

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO.473 OF 2019

Ramesh Kumar Rajaram Sharma

... Petitioner

Vs.

The State of Maharashtra

... Respondent

Mr.J.B. Mishra for the Petitioner

Mr.A.R. Patil, APP, for the Respondent – State

CORAM: Mrs.MRIDULA BHATKAR, J.

DATED: FEBRUARY 6, 2019

P.C.:

1. Upon urgent mentioning, taken on Production Board.
2. This Writ Petition is moved against the orders dated 15.11.2018 on an application for alteration of charge and order dated 8.11.2018 whereby the learned Additional Sessions Judge – 1, Vasai has not considered the application filed under section 216 of the Code of Criminal Procedure, below exhibit 54 in POCSO Special Case No.49 of 2015 and directed that the case shall be heard finally with applications below exhibits 53 and 54. On query, the learned Counsel for the petitioner informed that statement of

the accused under section 313 of the Code of Criminal Procedure is recorded on the same day of the application i.e., 15.1.2018. The accused is facing charges under sections 376, 506 of the Indian Penal Code and also under sections 4, 8 and 12 of the Protection of Children from Sexual Offences Act. The evidence of all the witnesses is over. On the date when the matter was scheduled for recording of statement of the accused under section 313, the petitioner/accused moved application for alteration of charge under section 216 of the Code of Criminal Procedure. The learned Counsel submits that the said application was not decided on that day. The learned Special Judge stated that this application can be considered as submissions of notes of arguments at the time of hearing. The learned Counsle submitted that there is no reliable evidence in respect of the age of the victim that she was below 18 years old. He relied on the evidence of the medical officer, the prosecutrix which is produced before the Court. He has submitted that there is variance in the opinion based on the dental examination and the ossification test. The age of the victim in dental examination was admitted as 15 to 16 years and in ossification test, it was 14 to 15 years. He submitted that if at all the girl is major, then, the charges under the POCSO Act can be

deleted at this stage and accordingly, the defence of consensual sex can be taken by the accused.

3. The learned Prosecutor has opposed the application.

4. The submissions made by the learned Counsel are devoid of merits and not acceptable in view of the legal position, especially after the amendment carried out in the Indian Penal Code in section 376 after Nirbhaya's case. It is to be noted that the learned Judge will have an independent assessment in respect of the age of the victim as the trial has come to an end so it is not fair on the part of this Court to express any opinion. However, it is to be noted that in any medical evidence, a margin of error can be considered of 1½ to 2 years with regard to the birth date and the age and in this case, a specific birth date is mentioned. It is entirely left to the assessment by the trial Court.

5. Hence, the Writ Petition is rejected.

(MRIDULA BHATKAR, J.)