IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL MISC.APPLICATION NO. 15092 of 2022

In R/CRIMINAL APPEAL NO. 1611 of 2022

With
R/CRIMINAL APPEAL NO. 1611 of 2022

==
STATE OF GUJARAT
Versus
PRATAP PRABHURAM DEVASI
==
Appearance:
MS CM SHAH, ADDL. PUBLIC PROSECUTOR for the Applicant(s) No. 1
for the Respondent(s) No. 1
==

CORAM:**HONOURABLE MR. JUSTICE S.H.VORA**
and
HONOURABLE MR. JUSTICE RAJENDRA M. SAREEN

Date : 22/08/2022

ORAL ORDER
(PER : HONOURABLE MR. JUSTICE S.H.VORA)

1. Feeling aggrieved and dissatisfied with the judgment and order dated 30.4.2022 passed by the learned Special (POCSO) Judge, Surat in Special (POCSO) Case No.40 of 2016 for the offences under section 376 of IPC and also u/s 3 and 4 of the POCSO Act, the applicant – State of Gujarat has preferred this application to grant leave to appeal as provided under section 378(1)(3) of the Code of Criminal Procedure, 1973 (**"the Code"** for short).

2. Briefly stated, it is the case of the prosecution that from 26.12.2015 to 27.12.2015, the accused forcibly entered in the house of the complainant, threatened the victim to kill her

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parents and thereupon, forcibly made intercourse with the victim and thus, committed the offence punishable u/s 376 of IPC and also u/s 3 and 4 of the POCSO Act.

3. In pursuance of the complaint lodged by the complainant, investigating agency recorded statements of the witnesses, collected relevant evidence in form of various Panchnamas, relevant medical evidence and other evidence. After having found material against the respondent accused, charge-sheet came to be filed in the Competent Court at Surat, which was registered as Special (POCSO) Case No.40 of 2016. As said Court lacks jurisdiction to try the offence, it committed the case to the Sessions Court, Surat as provided under section 209 of the Code.

4. Upon committal of the case to the Sessions Court, Surat, learned Sessions Judge framed charge at Exh.10 against the respondent accused for the aforesaid offence. The respondent accused pleaded not guilty and claimed to be tried

5. In order to bring home charge, the prosecution has examined 14 witnesses and also produced various documentary evidence before the learned trial Court, more particularly described in para 4 of the impugned judgment and order.

6. On conclusion of evidence on the part of the prosecution, the trial Court put various incriminating circumstances appearing in the evidence to the respondent accused so as to obtain their explanation/answer as provided u/s 313 of the Code. In the further statement, the respondent accused denied all incriminating circumstances appearing against him as

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false and further stated that he is innocent and false case has been filed against him. After hearing both the sides and after analysis of evidence adduced by the prosecution, the learned trial Judge acquitted the respondent accused of the offences, for which he was tried, as the prosecution failed to prove the case.

7. We have heard learned APP appearing for the applicant State and have minutely examined the record and proceedings provided to us during the course of hearing. As per the prosecution case, the birth date of the victim is 25.9.1998, copy of which is produced at Exh.30 and thus, on the date of the incident, the victim was aged about 17 years 03 months and 02 days. It is further the case of the prosecution that the victim was minor and therefore, the learned trial judge ought to have believed the birth certificate Exh.30. In this regard, we have carefully examined the birth certificate produced at Exh.30. One fact is clear that the birth certificate Exh.30 was obtained by the complainant after registration of the FIR. On close scrutiny of birth certificate, it transpires that the birth certificate was registered on 14.8.2019 and it was also issued on the same date. Thus, registration and issuance of the birth certificate of the victim took place on 14.8.2019. However, the prosecution has not brought on record any authentic and reliable evidence as to wherefrom the contents of the birth certificate being obtained and placed on record. Unfortunately, the prosecution has not examined any competent witnesses from the authority by whom the birth date of the victim is recorded in the Register. No any primary evidence is brought on record to show that the victim born on 25.9.1998.

