

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

CRIMINAL APPEAL NO. 445 OF 2023

X.Y.Z.

appellant Since Minor through
His Father Kamlakar Baburao
Aamate

...Appellant

Versus

1. The State of Maharashtra
2. Mahesh Shamrao Suthar

...Respondents

....

Mr. Shekhar Ingawale, Advocate for the Appellant.

Mr. Aliabbas Delhiwala, Advocate for Respondent No.2.

Ms. Pallavi N. Dabholkar, APP for the Respondent No.1 – State.

....

CORAM : PRAKASH D. NAIK, J.
DATE : 22nd JUNE, 2023.

PER COURT:

1. This appeal is preferred under Section 101(5) of Juvenile Justice (Care and Protection of Children) Act, 2015 (Hereinafter referred to as “Juvenile Justice Act”) challenging the order dated 20.02.2023 passed by the learned Additional Sessions Judge-1, Kolhapur rejecting the application for bail preferred by Child in Conflict with Law (hereinafter referred to as “CCL”) through his father.

2. The appellant was arrested on 06.06.2022 in connection with C.R.No.301 of 2022 registered with Juna Rajwada Police Station, Kolhapur for offences under Section 376 of Indian Penal Code (for short 'IPC') and Sections 4, 6, 8 & 12 of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act').

3. The brief facts of prosecution case are as follows :-

i) The first informant is the father of victim girl. The CCL was working in the puncture shop of informant from 01.06.2022.

ii) Due to heavy rain the old house of informant had collapsed and hence he had shifted with his family in the premises situated in upper portion of his shop.

iii) On 05.06.2022, CCL had joined the work at 9.00 a.m. Around 4.00 p.m., informant could not see him in the shop. While searching him, the informant found that the door of his collapsed house was closed. He entered inside by opening door. He saw that victim girl was made to sit on window and her legging and undergarment was removed. The CCL has pulled down his pant and underwear and he was committing sexual intercourse with victim. The informant rushed inside the house and rescued victim girl. The CCL managed to run

away from the spot. The victim girl is aged six years. On inquiry with victim, she informed that, “CCL took her to the place of incident and removed her legging and underwear and removed his pant and underwear and committed bad act.

iv) FIR was registered on 05.06.2022. The CCL was arrested on 06.06.2022. Date of birth of CCL is 23.10.2004. He was aged 17 years, 7 months & 13 days at the time of incident. The date of birth of victim girl is 27.02.2016. She was aged around six years at the time of incident.

v) Statement of victim girl was recorded on 05.06.2022. She stated that, the CCL lifted her and took her to collapsed house. She was made to sit on window and by removing her undergarment and his undergarment, he penetrated his private part in her private part. She did not shout, apprehending that her father would shout. Thereafter, her father came to the spot and assaulted CCL. He ran away.

vi) Statement of victim girl was recorded under Section 164 of Cr.P.C. on 13.06.2022. She narrated the incident of sexual assault by CCL.

vii) Statement of informant was recorded under Section 164 of Cr.P.C. on 13.06.2022. Statement of other witnesses were recorded.

viii) Medical examination of victim girl was conducted. History of incident was given by victim and her mother to medical officer stating that the CCL inserted his genitalia inside victim's genitalia. The report of medical examination mentions that, there was redness and tenderness present on inner aspect of labia and at hymenal region. Clinical finding suggestive of recent vaginal penetration. However, sexual assault cannot be ruled out. On completing investigation, charge-sheet was filed.

4. The appellant was produced before the Juvenile Justice Board. Application for bail was preferred before the learned Principal Magistrate, Juvenile Justice Board, Kolhapur. The application was rejected vide order dated 13.07.2022. The learned Principal Magistrate while rejecting the said application has observed that, as per report of S.J.P.U., offence committed by CCL is serious in nature. If he is released on bail there is possibility that he may commit similar kind of offence. Hence, he be kept in observation home. As per report of D.P.O., CCL left school after 9th standard. His family is poor. CCL is working in two wheeler puncture removing shop. CCL committed said crime. His father is working as driver. Tender age, excess use of mobile, negligence of parents, bad company are the causes behind committing said crime.

