

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/CRIMINAL MISC.APPLICATION NO. 9857 of 2022
In R/CRIMINAL APPEAL NO. 1054 of 2022****With****R/CRIMINAL APPEAL NO. 1054 of 2022**

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STATE OF GUJARAT

Versus

HASMUKHBHAI @ HARSHADBHAI DAHYABHAI MAKWANA

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Appearance:
MS CM SHAH APP for the Applicant(s) No. 1
for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR. JUSTICE S.H.VORA**

and

HONOURABLE MR. JUSTICE RAJENDRA M. SAREEN

Date : 04/07/2022

ORAL ORDER**(PER : HONOURABLE MR. JUSTICE RAJENDRA M. SAREEN)****Order in Criminal Misc. Application:**

1. This is an application by the applicant – original complainant – State of Gujarat under Section 378(1)(3) of the Code of Criminal Procedure, 1973, seeking leave of this Court to present an appeal against the judgment and order of acquittal, passed by the learned Special Judge and Additional Sessions Judge, Anand in Special (POCSO) Case No.35 of 2015 dated 16/12/2021, acquitting the respondent accused from the offences punishable under sections 376(Chh) of Indian Penal Code and sections 5(F)(M) and 6 of POCSO Act.

2. Heard learned APP Ms. C.M. Shah for the applicant - - State and perused the impugned judgment and order of the trial Court so also Record and Proceedings.

3. While considering the application for leave to appeal, Court is required to look the judgement and order of acquittal prima facie and the record and proceedings so as to reach to a subjective conclusion that whether there is any prima facie case or not. If there is prima facie case, leave to appeal is required to be granted and if there is no prima facie case and there is no merits in the appeal itself and no error is committed by the trial court in acquitting the accused, leave to appeal is not required to be granted. Leave to appeal cannot be granted as a matter of right and without subjective satisfaction, otherwise, it would increase the appeals on the file of the High Court.

4. Having heard the learned APP and considering the records, it appears that the case hinges mainly on the evidence of the complainant and the Doctor. From the deposition of the complainant that she had not informed about the incident or she had not made any complaint about her daughter to her husband on the date of incident. She has admitted in her cross examination that she had suspicion that the accused, who was conductor in the school bus of the victim, has done something wrong with her daughter as she found some redness on the private part of her daughter. She has further admitted that she had not disclosed before Dr.Rakhi Apurva Patel, who examined the victim, about the rape on her daughter. She admitted that after lodgement of the FIR, she had gone to the Anand Police Station on 2/5/2015 and on that day she had made allegation against her husband. She had admitted that her further statement was recorded on 2/5/2015 wherein she

had not made any allegation against the accused. She admitted that she does not know the name of the driver of the school bus. She has admitted that as she had doubt on the respondent accused, she lodge the FIR. Even the husband of the complainant and father of the victim has not supported the case of the prosecution.

5. As per the evidence of the Dr.Rakhi Apurva Patel, who examined the victim, there was redness on the lebia minora - private part of the victim and there was no injury on the hymen and perineum and there was no bleeding. As per the Doctor, there was vaginal fingering. The victim was examined twice on 29/4/2015 and 2/5/2015. The Doctor in the cross examination has admitted that the complainant - mother of the victim had disclosed suspicion against her husband - father of the victim regarding commission of the offence. The Doctor admitted that redness can be done by more than one reason. She also admitted that she gave opinion of vagina fingering on the basis of redness only. She admitted that redness cannot be said to be conclusive proof of vagina fingering. She further admitted that during her examination she found no mark of rape. She had not given specific opinion regarding rape. She admitted that mother of the victim had given history before her wherein she had not made allegation of rape. She admitted that she had not given reasons about oldness of the redness. She specifically admitted that in the Certificate Ex.10 she had given opinion of fingering on the basis of history given by the mother of the victim.

6. In the present case most of the panchas have turned

hostile. Panchas of seizure of clothes of the accused and panchas of examination of the person of the accused have not supported the case of the prosecution and they are declared hostile.

7. In this case, one witness who is teacher of the school where the victim was studying namely Pratibhaben Shaileshbhai is also examined who has also stated nothing regarding incident alleged to have happened in the running bus. She has admitted that she came to know about the incident through police. Nothing has come out from her deposition. She has also stated that no complaint has been received from any of the parents regarding character of the accused. It is also pertinent to note that the complainant has denied that in the bus other lady teachers were also doing updown like Rakhiben Chandniben, Rupanjanaben and Karishmaben. She only remembered the name of Rakhiben, whereas regarding other names, she has denied. Here in this case, Rakhiben Manojbhai Kanabar, who is also a teacher in the school, has been examined as a witness and she has clearly stated that Rekhaben, Rupanjanaben, Pratibhaben and Karishmaben were also doing updown in the bus and in the cross examination she has admitted that no complaint has been received against the accused from any of the parents till today.

8. Here in this case it is to be noted that on one side the complainant has alleged against the respondent accused regarding sexual assault upon her victim daughter and merely after a span of 3 to 4 days she has alleged against her own husband regarding sexual assault upon her victim

daughter. As such, two contradictory versions have been stated by the complainant within a span of 4 days against two persons and both the allegations are based on suspicion and doubt, one against the present respondent accused and another against her husband. As such, mere suspicion and doubt cannot be considered to be cogent and convincing proof to prove the allegations.

