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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 1373 OF 2015
IN
CRIMINAL APPEAL NO. 1064 OF 2015

Sakir Ayub Qureshi ... Applicant
vs.
The State of Maharashtra ... Respondent

Mr. A.H.H. Ponda i/b. Mr. Shailesh Kharat, Advocate for the applicant.
Mr. H.J. Dedia, APP for the respondent/State.

**CORAM: MRS. V.K. TAHILRAMANI, Actg. C.J. &
MRS. MRIDULA BHATKAR, JJ.**

AUGUST 11 , 2016.

P.C.: (Per Mrs. Mridula Bhatkar, J.)

The applicant/accused is convicted by the Designated Court by the judgment and order dated 5th September, 2015 passed under Protection of Children from Sexual Offences Act, 2012 for the offences punishable under section 5(p) r/w. section 6 of the Protection of Children from Sexual Offence Act (POSCO) for the imprisonment for life and to pay a fine of Rs.3,000/- i/d. to suffer R.I. for three months.

2. The incident of forcible rape has taken place on 3rd February, 2014 at

around 3.40 p.m. when victim, who was about 17 years old, was in the house alone. The victim is a real sister of the wife of the accused. The applicant/accused raped the victim when she was alone in her house.

3. The learned counsel Mr. Ponda raised two questions; firstly, whether the victim was 18 years old to cover under POSCO; and secondly, whether it was really a forcible rape as described by the victim. He submitted that the age of prosecutrix is not proved by the prosecution. It has remained a doubtful fact. He submitted that the prosecution relied on birth certificate (Exhibit 12) of the victim where her date of birth is shown as 8th March, 1996. However, in the birth certificate some other name, i.e., Fatima is written and not the name of the prosecutrix is mentioned. He further submitted that in her school leaving certificate at Exhibit 50, her date of birth is shown as 15th June, 1995. He further argued that her school leaving certificate is to be considered more authentic than her birth certificate. In support of his submissions, he relied on the judgment of Hon'ble Supreme Court in the case of **Mahadeo Kerba Maske vs. State of Maharashtra & Ors, reported in (2013) 14 SCC 637**. He submitted that in the said case, the Judges have relied on Rule 12(3) of Juvenile Justice (Care and Protection of Children) Rules, 2007. He relied on paragraph 9 of the

evidence of the prosecutrix PW-1 and the FIR and submitted that as per the version of the prosecutrix, sexual intercourse was complete and she has wiped semen and the sticky substance with her nicker and the nicker (Article 6) was handed over to the doctor immediately on the next day without washing. He submitted that in the report of Chemical Analyser, semen was not found on the nicker. He also submitted that in the medical report, no injury was found on her body and on her private part. Considering the variance in the medical and ocular evidence on the point of rape, the application for bail be granted.

4. Learned APP opposed this Application and relied on DNA report disclosing that spermatozoa was found in vaginal swab and it matched with the accused and so also the semen was found on her salwar. She has disclosed the fact of intercourse immediately to her mother and on the next day the FIR was lodged against the accused. Hence, the accused is convicted under POCSO and, therefore, he is not to be granted bail.

5. Perused the evidence of the witness. The FIR is lodged on the next day, however the incident was disclosed to her mother on the same day. Two documents of proof of birth date of the prosecutrix are on record, i.e.,

birth certificate disclosing the date of birth as 8th March, 1996 (Exhibit 12) and school record and admission form (Exhibit 50) disclosing the date of birth as 15th June, 1995. The incident has taken place on 3rd February, 2014. Thus, as per the birth certificate, she was 17 years and 11 months old and considering the date of birth in the school record, the victim was more than 18 years old on the date of occurrence. However, the birth certificate stands in the name of Fatima and not in the name of prosecutrix. The statement to that effect giving explanation in respect of name was never recorded by the police. We rely on the provisions of Juvenile Justice (Care & Protection of Children) Rules 2007 under the said Act. Rule 12(3) it is specifically provides that only in the absence of alternate methods described under Rule 12(3)(a)(i) to (iii) the documents are to be given weightage and taken into account accordingly. The date of birth in the certificate issued by the school first attended is to be given preference to the birth certificate given by the Corporation. In the case of **Mahadeo Karbe Maske** (*supra*), the Hon'ble Supreme Court has held that same yardstick can be rightly followed by the Courts for the purpose of ascertaining the age of victim as well.

6. As per the CA report as submitted by the learned Prosecutor, the

sperms were found in vulva and the positive report is going against the accused. However, there is negative report of finding of semen on her nicker about which she has categorically deposed that she wiped semen with that nicker. It is rightly pointed out by the learned defence counsel that as per the evidence of the prosecutrix and FIR, it was a complete intercourse. The conviction is under section 5(p) of POSCO which envisages a penetrative sexual assault. From the medical report and the evidence of PW-7 Dr. Kshitij Prakash Jamdade, no injuries were found on her person though he noticed blood in the vagina. We considered negative observation of the doctor regarding the injuries, condition of hymen and the finding of PV examination and after considering this, we are inclined to grant bail to the applicant/accused on the following conditions:

ORDER

- i) Application is allowed.
- ii) The applicant shall be released on bail upon furnishing P.R. Bond in the sum of Rs.50,000/- with one or two sureties in the like amount;
- iii) The applicant shall not tamper with the evidence;
- iv) The applicant shall not contact or pressurize the complainant in any manner;

- v) The applicant shall not indulge into any criminal activity while on bail;
- vi) The applicant shall attend the concerned police station on the first day of every month.
- vii) The applicant shall not abscond and furnish his permanent and present address to the police along with address proof.
- viii) The applicant shall not jump the bail till the final hearing of the Appeal.
- ix) Violation of any of the conditions imposed shall amount to cancellation of bail forthwith.
- x) The applicant shall not leave India.

6. The Application for bail stands disposed of on above terms.

(MRS. MRIDULA BHATKAR,J.) (ACTING CHIEF JUSTICE)