The board than opined that the offence is serious in nature. Parameters required to be considered for granting or not granting bail to the delinquent minor are to be read in context of mandate contained under Section 12 of the Act. In this case, if CCL is released on bail, there is likelihood he repeating the offence. Victim is 6 years of very tender age. So far as mandate of Section 12 is concerned the exception given for rejecting bail stipulates to the extent that, he shall not be so released if there appears reasonable ground for believing that, the release is likely to bring him into association with any known criminal. In view of mandate of Section 12 of the Act, if the aforesaid condition is existing there is reasonable likelihood of CCL being exposed to moral, physical or Psychological danger or persons release would defeat the ends of justice. As per report of D.P.O., CCL was held responsible for committing the said act. Report reveals that, negligence of parents towards CCL. Father is working as driver, tender age, excess use of mobile, bad company, negligence of parents are some causes behind committing the act. Parents of CCL has no supervision over CCL. There is possibility that he may commit similar kind of act again. Report of D.P.O. also shows poor background. There is also danger to life from complainant. There is possibility of pressurizing witnesses.

5. The order dated 13.07.2022 passed by learned Juvenile Justice Board was challenged before Sessions Court by preferring Criminal Appeal No.73 of 2022. The learned Additional Sessions Judge, Kolhapur by order dated 17.11.2022 rejected the appeal. The Court observed that, CCL was 17 years old at the time of incident. He was having capacity to understand the alleged act. Victim was too minor and unable to understand anything about the alleged act. Considering the seriousness of the offence and the mental agony undergone by the minor victim, the applicant has not made out sufficient ground to releasing him on bail. Considering the mental agony undergone by victim and future consequences, which would be suffered by the victim, the release of CCL, would defeat the ends of justice. The Court than noted the probation officer's report and mental condition of CCL. It was observed that, there is no evidence of mental incapacity of CCL to commit such offence. He has ability to understand consequences of the offence. The CCL has not produced any documentary evidence to support the contention that CCL is suffering from any such mental retardment. The present case does not come under the category described under Section 12 of Juvenile Justice Act.

6. As per Section 15 of Juvenile Justice, 2015, the board has to

conduct preliminary assessment of Child in Conflict with Law in respect of mental and physical capacity of CCL to commit said offence, ability to understand the consequences of the offence and the circumstances in which allegedly the offence was committed by him. Preliminary assessment is not a trial but is to assess the capacity of such child to commit and understand the consequences of alleged offence. The preliminary assessment was taken up pursuant to order dated 13.06.2022 passed by the Board. The learned Principal Magistrate, Juvenile Justice Board, Kolhapur considered Psychological report, probation officers report, medical report of victim and by order dated 16.12.2022 concluded that, case is made out to transfer the case of CCL before children's Court, so further inquiry is necessary to be conducted through children's Court. Vide separate order dated 16.12.2022, the Juvenile Justice Board observed that, charge-sheet is filed against CCL for the offences punishable under Section 376 of IPC and Sections 4, 6, 8, 12 of POCSO Act. After conducting assessment of CCL order passed below Exhibit - 1 recording conclusion that case is made out to transfer the case before Children's Court for further inquiry, this matter is committed to Children's Court for disposal as per Law. CCL was directed to appear before Children's Court on 13.02.2023.

7. The Bail Application No.3287 of 2022 filed in this Court was disposed of by order dated 05.01.2023 by permitting the applicant to move an application before Children's Court, since during the pendency of application, the Juvenile Justice Board conducted preliminary assessment under Section 15 of the Juvenile Justice Act and case is transferred to Children's Court. Thereafter, application for bail was preferred before Additional Sessions Judge, Kolhapur on 31.01.2023. The said application was rejected vide order dated 20.02.2023. While rejecting the said application it was observed that, it is well settled provision of law that, while deciding the bail application, the best interest of the CCL as well as the interest of the society and ends of justice is also required to be considered. It was further observed that, the victim was aged 6 years. The CCL was aged about 17 years at the time of alleged offence and having capacity to understand the alleged act. Whereas, the victim was minor and was unable to understand anything about the alleged act. Considering the seriousness of the offence and mental agony undergone by the minor victim, grant of bail would defeat the ends of justice, and CCL has not made out sufficient ground for release him on bail.

