunas in prosecution evidence, he submits that the prosecution has failed to prove foundational facts, and therefore, presumption would not be available in the facts of the present case.

7. With the assistance of learned A.P.P. and learned advocate for the accused, we have perused the evidence on record.

8. Record reveals that the victim has given vital admissions in her cross-examination which go to the root of the matter. She admitted that she had not stated before police that friend of Sandip inserted his penis in her vagina by removing his

pant. She did not state before the Magistrate that friend of Sandip removed her leggy and removed his pant and inserted his penis in her vagina and committed rape on her. She could not assign any reason as to why those facts were not stated by her before police and Magistrate. She denied the suggestion that at the instance of her parents and maternal uncle, she filed false case against accused.

9. Both accused were not known to the victim. Test Identification Parade was conducted by PW-6 Tahsildar, Navapur. In the cross-examination he has admitted that T.I. parade was not conducted properly. He has also admitted that age, occupation and description of the dummy persons is not noted in the memorandum.

10. Medical certificate (Exh.75) of the victim is not favourable to the prosecution. Medical Officer (PW-10) has specifically admitted that she did not come across symptoms of sexual assault. Learned A.P.P. has strenuously argued that in the medical certificate it is noted that hymen was torn and this is sufficient to infer commission of rape. We do not agree with the said submission. Medical Officer (PW-10) in her cross-examination has admitted that, "it is true that if there is rupture to the hymen then there is tenderness and

reddishness to the vagina". No such facts were noticed by the Medical Officer on examination of victim. She has further admitted that no injuries on or around private part of the victim were noticed. Thus, it can be stated that medical evidence does not support the prosecution case.

11. Scientific evidence in the form of C.A. report (Exh.97) also is of no help to the prosecution. No semen stain was detected on the clothes of victim as well as on the vaginal swab and pubic hairs. Her nicker was not seized during investigation.

12. Taking into consideration the afore-stated aspects, learned advocate for the accused is right in saying that the prosecution has failed to prove foundational facts and trial Court, is therefore, justified in recording acquittal.

13. Learned A.P.P. has relied on the judgment in the case of ***State of Maharashtra vs Gopal*** (supra) wherein this Court has held that, "*it is well settled that even in absence of any corroboration by medical evidence, oral testimony of victim can be accepted, if it is found to be cogent, reliable, convincing and trustworthy. In the case in hand, there is absolutely no reason brought on record for false implication of the accused*

in the crime in question". In this case three minor victim girls were ravished by their teacher, and therefore, this Court was of the view that there is absolutely no reason as to three minor girls or their parents will falsely implicate their teacher with such heinous offence.

In the present case in view of admission given by the victim in the cross-examination, her evidence does not inspire confidence. Therefore this ruling is of no help to the prosecution.

14. In the facts of the present case, we do not find any clinching evidence to record conviction of the accused. The view taken by trial Court is a possible view. Therefore, merely because another view is possible, is not a sufficient ground to interfere with the judgment of acquittal. We, therefore, find no merit in the application seeking leave to file appeal against acquittal. Application is therefore rejected.

(SANDIPKUMAR C. MORE)
JUDGE

(NITIN B. SURYAWANSHI)
JUDGE