

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL WRIT PETITION NO. 849/2017

Akshay s/o Sanjay Vaidya,
Aged 21 yrs, Occ. Education,
R/o Adegaon, Tah.Deoli, Distt.Wardha.

PETITIONER

.....VERSUS.....

State of Maharashtra,
through P.S.O. Deoli,
Distt. Wardha.

RESPONDENT

Mr. Mahesh Rai, counsel for the petitioner.
Mr. Shyam Bissa, A.P.P. for the respondent.

CORAM : REVATI MOHITE DERE, J.
DATE : 31ST OCTOBER, 2017.

ORAL JUDGMENT

RULE. Rule is made returnable forthwith. The petition is heard finally at the stage of admission with the consent of the learned counsel for the parties.

2. By this petition, the petitioner has impugned the order dated 11.07.2017 passed by the learned Special Judge for POCSO, Wardha, below Exhibit 16 in Special Case No.93 of 2014.

3. Mr.Mahesh Rai, learned counsel for the petitioner states that the petitioner was a child in conflict with law, at the time when the alleged incident took place and as such the case of the petitioner ought to have been sent to the Juvenile Justice Board. He submitted that the

learned Special Judge for POCSO, Wardha has clearly erred in law by observing that the petitioner was a major, when the F.I.R. was lodged, i.e. the said F.I.R. was lodged after almost one year of the alleged incident. Learned counsel for the petitioner relied on the petitioners birth certificate which is on Page 90 of the petition and the school leaving certificate which is on Page 89 of the petition, to show that the petitioner was a child in conflict with law, when the alleged incident is stated to have taken place. The date of birth of the petitioner in the said document is 19.01.1996. According to the learned counsel, the alleged incident had taken place between September-2013 to November-2013 and as such, the petitioner was below 18 years at the time of the alleged incident.

3A. Mr. Shyam Bissa, learned Additional Public Prosecutor does not dispute the fact, that the petitioner was a 'child' at the time of the alleged incident, i.e. below 18 years and as such a child in conflict with law, in terms of the Juvenile Justice (Care and Protection of Children) Act, 2015.

4. Perused the papers. Before advertng to the facts of the present case, it is necessary to reproduce the relevant provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015. Section 2(12) of the said Act, defines a "child" as a person who has not completed

eighteen years of age. Section 2(13) defines a “child in conflict with law” as a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence. Section 9(1) of the said Act reads as under:-

“9(1). Procedure to be followed by a Magistrate who has not been empowered under this Act. –
(1) When a Magistrate, not empowered to exercise the powers of the Board under this Act is of the opinion that the person alleged to have committed the offence and brought before him is a child, he shall, without any delay record such opinion and forward the child immediately along with the record of such proceeding to the Board having jurisdiction”

5. The complainant, who is the mother of the prosecutrix, has stated that on 27.03.2014, she learnt that her daughter (prosecutrix), aged 17 was pregnant, when she took her daughter to a hospital for medical examination. The complainant has further stated that when she enquired with her daughter (prosecutrix), she disclosed that she was in love with the petitioner and that there were relations between the two, from August-2013 to November-2013. The prosecutrix further disclosed that thereafter she was in a relationship with the co-accused-Swapnil. According to the prosecutrix, both the accused (including) the petitioner had committed forcible sexual intercourse with her. The complainant has stated that pursuant thereto, her daughter (prosecutrix) delivered a girl

child on 13.06.2014). Pursuant thereto, the complainant lodged an F.I.R. on 02.08.2014 with the P.S.O. Deoli, District Wardha, bearing C.R. No.116/2014, as against the petitioner and co-accused-Swapnil, alleging offences punishable under Section 376(2)(n) read with Section 34 of the I.P.C. and Sections 4 and 6 of POCSO Act. After investigation, charge-sheet was filed. The petitioner was arrested on 03.08.2014 and thereafter enlarged on bail.

6. On 08.11.2016, the petitioner filed an application under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 and prayed that the trial of the petitioner be separated and the record pertaining to the petitioner be forwarded to the Juvenile Justice Board, as the petitioner was a 'child' at the time of the alleged offence. The learned Special Judge for POCSO, Wardha *vide* order dated 11.07.2017 was pleased to reject the said application, being Exhibit 16. Hence, this petition. According to the prosecution, the prosecutrix aged 17 years was sexually assaulted by the petitioner during the period from August-2013 to November-2013. The petitioners date of birth, as reflected in the documents produced by the petitioner, i.e. the birth certificate and the school leaving certificate, is 19.01.1996. It is thus, evident that the petitioner was aged about 17 years and 10 months at the time of the alleged incident. The said documents produced and relied upon by the

petitioner are not disputed by the learned Additional Public Prosecutor. Thus, in the present case, there is no controversy that the petitioner was aged about 17 years 10 months at the time of commission of the alleged incident of sexual assault and had not completed 18 years of age.

7. In this view of the matter, keeping in mind the relevant provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015, it is evident that the petitioner was a 'child' on the date of the alleged incident. The learned Judge has clearly erred in law by observing that the petitioner was a major when the F.I.R. was lodged, which was lodged after almost one year of the incident. It is pertinent to note, that it is the date of offence and not the date when the F.I.R. was lodged which is to be borne in mind, whilst considering whether an accused is a 'child' or not and for applying the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015.

8. Considering the aforesaid, the criminal writ petition is allowed. The impugned order dated 11.07.2017 passed by the Special Judge for POCSO, Wardha below Exhibit 16 in Special Case No.93 of 2014 is quashed and set aside. The learned Special Judge to separate the trial of the petitioner and forward the necessary papers of the petitioner, to the Juvenile Justice Board, Wardha. The Juvenile Justice Board shall thereafter conduct the case in accordance with law.

9. With the disposal of the criminal writ petition, Criminal Application (APPW) No.195 of 2017 also stands disposed of.

Rule is made absolute in the aforesaid terms. No costs.

10. All the parties to act on the authenticated copy of this judgment.

JUDGE

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