8. Learned Advocate for the appellant submitted that CCL was below 18 years at the time of incident. He was juvenile. He is in

custody from 06.06.2022. The Courts below while rejecting the applications for bail have not taken into consideration the scope of Section 12 of the Juvenile Justice Act. The Probationary Officer's report supports the prayer of CCL for bail. The CCL is not having any criminal antecedents. The Psychological Report also supports the ground ground for bail. Section 12 of Juvenile Justice Act, governs the procedure for bail for Child in Conflict with Law. Provisions of Section 437 and 439 of Cr.P.C. cannot be applied. Bail can be refused to CCL only in exceptions provided in Section 12 of the Act.

9. Learned Advocate has relied upon the following decisions of this Court.

i. ***Sandeep Ayodhya Prasad Rajak, A minor through his mother Shimla Ayodhya Prasad Rajak Vs. The State of Maharashtra*** dated 22.08.2022 passed in Bail Application No.3838 of 2021.

ii. ***Shubham @ Bablu Milind Suryavanshi Vs. The State of Maharashtra*** dated 21.10.2022 passed in Bail Application No.2282 of 2021.

10. Learned A.P.P submitted that the offence is of serious nature. The victim was aged around 6 years. The victim was subjected to

penetrative sexual assault. There is sufficient evidence to support the prosecution case. The medical evidence corroborates the version of the victim. The father of victim is witness to the incident. The accused was aged around 17 years and 7 months at the time of incident. Whereas, the victim girl was aged around 6 years. In accordance with Section 12 of the Juvenile Justice Act, the CCL is not entitled for bail. The case of appellant is not covered by exceptions carved out in Section 12 of the Act. If the appellant is released on bail, there is every possibility of pressurising and threatening the victim and other witnesses. As per report of probation officer, the CCL is in bad company which is one of the reason for commission of offence. If the applicant is released on bail, there is every possibility of CCL joining the bad company. The decisions relied upon by learned Advocate for appellant were delivered in the facts of those cases. The report of department of Psychiatry mentions that, CCL has ability to understand consequences of the offence. The CCL is tried as adult. Medical report supports version of victim. grant of bail would defeat ends of justice.

11. Learned Advocate for Respondent No.2 submitted that, Section 12 of the Juvenile Justice Act prohibits grant of bail in

exceptions stipulated therein. The crime committed by CCL is of heinous nature. The CCL was of the age of understanding, whereas the victim girl was too minor aged around 6 years. The punishment for the offence committed by the CCL is more than 7 years. The orders relied upon by the learned Advocate for the appellant can be distinguished. Bail was granted to CCL on the basis of the facts of those cases. The FIR was lodged immediately. The appellant was capable of understanding the consequences of his act. Grant of bail would defeat ends of justice.

12. On perusal of the documents on record it is evident that the Psychological Report of CCL was produced on 11.07.2022. The report of District Probation Officer was submitted on 10.06.2022. According to the report of Probation Officer, the CCL was working in shop of complainant. On 05.06.2022, the CCL attempted to commit rape on minor daughter of complainant. The CCL attempted to initiate obscene acts recorded in mobile phone of his friend. Poor family, illiterate parents, leaving education half way, excessive use of mobile, bad company, suffering from convulsions for five years are the factors behind commission of crime. The age of CCL, giving warning and bond for good behaviour and counselling of parents be considered for releasing him. It appears

that the probation officer is under belief that CCL had attempted to commit rape, which is contrary to material on record. The learned Sessions Judge vide order dated 20.02.2023 has observed that no medical certificate has been produced at the instance of appellant to support the claim of epilepsy. As per report of S.J.P.U. offence is serious nature. If the CCL is released there is possibility of he committing similar kind of offence. Physical capacity assessment report of CCL was produced before Juvenile Justice Board coupled with mental assessment report of departmental of Psychiatry issued by RCSM Government Medical Collage, Kolhapur states that the IQ of CCL is 94 and suggestive of average intelligence. There was no evidence of any active Psychopathology on history and mental status examination. On mental status examinations he was found to be conscious. contact was established. His mood was euthymic, affect was mood congruent, stable. His thought process revealed no evidence of formal thought disorder, delusions, depressive cognition or death wishes. His memory and judgment were found to be intact. On evaluation by three Psychiatrists, it was found that, as told by CCL on 5th day of his work, he had physical relationship with a girl at his workplace. During that time, the victim's father came at that place. Her father beat him and filed police case against him. He left his school about three years back.

