

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1223 OF 2017

IN

CRIMINAL APPEAL NO.735 OF 2017

Ajay Suresh Gaikwad ... **Applicant**

V/s.

The State of Maharashtra ... **Respondent**

.....

Mr.Shantanu R.Phanse, Advocate for the Applicant.

Mr.S.V.Gavand, APP for the Respondent/State.

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CORAM : A.M.BADAR J.

DATED : 3rd AUGUST 2018.

P.C. :

1 This is an application for suspension of sentence and releasing the applicant/accused on bail during pendency of appeal filed by him.

2 The applicant/accused is convicted of the offence punishable under Sections 376(2)(g) and 506 of the Indian Penal Code as well as under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO' for the sake of brevity). For the offence punishable under Section

376(2)(g) of the IPC as well as under Section 4 of the POCSO, the applicant/accused is sentenced to suffer rigorous imprisonment for twenty years each apart from imposition of fine of Rs.25000/- on each count. On failure to pay fine, he is sentenced to suffer rigorous imprisonment for six months on each count. For the offence punishable under Section 506 of the IPC, the applicant/accused is sentenced to suffer rigorous imprisonment for two years apart from payment of fine of Rs.1000/- and default sentence of rigorous imprisonment for three days.

3 Because of penury the applicant/accused has sought for legal aid from this Court and that is how Shri.Shantanu Phanse, the learned Advocate on the Panel of Legal Aid of this Court is appointed to represent the applicant/appellant/accused.

4 Heard Shri.Phanse, the learned Advocate appointed to represent the applicant/accused at the cost of the State. He drew my attention to para 30 of the impugned Judgment and Order, so also to evidence of P.W.No.4 Vatsala, who happens to be mother of the victim/P.W.No.5, who has been considered as a child by the learned trial Court. The learned Advocate submitted that P.W.No.4 Vatsala, who happens to be mother of the victim has deposed that at the time of commission of offence, the victim/P.W.No.5 was of 18 years of age. The learned trial Court, in submission of the learned Advocate for the applicant/accused,

has rejected documentary evidence pertaining to the age of the victim child and has relied on mental age of the victim /P.W.No.5. That is how mental age of 11 years has been assessed by the learned trial Court to conclude that the victim of the crime in question is a child as defined under Section 2(d) of the POCSO. The learned Advocate further argued that evidence of the victim/P.W.No.5 unerringly pointed out that the applicant, who happens to be accused No.2 had not committed any penetrative sexual assault on her and she had roped in the present applicant only because she had love relations with juvenile-in-conflict with law namely Vishal Gorule. Shri.Phanse, the learned Advocate further argued that the report of DNA test has excluded not only the applicant but the co-accused also.

5 The learned Additional Public Prosecutor opposed the application by contending that the crime in question is serious and the applicant was found to have committed penetrative sexual assault apart from the gang rape on the victim/P.W.No.5, whose mental age was assessed as 11 years by the learned trial Court.

6 I have carefully considered the rival submissions and also perused the Record and Proceedings. According to the prosecution case, the victim of the crime in question is a female child and the applicant along with co-accused had committed gang rape on her.

7 The learned trial Court has concluded that the victim/P.W.No.5 is a child as defined by Section 2(d) of the POCSO by holding that biological age of the victim/P.W.No.5 is not relevant and what is relevant is her mental age. Paragraph 30 of the impugned Judgment and Order needs to be reproduce here. It reads thus :

“30. In the absence of other relevant documents, I can then place reliance on ossification report (Exh.33) filed by the prosecution. Further, even though it is considered that the age of the victim was 15-18 years, at the time of the incident, but what is relevant is that she was mentally of 11 years of age at the time of incident as has been opined by Dr.Patil (PW-1), Dr.Shingra (PW-2) and Dr.Sawant (PW-3). So, to say that she was not minor at the time of incident would be absolutely wrong and so I do not support the arguments of the defence.”

8 It is thus seen that bony age of the victim was assessed as 15 to 18 years as per report of the ossification test. In the matter of *Jaya Mala v. Home Secretary, Government of Jammu & Kashmir & Ors.*¹, the Honourable Apex Court has noted that there is error of two years on either side in the bony age of a person assessed by the ossification test. Thus, the victim/P.W.No.5 can be even of twenty years of age if the report of

1 AIR 1982 SC 1297.

ossification test is accepted. However, the same was not accepted by the learned trial Court by holding that the victim's age is 11 years by considering her intellectual capacity as assessed by three Doctors. The question whether biological age or mental age of a person is required to be taken into consideration is determined by the Honourable Apex Court in the matter of *Ms.Eera, through Dr.Manjula Krippendorf v. State (Govt. of NCT of Delhi) & Anr.*¹ relied by Shri.Phanse, the learned Advocate appearing for the applicant. Paragraph Nos.82 and 87 of that Judgment need reproduction and those read thus :

82. The situation can be viewed from another aspect. The POCSO Act has identified minors and protected them by prescribing the statutory age which has nexus with the legal eligibility to give consent. The Parliament has felt it appropriate that the definition of the term “age” by chronological age or biological age to be the safest yardstick than referring to a person having mental retardation. It may be due to the fact that the standards of mental retardation are different and they require to be determined by an expert body. The degree is also different. The Parliament, as it seems, has not included mental age. It is within the domain of legislative wisdom. Be it noted, a procedure for determination of age had been provided under Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2000. The procedure was meant for determination of the biological age. It may

¹ AIR 2017 SUPREME COURT 3457.

be stated here that Section 2(12) of the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016) defines "child" to mean a person who not completed eighteen years of age. There is a procedure provided for determination of the biological age. The purpose of stating so is that the Parliament has deliberately fixed the age of the child and it is in the prism of biological age. If any determination is required, it only pertains to the biological age, and nothing else.

