

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Criminal Jurisdiction)

Friday, the Twenty Fifth day of January Two Thousand Nineteen

PRESENT

The Hon`ble Mr Justice V. PARTHIBAN

CRIMINAL MISCELLANEOUS PETITION No.15878 of 2018

IN CRL A.765/2018

SATHISHKUMAR

[APPELLANT / ACCUSED]

Vs

THE STATE REP BY ITS,
THE INSPECTOR OF POLICE,
J-13 TARAMANI POLICE STATION,
CHENNAI DISTRICT
CR.NO.202 OFF 2014.

[RESPONDENT]

Petition praying that in the circumstances stated therein and in the Memorandum of Grounds in CRL A.765/2018 on the file of the High Court, the High Court will be pleased to suspend the sentence imposed by Learned Sessions Judge Special Court for Cases Under POCSO ACT/Mahila Court, Chennai by a Judgment dated 20.09.2018 in S.C.No.75 of 2017 and enlarge the petitioner on bail pending disposal of the above CRL A.765/2018

Order : This petition coming on for orders upon perusing the petition and the Memorandum of Grounds in CRL A.765/2018 on the file of the High Court and upon hearing the arguments of M/S.R.JOHN SATHYAN, Advocate for the petitioner and of MRS.V.SARATHADEVI Govt. Advocate (Crl. Side) on behalf of the Respondent the court made the following order:-

The above criminal miscellaneous petition has been filed seeking to suspend the sentence imposed on the petitioner. The petitioner/accused was found guilty and hence by judgment dated 20.09.2018 convicted for the offence under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) and sentenced to undergo 10 years Rigorous Imprisonment and imposed fine of Rs.10,000/- and in default to undergo Rigorous Imprisonment for a period of six months. The said judgment of trial Court is a subject matter of the above criminal appeal. While pending appeal, the present miscellaneous petition has been filed seeking suspension of sentence.

2 The learned counsel for the petitioner/accused would submit that the consistant stand of the defence was age of the victim girl, as according to the petitioner/accused, the victim girl was 18 years old and therefore the provisions of the POCSO Act were not attracted to the learned counsel, the only document which was

marked as Ex.P2 on behalf of the prosecution for establishing the factum of age of the victim girl was a school certificate and the same was marked through P.W.1, who is the mother of the victim girl. P.W.1 deposed only about the contents indicating the date of birth in the school certificate and no school official was examined to establish the contents of the document Ex.P2. Further the learned counsel would also submit that the conviction and sentence was solely based on the statement given by the victim girl/P.W.3 herself and the credibility of her evidence is also questionable. According to the learned counsel, when P.W.1, mother of the victim girl was examined, she had clearly deposed that her daughter had been married two years before and has a girl child. On the contrary, the victim girl who was examined as P.W.3 has clearly denied in her evidence about the marriage and the fact of begetting child. In the said circumstances, the learned counsel would submit that the prosecution can hardly attach credibility to such evidence of victim girl, who has chosen to deny the very factum of marriage and begetting the child through the same. Moreover, the learned counsel for the petitioner would also submit that the petitioner was led to believe by the victim that she was 18 years old, as she was working in a electronic shop at the time, the incident is said to have occurred. In fact to that effect a suggestion was also put to the witness on behalf of the defence. Therefore he would submit that the consistant case of the defence was that the victim girl was 18 years and therefore, the POCSO Act cannot be slapped on the petitioner. In support of this contention the learned counsel would rely on the decision of the Hon'ble Supreme Court of India reported in **(2011) 2 SCC 385 (Alamelu and another vs. State represented by the Inspector of Police)**. He would draw attention of this Court to paragraph nos.41 to 49 and would submit that a proper witness has not been examined in order to establish the contents of the school certificate. These paragraphs are extracted hereunder:

"41.We may notice here that PW1 was examined in the Court on 9-8-1999. In his evidence, he made no reference to the transfer certificate (Ex.P16). He did not mention the girl's age or date of birth. PW2 was also examined on 9-8-1999. She had also made no reference either to her age or to the transfer certificate. It appears from the record that a petition was filed by the complainant under [Section 311 Cr.P.C.](#) seeking permission to produce the transfer certificate and to recall PW2. This petition was allowed. She was actually recalled and her examination was continued on 26-4-2000. The transfer certificate was marked as Ex.P16 at that stage, i.e., 26-4-2000. The judgment was delivered on 28-4-2000. In her cross-examination, she had merely stated that she had signed on the transfer certificate, Ex.P16 issued by the School and accordingly her date of birth noticed was noticed as 15-6-1977. She also stated that the certificate has been signed by the father as well as the Headmaster. But the Headmaster has not been examined.