His father sent him to a job at Motorcycle repairing shop since 01.06.2022. Report further mentions that there is no history of any psychiatric illness in family members and there is no history of any major medical and surgical illness in CCL. His speech was continuous, coherent, relevant. There is no evidence of mental incapacity of CCL to commit such offence. He has ability to understand consequences of the offence.

13. The learned Principal Magistrate while committing the case to Children's Court vide order dated 16.12.2022 observed that, according to reports of probation officer, CCL accepted that, he had committed alleged act with victim. Physical capacity assessment report of CCL and mental assessment report is considered by board. Physical and mental condition of CCL was found well. Age of CCL on the date of commission of offence was 17 years, 7 months and 13 days. However, the age of victim was 6 years. The assessment by the Board under the Act correlates the heinousness of crime to the maturity of judgment involves the exercise of both cognitive abilities and psychological capabilities. Psychological capabilities enable an individual to control his impulses through the use of reason to guide his behaviour, the long term consequences of his acts being factored in. As per medical report of victim, redness

and tenderness present on inner aspect of labia and at hymen. Report clarifies in respect of psycho-social capabilities of CCL. During interaction with CCL, board noticed about the ability of CCL to control his impulses through the use of reason to guide his behaviour. It was found that, CCL was stable. He has ability to understand consequences of the offence. As per statement of victim she was picked up by CCL and taken to abandoned house. He was caught by father of victim. He started running. This shows that he knows the consequences of the act.

14. Section 12 of the Juvenile Justice Act reads as follows :

“ 12. Bail to a person who is apparently a child alleged to be in conflict with law. --

(1) When any person, who is apparently a child and is alleged to have committed a a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:

Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the persons release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.

(2) When such person having been apprehended is not released on bail under sub-section (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home 1[or a place of safety, as the case may be] in such manner as may be prescribed until the person can be brought before a Board.

(3) When such person is not released on bail under sub-section (1) by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.

(4) When a child in conflict with law is unable to fulfill the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail.”

15. Section 12 of the Juvenile Justice Act deals with grant of bail to a child contains a non-obstante clause to say that a child shall notwithstanding anything contained in the Code of Criminal Procedure, 1973, or in any other law for the time being in force, be released on bail subject to proviso enumerated therein. This makes it clear that applications of provisions of Cr.P.C. is excluded in case of bail plea of child. Section 12 is a specific provision in a special statute that deals with bail. Section 5 of Cr.P.C. stipulates that nothing contained in the Code shall, in the absence of provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special

form of procedure prescribed by any other law for the time being in force. The considerations for grant of bail or denial of bail under Section 12 are completely different and distinct from those under Section 439 of Cr.P.C. The Delhi High Court in the case of ***CCL A' Vs. State (NCT of Delhi)***¹ has observed that application of provisions of Cr.P.C. is excluded in the case of bail plea of child. Section 12 is a specific provisions in the special statute that deals with the matter of bail and accordingly application under Section 439 of Cr.P.C. is also necessarily excluded. The bail on behalf of a child is not maintainable under Section 439 of Cr.P.C. Section 12 of the Juvenile Justice Act mandate grant of bail to a child and the only grounds on which bail may be denied to a person, who is apparently a child, are the danger that the child's release is likely to bring the child in association with a known criminal; or there is risk to the moral, physical or psychological safety of the child itself; or if the child's release would defeat the ends of justice.

16. Some of the Definitions under the Juvenile Justice Act of 2015 which are relevant for adjudicating this appeal are as follows :

“ 2. Definitions. - In this Act, unless the context otherwise requires, -

¹ 2021 Cri.L.J. 1251

(12) “child” means a person who has not completed eighteen years of age;

(13) “child in conflict with law” means a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence;

(20) “Children’s Court” means a court established under the Commissions for Protection of Child Rights Act, 2005 or a Special Court under the Protection of Children from Sexual Offences Act, 2012, wherever existing and where such courts have not been designated, the Court of Sessions having jurisdiction to try offences under the Act;

(33) “heinous offences” includes the offences for which the minimum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment for seven years or more;

