

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**APPLICATION FOR LEAVE TO APPEAL BY STATE
NO.108 OF 2020**

The State of Maharashtra,
Through Police Station In-charge,
Police Station Ambad,
Tq-Ambad, Dist-Jalna

...APPLICANT

VERSUS

- 1) Kailas S/o Sitaram Bhojane,
Age-27 years, R/o-Jamkhed,
Tq-Ambad, Dist-Jalna,
- 2) Suresh S/o Ganeshsing Thakur,
Age-20 years, R/o-Ranjani,
Tq-Ghansawangi,
At present R/o-Banjara Lodge, Beed,
- 3) Bharat Pralhad Sonvane,
Age-26 years, R/o-Kurla,
Tq. & Dist-Beed,
At present R/o-Banjara Lodge, Beed,
- 4) Sitaram S/o Moghaji Bhojane,
Age-60 years, R/o-Jamkhed,
Tq-Ambad, Dist-Jalona,
- 5) Janabai W/o Sitaram Bhojane,
Age-50 years, R/o-Jamkhed,
Tq-Ambad, Dist-Jalna.

...RESPONDENTS

...
Mr. A.V. Deshmukh, A.P.P for Applicant - State.
...

**CORAM: SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

DATE : 27th JULY, 2023

ORDER [PER SMT. VIBHA KANKANWADI, J.] :

1. Present Application has been filed by the prosecution seeking leave to appeal under Section 378(1)(b) of the Code of Criminal Procedure challenging the acquittal of the respondents by the learned Judge, Special Court, Jalna in Special Case (Child) No.67 of 2016 of the offence punishable under Sections 363, 366-A, 376(2)(i), 376 D read with Section 34 of the Indian Penal Code and of the offence punishable under Sections 4 and 10 of the Protection of Children from Sexual Offences Act (for short "the POCSO Act"), on 7th March 2020.

2. We have heard Mr. Deshmukh, learned APP appearing for the State. With the able assistance of the learned APP, we have gone through the entire record which was before the learned trial Judge.

3. The prosecution story, in short, is that First Information Report (for short "the FIR") was lodged by the mother of the victim on 22nd August 2016 at about 17.05 hours stating that

accused No.4 had come to her house around 7.30 a.m. on 21st August 2016 and asked her as to whether she was going to Aurangabad. She replied that she along with her husband was going to Aurangabad to attend the ritual of *Terava* of her relative. Accordingly, she went there. Her two daughters, aged 15 and 10 years had gone to graze she-goats. In the evening the informant and her husband returned. They found that their younger daughter was crying. The daughter told that around 1.00 p.m. to 1.30 p.m. on that day accused No.1 had come to the field with four wheeler vehicle and asked the victim, the elder daughter of the informant, aged 15 years to come with him and took her under the pretext that the parents have called her. Though victim refused to go with him, accused No.1 forcibly caused her to sit in the vehicle. After receipt of such information, informant went to the house of accused No.1 and informed accused No.4 that accused No.1 has kidnapped her daughter. Informant asked about the whereabouts of her daughter. Accused Nos. 4 and 5 gave evasive answers and therefore, search for the girl started. Informant lodged report for the offence under Section 363 and 366(A) of the Indian Penal Code. The spot panchnama was carried out and accused Nos.4 and 5 came to be arrested. Accused No.1 was arrested on 26th August

2016 and thereupon it led to the further investigation. It was revealed that the girl was taken to Shirdi and they had stayed at one lodge there. The girl was medically examined and then the offence for the sexual assault under the Indian Penal Code as well as the POCSO Act came to be added. After completion of the investigation, charge-sheet was filed before the learned Special Judge.

4. Trial was conducted. Prosecution examined in all thirteen witnesses to bring home the guilt of the accused. After considering the evidence on record and hearing both sides, the learned trial Judge has acquitted all the accused persons from all the charges. Hence present Application.

5. At the outset, we would like to say that perusal of the evidence and the impugned Judgment would show that the age of the girl has not been proved by leading cogent evidence. Though PW-2 – victim has stated her age as 17 years on 4th October 2018 when her testimony was recorded and the incident is of 21st August 2016 and she has given her birth date as 5th July 2002, there is no concrete evidence. The age of the girl has not been medically determined. PW-12 Maroti Satpute is the headmaster of Zilla Parishad school where the girl has taken

education. He had brought the admission register and stated that girl took admission on 26th June 2008 in their school and as per school record her date of birth is 5th June 2002. In cross-examination, he has stated that he has no idea as to who had taken the entries in the admission register and the admission register is silent as to which documents were furnished to support the said date of birth. Thus, supporting document has not been produced and proved at all.