9. The version of the complainant in her chief-examination is full of contradictions and additions as stated hereinabove. Regarding version of the complainant in her chief examination that on 28/4/2015 her daughter came crying and she was not eating food and when she went for changing clothes, the complainant found redness on the private part of the victim and thereafter she took the victim to the hospital but the Doctor has not taken the case on hand and thereafter she went to the police station and informed the police. This fact has not been mentioned in the complaint, which is admitted by the investigating officer in his deposition.

It is also to be noted that the complainant had informed her one friend regarding condition of the victim but no such friend has been examined.

10. The complainant has stated in her deposition that the accused had given him phone number and they were talking on the phone and the accused had called her at his house and the complainant thought that the accused was not a person who can be relied upon and the complainant while taking on the phone felt that the conduct of the accused

was not good. However, all these aspects are not found in the complaint nor in the further statement of the complainant, which is admitted by the investigating officer in his cross-examination. As such, these are additions which the complainant has made in her deposition. The complainant has tried to create an impression that the accused was of a loose character and the accused was not reliable person. This aspect is also not mentioned in the complaint. This type of improvement has been made by the complainant in her deposition and the same is proved by the deposition of the investigating officer. All the aforesaid facts stated by the complainant in her deposition, have not been mentioned by the complainant either in her the complaint or in her statement. As such, the reliability and credibility of the complainant is doubtful. Moreover, for the sake of argument if the improvement made by the complainant in her deposition that the accused was calling her or accused has offer to send the complainant to Israel and there was exchange of telephone number and they used to call each other, are believed, it can be presumed that there might be some relation between the complainant and the accused and possibility of settling the score with the accused by filing false complaint against the accused cannot be ruled out.

11. In the Cross examination, the investigating officer has admitted that on 2/5/2015, the mother of the victim had disclosed before him that the father of the victim has committed. He admitted that in the Certificate Ex.10, there is no mention of any offence. He admitted that as per the allegation of the complainant, no evidence regarding offence

being committed in running bus was found on record. It is an admitted fact that the driver of the bus has not supported the allegations of prosecution in his evidence. It is also admitted by the investigating officer that as per the medical evidence, no evidence regarding sexual assault has been found. It is also admitted by the investigating officer that during the investigation the complainant and witnesses have given their statements on suspicion.

12. It is pertinent to note that as per the allegations levelled against the respondent accused by the complainant is that the victim used to sit on the lap of the accused whenever the complainant used to send her to the school in the bus and she used to handover the custody of the victim to the accused. But this aspect that on the date of the incident the victim was sitting in the lap of the accused is not supported by any of the witnesses. The teacher who was doing up-down in the same bus daily has also not uttered a word that the victim used to sit in the lap of the accused during her journey from her home to the school. Even the driver of the school bus, who is also one of the important person who can throw light on the incident and say about the say of the victim in the lap of the accused, has not been examined.

13. As noted hereinabove, the complainant filed the complaint merely on suspicion. She has filed complaint against the respondent accused and on the other hand she has also made allegations of rape against her husband. As per medical evidence, there is no rape committed and Doctor opined fingering which is possible for more than one

reason.

14. There are material contradictions, additions and alterations in the statements of the complainant and deposition of the victim. On the one hand, the complainant had made allegations against the respondent accused and on the other hand, she had made allegations against her husband.

15. Present complaint is filed merely on suspicion and doubt. Suspicion, however strong, cannot take the place of proof, the Hon'ble Supreme Court has said, stressing that an accused is presumed to be innocent unless proved guilty beyond a reasonable doubt.

16. No doubt the alleged offence is a shocking one but the gravity of the offence cannot by itself overweigh as far as legal proof is concerned.

17. It may not be necessary to refer to other decisions of this Court except to bear in mind a caution that in cases depending largely upon circumstantial evidence there is always a danger that the conjecture or suspicion may take the place of legal proof and such suspicion however so strong cannot be allowed to take the place of proof. The Court has to be watchful and ensure that conjectures and suspicions do not take the place of legal proof. The Court must satisfy that the various circumstances in the chain of evidence should be established clearly and that the

completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused. Bearing these principles in mind we shall now consider the reasoning of the courts below in coming to the conclusion that the accused along has committed the offence.

18. A reasonable doubt has already been thoroughly explained in the case of **Latesh @ Dadu Baburao Karlekar Versus The State of Maharashtra, (2018) 3 SCC 66** wherein 'reasonable doubt' has been enunciated by this Court as "a mean between excessive caution and excessive indifference to a doubt, further it has been elaborated that reasonable doubt must be a practical one and not an abstract theoretical hypothesis." In this case at hand, the imposter has not been found or investigated into by the concerned officer. Law is well settled with regard to the fact that however strong the suspicion may be, it cannot take the place of proof. Strong suspicion, coincidence, grave doubt cannot take the place of proof. Always a duty is cast upon the Courts to ensure that suspicion does not take place of the legal proof. The standard of proof in a criminal trial is proof beyond reasonable doubt because the right to personal liberty of a citizen can never be taken away by the standard of preponderance of probability.

19. The trial court, on appreciation has rightly acquitted the accused – respondent herein and by no stretch of imagination, the impugned judgement and order can be said to be perverse and we are are of the opinion that no error or illegality has been committed by the trial court and hence

no interference of this Court is called for. Hence to grant the leave to appeal and thereafter to dismiss the appeal would be futile exercise and hence we are of the opinion that no leave is required to be granted.

20. In the result, present application is rejected.

Order in Criminal Appeal:

In view of rejection of the application for leave to appeal, present appeal is dismissed in limine.

(S.H.VORA, J)

R.H. PARMAR

(RAJENDRA M. SAREEN, J)

