

Code in view of Section 42 of POCSO Act. The applicant is acquitted for the offence punishable under section 4 and 12 of POCSO Act.

3. The case of the prosecution is that the victim is mentally retarded girl. PW.3 is social worker. Workshop was conducted for handicapped children on 24/10/2016. The victim was taken by her mother (PW.4) for workshop. During the workshop, PW.3 had talk with the victim. The victim disclosed that accused who is son of her maternal uncle and his younger brother (juvenile) subjected her to forcible sexual intercourse since last one year when she was along in the house. She was threatened not to disclose the incident to anyone.

4. Learned advocate for the applicant submitted that the applicant is in custody for a period about 5 years and 5 months. There are serious discrepancies in the evidence of the victim. The incident was reported after one year. Medical evidence does not support the prosecution case. Appeal may not come up for hearing within short period of time. The applicant has completed half the sentence. The accused has examined defence witness to prove that there was land disputes between the parties which is motive for false implication. The co-accused was tried before the Juvenile Justice Board. Similar role was attributed to him. He has been acquitted.

5. Learned APP submit that there is sufficient evidence against the applicant. The victim has attributed specific overtact. She has stated that accused has sexually assaulted her. Her statements were recorded under section 161 and 164 of Cr.PC. There is no reason to

disbelieve the victim. She is mentally retarded girl.

6. Learned advocate for respondent no.2 submitted that the defence of the accused about false implication cannot be accepted. The incident was not disclosed to social worker. Victim and social worker had no reason to implicate the applicant. The incident came to light when workshop was conducted for physically handicapped children. The age of the victim was 13 years at the time of incident. Since the victim was examined after one year. There cannot be injury on her person. No case is made out for suspension of sentence and grant of bail.

7. Undisputedly the alleged incident had occurred one year prior to its reporting. The victim had not disclosed alleged sexual assault to her mother or any other person. The disclosure was allegedly made by the victim on 24/10/2016.

8. PW.1 (Victim) is completely silent about the date of alleged incidents. She has not referred to workshop. PW.1 is aged around 15 years at the time of recording evidence. The trial Court has recorded that the victim has certain capacity to understand the question and give rational answer. She stated that accused were neighbours. Applicant subjected her to sexual assault. She was threatened, shown obscene pictures on mobile. She was cross examined. She had answered all the questions. Her version does not reflect any signs of mental retardation. She admitted that she was close to Madhuri madam. She shares everything with her. She used to talk to her. She

never told about incident to her. Many times there were quarrels between Badi Amma and Chacha. She knows Poonam didi from Apanalaya. She met her once when she was called in Apanalaya with her mother. Poonam didi called her inside alone. Thereafter she called her mother alone. Poonam didi took her to hospital. She denied all the suggestions. PW.2 is Panch witness for spot. He has not supported prosecution case.

9. (PW.3)-Poonamdita Bohra was working as Manager in Apanalaya Sanstha. She has arranged the workshop for disabled children in October 2016. According to her, the victim had attended workshop. Victim had mental disability. The mother of victim also attended the session of workshop on the same day. While she was talking to the victim she had disclosed that her maternal uncle did bad act with her and another maternal uncle sahud also did bad act. Victim disclosed that the accused had fingered her private part. She was subjected to oral sex. Accused showed her porn video. Sahud did similar act of fingering. She decided to lodge report. From her evidence it is noticed that victim had not disclosed to her about sexual intercourse by accused. She did not give any certificate of the victim in respect of her mental disability. She did not take mother of victim to police station to lodge report. She did not give any identity card or any other documents to show that, she is working with said organisation. There was no written communication about the incidents to her seniors. No documents are produced about workshop. Mother of victim was not taken to police station to lodge complaint. F.I.R. was lodged by her.

10. (PW.4) is the mother of victim. She stated that victim is mentally retarded. The accused are sons of her maternal uncle. They are neighbors. The father of accused is brother of her mother. Her Nani has agricultural land. She did not get any share in the agricultural land of her mother. On 24/10/2016 there was programme of mentally retarded children. Victim told something to PW.3. Victim told her that both accused committed sexual intercourse with her. Accused had threatened victim. PW.3 lodged report. PW.4 did not state that she was hesitant to lodge FIR as claimed by PW.3. The evidence of PW.3 does not mention that victim had disclosed incidents to PW.4. PW.3 runs NGO. On 24/10/2016 she was with victim entire day. From 24/10/2016 to 15/11/2016 she was not knowing about incidents. She had stated before police about incidents of sexual assault by accused but she cannot say why it is not appearing in her statement.

11. (PW.5) is the Medical Officer who stated that the alleged last incident had occurred one year ago. Survivor had provided history. No injuries were noticed on the private part of the victim. She has admitted that she formed opinion that as per the history narrated of sexual violence by the victim, there are no signs of use of force and sexual violence cannot be ruled out due to time log. No birth certificate was produced. She has also admitted that on physical examination of victim, it was not noticed that sexual intercourse was committed with her. It is true that on the basis of history she opined that there is possibility of sexual intercourse with Victim. No injuries were noted on entire body of victim. In the history by victim, she did not state day,

date and time of incident. Hymen was intact.

12. (PW.6) is the police Inspector. From his evidence, it can be seen that victim had not stated that Afjal Mamu i.e. accused was showing her obscene pictures. She had not stated that Afjal Mamu - accused had committed act of penetration and he used to threaten her that if she disclose the incident to any one he will kill her. He also admitted that victim had not stated that accused had outraged her modesty. The victim also did not disclose that when she went to the house of accused she was subjected to sexual intercourse. The witnesses further admitted that mother of the victim had not disclosed the birth date of the victim as 24/10/2010. She also did not disclose that both the accused had committed sexual intercourse with victim and that they had fingered the victim. She also did not state that the accused were committing the act whenever she used to leave the victim at house. Similar acts were also attributed to the co-accused. He was tried before Juvenile Justice Board. By judgment and order dated 2nd January 2022, he has been acquitted. While acquitting it was observed that the medical evidence does not support the prosecution case. The defence witness has referred to the pendency of the litigation between the parties. The oral evidence is not supported by the medical evidence.

13. The applicant is in custody for more than 5 years. Considering aforesaid aspects the sentence of imprisonment can be suspended and bail can be granted to the applicant.

ORDER

- (i) Interim Application is allowed and disposed of;
- (ii) The sentence of imprisonment imposed vide judgment and order dated 3rd January 2022 passed by learned Special Judge, under POCSO Act, 2012, Greater Bombay in POCSO Special Case No. 35 of 2017 is suspended and applicant is directed to be released on bail on executing PR bond in the sum of Rs.25,000/- with one or more sureties in the like amount;
- (iii) The applicant is permitted to furnish cash bail in the sum of Rs.25,000/- for a period of eight weeks in lieu of sureties;
- (iv) The applicant shall attend Trial Court once in six months on First Saturday of the month till disposal of the Criminal Appeal;
- (v) In the event there are two consecutive defaults in attending the Trial Court, the Trial Court shall submit report to this Court;
- (vi) In the event of default committed by the applicant in attending the Trial Court, the prosecution will be at liberty to prefer application for cancellation of bail.
- (vii) The applicant shall not harass and shall not approach the victim in any manner.

(PRAKASH D. NAIK, J)