6. Recently, in ***P. Yuvaprakash vs. State represented by Inspector of Police (Criminal Appeal No. 1898 of 2023)*** the Hon'ble Supreme Court on 18th July 2023, by relying upon ***Rishipal Singh Solanki vs. State of Uttar Pradesh and others, 2021 (12) SCR 502***, reiterated the procedure to be followed in cases where age determination is required. In ***Rishipal*** (supra) following has been held:-

“ 20. Rule 12 of the JJ Rules, 2007 deals with the procedure to be followed in determination of age. The juvenility of a person in conflict with law had to be decided prima facie on the basis of physical appearance, or documents, if available. But an inquiry into the determination of age by the Court or the JJ Board was by seeking evidence by obtaining : (i) the matriculation or equivalent certificates, if available and in the absence whereof; (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof; (iii) the birth certificate given by a corporation or a municipal authority or a panchayat. Only in

the absence of either (i), (ii) and (iii) above, the medical opinion could be sought from a duly constituted Medical Board to declare the age of the juvenile or child. It was also provided that while determination was being made, benefit could be given to the child or juvenile by considering the age on lower side within the margin of one year. "

7. Further, in ***P. Yuvarakash*** (supra), note has also been taken by the Hon'ble Supreme Court in respect of the pronouncement in ***Sanjeev Kumar Gupta vs. The State of Uttar Pradesh and others, [2019] 9 SCR 735***. In ***P. Yuvarakash*** (supra), the Hon'ble Supreme Court, in Para-14 of the Judgment, observed as under:-

" 14. Section 94 (2)(iii) of the JJ Act clearly indicates that the date of birth certificate from the school or matriculation or equivalent certificate by the concerned examination board has to be firstly preferred in the absence of which the birth certificate issued by the Corporation or Municipal Authority or Panchayat and it is only thereafter in the absence of these such documents the age is to be determined through "an ossification test" or "any other latest medical age determination test" conducted on the orders of the concerned authority, i.e. Committee or Board or Court. In the present case, concededly, only a transfer certificate and not the date of birth certificate or matriculation or equivalent certificate was considered. Ex. C1, i.e., the school transfer certificate showed the date of birth of the victim as 11.07.1997. Significantly, the transfer certificate was produced not by the prosecution but instead by the court summoned witness, i.e., CW-1. The burden is always upon the prosecution to establish what it alleges; therefore, the prosecution could not have been fallen back upon a document which it had never relied upon. Furthermore, DW-3, the concerned Revenue Official (Deputy Tahsildar) had stated on oath that the records for the year 1997 in respect

to the births and deaths were missing. Since it did not answer to the description of any class of documents mentioned in Section 94(2)(i) as it was a mere transfer certificate, Ex C-1 could not have been relied upon to hold that M was below 18 years at the time of commission of the offence. ”

8. Thus, unless there would have been some supporting document, the school record cannot be taken as the proof for the age of the girl. Therefore, we support the reasons given by the learned trial Judge that the prosecution has failed to prove that the girl was ‘child’ within the definition of Section 2(1)(d) of the POCSO Act.

9. If the girl is not a ‘child’ as aforesaid, then the provisions of the POCSO Act will not be applicable. In respect of the provisions of the Indian Penal Code are concerned, if we consider the testimony of the girl with the testimony of PW-7 Faruk, the owner of the hotel at Shirdi, PW-11 Surendra, employee of the lodge from Beed situated in front of S.T. stand, then it can be seen that the girl was a consenting party. There was no fear in her mind or on her face and she had not asked for help. When girl had gone to Shirdi, she had taken *darshan* at *Sai Mandir* and her testimony further reveals that there were many people and also police at Ambad S.T. Stand but she has not complained to anybody that she has been brought by accused forcibly.

Considering the conduct of the girl, the inference drawn by the trial Court that she was the consenting party is justifiable. No case is made out for granting leave to appeal and the Application deserves to be rejected.

10. The Application stands rejected.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

asb/JULY23