87 In view of the aforesaid principles, the only conclusion that can be arrived at is that definition in Section 2(d) defining the term "age" cannot include mental age."

9 It is thus clear that as held by the Honourable Apex Court, mental age of a person cannot be included in the definition of the term 'child' in Section 2(d) of the POCSO. As such, merely because the victim/P.W.No.5 was found to be having mental age of 11 years by three Medical Officers, who examined her, it cannot be concluded that she is a child as defined by Section 2(d) of the POCSO.

10 P.W.No.4 Vatsala, who happens to be the mother of the victim/P.W.No.5, in her chief-examination itself has stated that at the time of the alleged incident her daughter P.W.No.5 was 18 years of age.

11 So far as the alleged incident of gang rape and penetrative sexual assault on her is concerned, the P.W.No.5 has deposed that during the period of Devi Festival, when she was watching movie at the house of her step-sister, Vishal (juvenile-in-conflict with law) called her by whistling and took her to his room on the ground floor of the apartment. There he committed forcible sexual intercourse with her. Thereafter by knocking the door of the room, the present applicant/accused Ajay came there and he committed the same act as was done by the Vishal (juvenile-in-conflict with law). The victim/P.W.No.5 further deposed that in that night when she was standing in front of her room another accused Sarang (who has declared as juvenile-in-conflict with law during pendency of his appeal) came and took her on the terrace of the building and committed penetrative sexual assault on her. This is what the victim is stating in her chief-examination. In chief-examination, she further stated that she did not tell anybody about the penetrative sexual assault. She further deposed that then she became pregnant and then her pregnancy was noticed by her mother. She was then taken to the Police Station where she lodged report Exhibit 19.

12 According to the prosecution case, the victim/P.W.No.5 has delivered a baby boy subsequently.

13 Cross-examination of the victim/P.W.No.5 is material.

In her cross-examination, P.W.No.5/victim in terms has deposed that she was having love affair with Vishal (juvenile-in-conflict with law) and because of love relations between herself and said Vishal, they had indulged in physical relations. The victim/P.W.No.5 has categorically stated in her cross-examination that she had falsely stated names of the present applicant – Ajay as well as that of Sarang (who has declared to be juvenile-in-conflict with law during pendency of his appeal) as persons who committed penetrative sexual assault on her. It is seen that thereafter the learned trial Court took aid of some third person Dr.Alka Subramanyam and puts few more questions to the victim of the crime in question. Suffice to state that cross-examination of the victim/P.W.No.5 indicates that in order to cover up all her relations with her boyfriend Vishal (juvenile-in-conflict with law), the victim/P.W.No.5 had named the present applicant as well as Sarang (who has declared as juvenile-in-conflict with law during pendency of his appeal) as the persons who indulged in forcible sexual intercourse with her.

14 Evidence of the victim/P.W.No.5 is very categoric in the sense that she has named only three viz: Vishal Gorule (juvenile-in-conflict with law), applicant Ajay and Sarang (juvenile-in-conflict with law) as persons, who had sexual relations with her. She has not accused anybody else for this act. Samples of DNA of the baby boy born to the victim/P.W.No.5 were

extracted so also blood samples of the applicant and the victim/P.W.No.5. The reports of DNA test at Exhibits 43 and 44 exclude Vishal Gorule, applicant Ajay as well as Sarnag (juvenile-in-conflict with law) to be the biological father of the baby boy born to the victim/P.W.No.5. This fact coupled with the admission in the cross-examination of the victim/P.W.No.5 that she has named applicant Ajay as well as Sarang (juvenile-in-conflict with law) as persons who had committed penetrative sexual assault on her to save her relations with her boyfriend Vishal speaks volumes. Considering the nature of this evidence against the applicant/appellant/accused, I am the considered view that his liberty needs to be restored to him till disposal of the appeal. Therefore, the Order :

ORDER

- (i) The Application is allowed.
- (ii) The substantive sentence of imprisonment imposed on the applicant/accused is suspended and he is directed to be released on bail on his executing P. R. Bond of Rs.15000/- and on furnishing surety in the like amount.
- (iii) As a condition of this Order, the applicant/accused should not contact the victim/P.W.No.5 or her relatives in any manner and he should not commit similar offence in future.

(iv) The application is disposed of accordingly.

(A.M.BADAR J.)

Raju
Dattatraya
Gaikwad

Digitally signed by
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