<https://hcservices.education.gov.in> in our opinion, there was no reliable

evidence to vouchsafe for the truth of the facts stated in the transfer certificate.

42. Considering the manner in which the facts recorded in a document may be proved, this Court in *Birad Mal Singhvi V. Anand Purohit*¹, observed as follows:- (SCC pp.618-19, para14)

"14....The date of birth mentioned in the scholars' register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined.....Merely because the documents Exs. 8, 9, 10, 11, and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exs. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of Hukmi Chand and Suraj Prakash Joshi was in issue, mere proof of the documents as produced by the aforesaid two witnesses does not furnish evidence of the truth of the facts or contents of the documents. The truth or otherwise of the facts in issue, namely, the date of birth of the two candidates as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those persons who could vouchsafe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts, namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi. In the circumstances the dates of birth as mentioned in the aforesaid documents have no probative value and the dates of birth as mentioned therein could not be accepted. (emphasis supplied)

43. The same proposition of law is reiterated by this Court in the case of *Narbada Devi Gupta Vs. Birendra Kumar Jaiswal*², where this Court observed as follows:- (SCC p.751 para 16)

"16....The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the "evidence of those persons who can vouchsafe for the truth of the facts in issue".

44. In our opinion, the aforesaid burden of proof has not been discharged by the prosecution. The father says nothing about the transfer certificate in his evidence. The Headmaster has not been examined at all. Therefore, the entry in the transfer certificate can not be relied upon to definitely fix the age of the girl.

45. In fixing the age of the girl as below 18 years, the High Court relied solely on the certificate issued by PW8 Dr. Gunasekaran. However, the High Court failed to notice that in his evidence before the Court, PW8, the X-ray Expert had clearly stated in the cross-examination that on the basis of the medical evidence, generally, the age of an individual could be fixed approximately. He had also stated that it is likely that the age may vary from individual to individual. The doctor had also stated that in view of the possible variations in age, the certificate mentioned the possible age between one specific age to another specific age. On the basis of the above, it would not be possible to give a firm opinion that the girl was definitely below 18 years of age.

46. In addition, the High Court failed to consider the expert evidence given by PW13 Dr. Manimegalaikumar, who had medically examined the victim. In his cross-examination, he had clearly stated that a medical examination would only point out the age approximately with a variation of two years. He had stated that in this case, the age of the girl could be from 17 to 19 years. This margin of error in age has been judicially recognized by this Court in the case of *Jaya Mala V Government of J&K*, In the aforesaid judgment, it is observed as follows:- (SCC 9.541 para 9)

9....However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side."

47. We are of the opinion, in the facts of this case, the age of the girl could not have been fixed on the basis of the transfer certificate. There was no reliable evidence to vouchsafe the correctness of the date of birth as recorded in the transfer certificate. The expert evidence does not rule out the possibility of the girl being a major. In our opinion, the prosecution has failed to prove that the girl was a minor, at the relevant date.

48. We may further notice that even with reference to [Section 35](#) of the Indian Evidence Act, a public document has to be tested by applying the same standard in civil as well as criminal proceedings. In this context, it would be appropriate to notice the observations made by this Court in the case of *Ravinder Singh Gorkhi Vs. State of U.P.*⁴ held as follows:-

38. "The age of a person as recorded in the school register or otherwise may be used for various purposes, namely, for obtaining admission; for obtaining an

marriage; obtaining a separate unit under the ceiling laws; and even for the purpose of litigating before a civil forum e.g. necessity of being represented in a court of law by a guardian or where a suit is filed on the ground that the plaintiff being a minor he was not appropriately represented therein or any transaction made on his behalf was void as he was a minor. A court of law for the purpose of determining the age of a party to the lis, having regard to the provisions of [Section 35](#) of the Evidence Act will have to apply the same standard. No different standard can be applied in case of an accused as in a case of abduction or rape, or similar offence where the victim or the prosecutrix although might have consented with the accused, if on the basis of the entries made in the register maintained by the school, a judgment of conviction is recorded, the accused would be deprived of his constitutional right under [Article 21](#) of the Constitution, as in that case the accused may unjustly be convicted." (emphasis supplied)

49. In such circumstances, we are constrained to hold that the High Court without examining the factual and legal issues has unnecessarily rushed to the conclusion that the girl was a minor at the time of the alleged abduction. There is no satisfactory evidence to indicate that she was a minor."

