

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

CRIMINAL APPLICATION NO.1130 OF 2016 IN
CRIMINAL APPEAL NO.90 OF 2016

Rajudan Gemardan Charan ... APPLICANT

VERSUS

The State of Maharashtra ... RESPONDENT

.....
Shri Rupesh Jaiswal, Advocate holding for
Shri N.S. Ghanekar, Advocate for applicant
Shri R.V. Dasalkar, A.P.P. for State
.....

CORAM: A.I.S. CHEEMA, J.

DATED: 10th August, 2016.

Date of reserving order : 8th August, 2016

Date of pronouncing order : 10th August, 2016

ORDER :

1. The applicant - accused has been convicted by Additional Sessions Judge, I/c District Judge-2 & Special Judge, Ambajogai under Sections 376(2)(i), 376(2)(n) and 506 of the Indian Penal Code as well as under Section 4 of the Protection of Children from Sexual Offences Act, 2012. He has also been convicted under Sections 3(1)(w)(i) and Section 3(2)(va) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Ordinance, 2014. For the different Sections, various

sentences of imprisonment and fine have been passed, which are to run concurrently.

2. Present application is for suspension of sentence of imprisonment and bail.

3. Heard learned counsel for the applicant - appellant - accused. It is argued by the learned counsel that, the facts as appearing from the record of the trial Court show that, the victim was in consensual relationship with the accused. The State alleged that, the victim was for the first time forcibly raped by the accused in January 2014 when she had gone to an isolated place to answer call of nature. The case of the victim was that, thereafter repeatedly whenever the victim went to answer call of nature, the accused was having forcible sexual intercourse with her. According to the counsel, the victim did not complain to anybody and there was no evidence that she was forcibly violated. There was no evidence of resistance. It has been argued that, the prosecution has tried to show that the victim was below 16 years of age, for which the evidence of P.W.8 Raghunath Dongre from the school was examined, who proved the school leaving certificate Exh.73, which recorded that the date of birth was 2.2.2001. The State brought on record another document Exh.83, as residence certificate of the victim where the date of birth was recorded as 18.2.1998. The learned counsel

argued that, the school record did not show as to the source on the basis of which the said entry in the school register was made. The counsel relied on the case of **Prakash Jagannath Pawar Vs. State of Maharashtra**, reported in **2015 ALL MR (Cri) 3898** and the case of **Manikumaraswamy Mudliyar Vs. State of Maharashtra**, reported in **2000 ALL MR (Cri) 315** to submit that, it was necessary for the State not only to prove the entries in the school register but also the source on the basis of which such entry of date of birth was taken in the concerned school record. According to the learned counsel, no ossification test was done and thus, it could not be presumed that the victim was minor. According to learned counsel, for such reasons, the applicant - accused has good case to argue in the appeal and should be admitted to bail.

4. Against this, the learned A.P.P. submitted that, the entry from the school record recorded the date of birth of the victim as 2.2.2001 and even from the Gram Panchayat record, when residence certificate was issued, the date of birth recorded was of 18.2.1998 and whichever date is taken, at the time of the first intercourse in January 2014, the victim was below 16 years of age. According to the learned A.P.P., the relevant age now is of 18 years and the victim was clearly a minor in January 2014 and her consent would be immaterial. The learned A.P.P. relied

on the judgment of the Hon'ble Supreme Court in the case of **Jarnail Singh Vs. State of Haryana** (Criminal Appeal No.1209 of 2010). The Hon'ble Supreme Court, in para 20 of the judgment, referred to the provisions of Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007, which prescribed procedure to be followed for determination of age. After reference to the rule concerned, the Hon'ble Supreme Court observed as under :

"Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW-PW6. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied

upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion."

5. It is clear that, the Hon'ble Supreme Court has laid down as to how the age of prosecutrix should be decided. In the present matter, there is evidence of P.W.8 Raghunath Dongre, who brought record from school regarding the admission of the victim in the 1st Standard and proved school leaving certificate Exh.73, where date of birth of the victim was recorded as 2.2.2001. It is entry which was made in ordinary course of business much before incident. There is no reason to doubt it. If the observations of the Hon'ble Supreme Court are considered, the observation is that, in case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive and no other material is to be relied upon.

6. In the present matter, in the evidence of the investigating officer P.W.18, in para 12 of his evidence, he referred to obtaining certificate of residence from the Gramsevak. The counsel for the accused did not object to exhibiting such document. This can be seen from the evidence

itself. The document was thus marked Exh.83. The same shows date of birth as 18.2.1998 recorded with Gram Panchayat. The trial Court has considered the school leaving certificate as well as this document and observed that, whichever document is taken into consideration, the victim was clearly a minor at the time of concerned incident. In this matter, there is also evidence of the victim giving birth to a child, D.N.A. of which matched with the accused.

7. Looking to the record and rival submissions and keeping judgment of the Hon'ble the Supreme Court in view, prima facie this does not appear to be an appropriate case where the applicant - appellant - accused should be released on bail. Prima facie the prosecution appears to have brought necessary evidence to establish the offence against the accused. The applicant - accused is thus not entitled to bail in such serious matter.

8. The application is rejected.

(A.I.S. CHEEMA, J.)