

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

**INTERIM APPLICATION NO. 1627 OF 2022
IN
CRIMINAL APPEAL NO. 553 OF 2022**

Lahu Parmeshwar Kale ..Applicant
Versus
The State of Maharashtra & Anr. ..Respondents

Mr. Viresh. V. Purwant a/w. Rushikesh Kale for Applicant.
Smt. M. R. Tidke, APP for State/Respondent No.1.
Mr. Sushil Inamdar, Appointed Advocate for Respondent No.2.

CORAM : SARANG V. KOTWAL, J.
DATE : 5th DECEMBER 2022

PC :

1. This is an application for bail pending Appeal. The applicant was convicted for commission of offence punishable under sections 363 and 366 of the I.P.C. and under sections 4, 6 and 8 of the Protection of Children from Sexual Offences Act (for short 'POCSO Act'). The major punishment imposed on him is of R.I. for 10 years for commission of offence punishable under section 6 of POCSO Act. There are observations that he is not convicted for commission of offence punishable U/s.376 of the I.P.C., but based on Section 42 of the POCSO Act at the highest it

may be said that no separate punishment is awarded. The incident is held to be true by the trial Court.

2. The prosecution case is that, the victim was knowing the applicant. He used to visit her house. He had told her that he was in love with her and he would marry her. On 17/10/2017 the victim was in front of her house. At that time, the applicant and other two came there. They took her to applicant's house. His mother and grand-mother told them that they should not stay there and, therefore, the applicant and the victim herself went to the house of the applicant's paternal aunt. There the applicant had put *Mangalsutra* around her neck. He told her paternal aunt that the victim was his wife. Thereafter, according to the victim, the applicant had forcible sexual intercourse with her. According to the victim, her date of birth was 13/08/2003 and, therefore, she was around 14 years of age. The mother of the victim brought her back to their house and then she lodged the F.I.R. at Vairag police station.

3. Learned counsel for the applicant submitted that the

applicant was on bail during trial and he has not misused that liberty. He submitted that the evidence shows that it was a consensual relationship. The victim had willingly accompanied the application and, therefore, it was a case of consent. She had gone to various places and had met various people including family members of the applicant and she had not made any grievance. This shows that she was a consenting party. He, however, conceded that, if her age is below 18 years of age then this defence will not help him; then technically the offence would be made out. However, Shri. Purwant questioned the prosecution case regarding the age of the victim. He submitted that the prosecution evidence itself shows that no clear evidence was led in that behalf. At different points, different age was mentioned and there is scope to believe that the age of the victim is not proved to be below 18 years of age. The victim herself has deposed that her date of birth was 13/08/2003. The Birth certificate which is produced on record mentions her date of birth as 04/09/2001. One of the witnesses i.e. PW-8 has deposed that, a copy of Birth certificate issued by Sarpanch which was filed in the charge-sheet was false. The

prosecution itself did not lead evidence regarding ossification test. However, in the cross-examination it is brought on record that her age could be between 14 to 17 years as per ossification test and therefore, it was argued that there is a possibility that taking the upper limit in consideration it could be more than 18 years of age. Shri. Purwant, therefore, submitted that, all these factors show that the prosecution has failed to prove that the victim was below 18 years of age, or that it was a forcible relationship. Therefore, it would not be a case of rape punishable under section 376 of I.P.C. If the victim's age is not proved to be below 18 years of age then the offence under POCSO Act would not be attracted.

4. Learned APP, as well as, learned counsel for the Respondent No.2 opposed this application on merits. They submitted that, there is no reason to doubt the birth certificate produced on record at Exhibit 72 through the evidence of PW-8 Village Development Officer, Smt. Chavan. In any case, in her deposition, she has stated that, Sarpanch has no authority to issue death and birth certificate.

5. I have considered these submissions. Though, in the deposition the victim has stated that the applicant had forcible sexual intercourse, the entire evidence read in entirety shows that she had willingly accompanied the applicant at various places and had met various family members of the applicant. The applicant has put *Mangalsutra* around her neck. After that there are allegation of forcibly sexual intercourse. However, it does appear that there was element of consent. Therefore, her age would assume importance in this case. In that behalf, the evidence of the prosecution appears to be doubtful.

6. PW-3 has deposed that, her date of birth was 13/08/2003. Her birth certificate produced on record at Exhibit 72 shows that her date of birth was 04/09/2001. Ossification test mentions it between 14 to 17 years. However, no concrete opinion could be expressed regarding that and there was a possibility that it could be more than the age mentioned in the ossification test. The birth certificate is produced through PW-8 Village Development Officer Smt. Chavan. There the date of birth is mentioned as 04/09/2001. However, that birth certificate included

the name of the victim. That birth certificate is based on the entry made in the register for Birth and Death. PW-8 has deposed that the entry in that register is taken mentioning only sex of the child. The name of the child is entered afterwards when the parents apply for birth certificate. In this particular case, she had issued the birth certificate on 25/01/2022 and she has mentioned name of the child as given by her parents. Therefore, it is clear that, in the original entry, name of the child was not mentioned. It is much later in the year 2022 her name was entered in that register and based on that entry the birth certificate is issued. Therefore, that entry itself being doubtful and the birth certificate based on that entry becomes doubtful. Moreover, he has admitted that a copy of the birth certificate issued by the Sarpanch, filed in the charge-sheet was false. Thus, there is an attempt on the part of the investigating agency to manipulate the date of birth of the victim. At this stage, benefit of doubt, for consideration of bail, can be given to the applicant. The prosecution has not proved age of the victim below 18 years of age with sufficient clarity. Even the name of the mother i.e. PW-1 is different in the deposition and as

mentioned in the birth certificate as mother of the child. Thus, sufficient doubt is created about the fact whether the victim was below 18 years of age. Thus, for consideration of bail, the applicant has made out a case in his favour. The applicant was on bail during trial and he has not misused that liberty. It is made clear that, all these observations are restricted only for passing of this order and all these issues are left open to be decided at the final hearing stage of Appeal.

7. Hence, the following order:

O R D E R

i) During pendency and final disposal of Criminal Appeal No.553 of 2022, the applicant is directed to be released on bail on his executing P. R. Bond in the sum of Rs.30000/- with one or two sureties in the like amount.

ii) The Application is disposed of.

(SARANG V. KOTWAL, J.)