The learned counsel would also rely on yet another decision of the Hon'ble Supreme Court of India reported in **(2003) 8 SCC Online 745 (Narbda Devi Gupta vs. Birendra Kumar Jaiswal and another)**. He would draw attention of this Court to paragraph no.16, which is extracted hereunder:

"16. Reliance is heavily placed on behalf of the appellant on the case of Ramji Dayawala & Sons (P) Ltd. The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the evidence of those persons who can vouchsafe for the truth of the facts in issue". The situation is, however, different where the documents are produced, they are admitted by the opposite party, signatures on them are also admitted and they are marked thereafter as exhibits by the court. We find no force in the argument advanced on behalf of the appellant that as the marks of exhibits has been put on the back portions of the rent receipts near the place where the admitted signature of the plaintiff appear, the rent receipts as a whole cannot be treated to have been exhibited as admitted documents."

Therefore he would submit that there appears to be a definite doubt in regard to the age of the victim girl and hence he would urge this Court to suspend the sentence imposed on the petitioner/accused pending finalisation of the above appeal.

3 Per contra, the learned Government Advocate (Crl.Side) appearing for the respondent would stoutly oppose grant of any interim relief to the petitioner/accused stating that P.W.1 to P.W.3 have deposed without any contradiction that the date of birth of the victim girl is 23.06.1999, in which event, she had completed 18 years only in 2017 and the date of occurrence was in 2014. According to her, as per the Juvenile Justice (Care and Protection of Children) Act, 2015, school certificate is one of the recognized documents to be accepted by the Court and when the school certificate clearly indicates the date of birth of the victim girl as 23.06.1999, the trial Court has rightly placed reliance on the document in order to accept the fact of the age in terms of the said document. Only when no document is available for establishing the age of the victim girl, the Doctor's certificate could be obtained to ascertain the age. According to the learned Government Advocate (Crl.Side) there is nothing wrong in the order of trial Court accepting the document and the arguments advanced on behalf of the petitioner is only for the purpose of suspending the sentence and has no merit.

4 This Court considered the rival submissions made on behalf of the petitioner as well as the respondent police and perused the materials available on record.

5 In order to convict a person under the provision of the POCSO Act, the most important factor is proof of age of the victim girl. In this case, there appears to be some doubt in regard to the factum of age as claimed by the prosecution. When a person is being convicted under the provisions of POCSO Act, prosecution has to establish the age of the victim girl beyond all reasonable doubt. In this case, prosecution appears to have failed in bringing home the point of age of the victim girl, without any doubt. Moreover, as rightly pointed out by the learned counsel for the petitioner that the evidence of the victim girl herself cannot be safely relied upon in view of her completely contradictory deposition in denying the marriage said to have been solemnized and begetting a girl child from the said wedlock. Such kind of evidence by the victim girl cast shadow on the credibility of her statement. Therefore, the trial Court cannot safely rely upon such evidence of the victim girl.

6 Further this Court is in agreement with the submissions made on behalf of the petitioner/accused that the factum of the age of the victim girl was not established by the proper person, who is connected with the document (Ex.P2) and not by another person. In this case, the prosecution has failed to mark the documents through any officials of the school concerned and in such event, benefit of doubt regarding the age of the victim girl, ought to be extended to the accused only insofar as seeking suspension of sentence.

7 For the above said reasons, this miscellaneous petition, seeking suspension of sentence is allowed and the substantial sentence of imprisonment alone is suspended and the petitioner is released on bail on condition that the petitioner shall deposit a sum of Rs.10,000/- (Rupees ten thousand only) to the credit of S.C.No.75 of 2017 on the file of the learned Sessions Judge, Special Court for cases under POCSO Act/Mahila Court, Chennai, and further the petitioner shall execute a bond for a sum of Rs.10,000/- (Rupees Ten Thousand only) with two sureties each for a like sum to the satisfaction of the learned Sessions Judge, Special Court for Cases under POCSO Act (Magaleer Needhi Mandram), Chennai. Further, the petitioner shall appear before the trial Court once in a week at 10.30 a.m until further orders.

-sd/-
25/01/2019

This order, on being produced, be punctually observed and carried into execution by all concerned

TRUE COPY

Sub-Assistant Registrar (Statistics/C.S.)
High Court, Madras - 600 104.

TO

1 THE SESSIONS JUDGE,
SPECIAL COURT FOR CASES UNDER POSCO ACT
[MAGALEER NEEDHI MANDRAM], CHENNAI.

2 THE PUBLIC PROSECUTOR
HIGH COURT, MADRAS.

3 THE INSPECTOR OF POLICE,
J-13 TARAMANI POLICE STATION,
CHENNAI DISTRICT.

+1C.C. to M/S.R.JOHN SATHYAN Advocate on payment of necessary charges SR NO.1570

Order

in
CRL MP.15878/2018

in
CRL A.765/2018

Date :25/01/2019

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