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8. So, the learned trial judge has rightly disbelieved the birth certificate Exh.30 in absence of cogent and reliable evidence. Apart from it, we have carefully gone through the deposition of the victim recorded below Exh.28. The victim deposed before the learned trial Court that on 26.12.2015 at 5:00 a.m. (wee hours) the accused came at her home and threatened her not to disclose anything to her parents and therefore, she got frightened. According to the victim, at the relevant time, her both the brothers were at home. She also deposed before the learned trial Court that her both the brothers went for school and tuition on both the days when the accused was at their home. It is relevant to note here that the victim has not disclosed anything with regard to the act of intercourse when her statement u/s 164 of the Code of Criminal Procedure was recorded. In nutshell, the victim did not shout for help or her brothers disclosed anything though were outside home for tuition and attending the school nor she sought any help by using her mobile. Not only that, she did not disclose to any of her relatives, who came at her home despite she was asked. Thus, considering the aforesaid evidence, the learned trial judge has rightly disbelieved the birth certificate of the victim and occurrence of the incident as alleged by the victim, as the learned trial judge did not find the version of the victim as reliable and trustworthy in addition to various omissions and contradictions in the evidence adduced before the learned trial Court. Under the circumstances, the learned trial Judge has rightly acquitted the respondent accused for the elaborate reasons stated in the impugned judgment and we also endorse the view/finding of the learned trial Judge leading to the acquittal.

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9. It is a cardinal principle of criminal jurisprudence that in an acquittal appeal if other view is possible, then also, the appellate Court cannot substitute its own view by reversing the acquittal into conviction, unless the findings of the trial Court are perverse, contrary to the material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable. (Ramesh Babulal Doshi V. State of Gujarat (1996) 9 SCC 225). In the instant case, the learned APP has not been able to point out to us as to how the findings recorded by the learned trial Court are perverse, contrary to material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable.

10. In the case of Ram Kumar v. State of Haryana, reported in AIR 1995 SC 280, Supreme Court has held as under:

> *"The powers of the High Court in an appeal from order of acquittal to reassess the evidence and reach its own conclusions under Sections 378 and 379, Cr.P.C. are as extensive as in any appeal against the order of conviction. But as a rule of prudence, it is desirable that the High Court should give proper weight and consideration to the view of the Trial Court with regard to the credibility of the witness, the presumption of innocence in favour of the accused, the right of the accused to the benefit of any doubt and the slowness of appellate Court in justifying a finding of fact arrived at by a Judge who had the advantage of seeing the witness. It is settled law that if the main grounds on which the lower Court has based its order acquitting the accused are reasonable and plausible, and the same cannot entirely and effectively be dislodged or demolished, the High Court should not disturb the order of acquittal."*

11. As observed by the Hon'ble Supreme Court in the case of Rajesh Singh & Others vs. State of Uttar Pradesh reported in (2011) 11 SCC 444 and in the case of Bhaiyamiyan Alias Jardar Khan and Another vs. State of Madhya Pradesh reported in

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(2011) 6 SCC 394, while dealing with the judgment of acquittal, unless reasoning by the learned trial Court is found to be perverse, the acquittal cannot be upset. It is further observed that High Court's interference in such appeal in somewhat circumscribed and if the view taken by the learned trial Court is possible on the evidence, the High Court should stay its hands and not interfere in the matter in the belief that if it had been the trial Court, it might have taken a different view.

12. Considering the aforesaid facts and circumstances of the case and law laid down by the Hon'ble Supreme Court while considering the scope of appeal under Section 378 of the Code of Criminal Procedure, no case is made out to interfere with the impugned judgment and order of acquittal.

13. In view of the above and for the reasons stated above, present application for leave to appeal fails and same deserves to be dismissed and is accordingly dismissed. In view of dismissal of the application for leave to appeal, captioned Criminal Appeal also deserves to be dismissed and is accordingly dismissed.

THE HIGH COURT OF GUJARAT
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(S.H.VORA, J)

(RAJENDRA M. SAREEN,J)

SHEKHAR P. BARVE

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