(35) “juvenile” means a child below the age of eighteen years;” (54) “serious offences” includes the offences for which the punishment under the Indian Penal Code (45 of 1860) or any other law for the time being in force, is imprisonment between three to seven years; ”

17. The Act of 2015 provides preliminary assessment to be done by Board in case of heinous offence alleged to have been committed by a child, who has completed or his above age of sixteen years, under Section 15 of the Act and Section 18(3) contemplates passing order after preliminary assessment Sections 15 & 18(3) of the Act reads as follows :

“ Section 15 :

15. Preliminary assessment into heinous offences by Board. –

(1) In case of a heinous offence alleged to have been committed by a child, who has completed or is above the age of sixteen years, the Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence, and may pass an order in accordance with the provisions of sub-section (3) of section 18:

Provided that for such an assessment, the Board may take the assistance of experienced psychologists or psycho-social workers or other experts. Explanation.—For the purposes of this section, it is clarified that preliminary assessment is not a trial, but is to assess the capacity of such child to commit and understand the consequences of the alleged offence.

(2) Where the Board is satisfied on preliminary assessment that the matter should be disposed of by the Board, then the Board shall follow the procedure, as far as may be, for trial in summons case under the Code of Criminal Procedure, 1973 (2 of 1974):

Provided that the order of the Board to dispose of the matter shall be appealable under sub-section (2) of section 101:

Provided further that the assessment under this section shall be completed within the period specified in section 14.”

Section 18(3) :

“18. Orders regarding child found to be in conflict with law. –

(1)

(2)

(3) Where the Board after preliminary assessment under section 15 pass an order that there is a need for trial of the said child as an adult, then the Board may order transfer of the trial of the case to the Children’s Court having jurisdiction to try such offences.”

18. In the case of ***Sandeep Ayodhya Prasad Rajak, A minor through his mother Shimla Ayodhya Prasad Rajak Vs. The State of Maharashtra (Supra)*** this Court has analyzed the provisions of the Juvenile Justice Act and also made reference to the decision of this Court in the case of ***Prasad Subhash Khade Vs. The State of Maharashtra*** dated 18.03.2021 as well as the decision of the Delhi High Court in the Case of ***CCL A’ Vs. State (NCT of Delhi)***² and observed that, the CCL therein was above 16 years of age on the date of commission of the alleged offence and the preliminary assessment order was passed by the Juvenile Justice Board and it was directed that the case which transferred to Children's Court for trial as per Section 15 r/w Section 18(3) of the Juvenile Justice Act, this Court by relying upon Section 12 of the Juvenile Justice Act, granted bail to the Juvenile. It was observed that, reading of

² 2021 Cri.L.J.1251

Sections 12 makes it imperative to release the CCL, who has alleged to have committed bailable or non-bailable offence and this power has to be exercised notwithstanding anything contained in the Code of Criminal Procedure. It was further observed that the parameters for considering an application for bail filed by a Juvenile under Sections 12 of the Juvenile Justice Act are distinguishable from the application filed under Section 439 of Cr.PC. and after following the procedure as prescribed under the Act, i.e. from Sections 15 to 18 when a decision is taken to try a juvenile as an adult, the issue that arises is whether bail can be denied to the Juvenile. It was further observed that, even if the juvenile is tried as an adult, the Court is not precluded from exercising the powers of Section 12 of the Juvenile Justice Act. The Court considered the fact that the case of CCL therein does not fall in any exceptions stipulated in Section 12 of the Act. The Court also noted the factual aspects of the case, wherein it was submitted by the Advocate for CCL that the involvement of the CCL was doubtful as he was identified as, 'Prema', but the prosecution has failed to establish that the said juvenile was known as 'Prema' and, therefore, identification by the uncle based on his photograph, was argued to be a non-reliable circumstance. The implication of the Juvenile was on the basis of the statement of his paternal uncle

with whom his family was at loggerhead. Similar view was taken in the case of *Shubham @ Bablu Milind Suryavanshi Vs. The State of Maharashtra* (supra).

19. In this case, the learned Judge while passing order dated 20.02.2023 noted that, while deciding the bail application the best interest of the applicant who was CCL at the time of commission of offence and ends of justice is required to be considered. It was recorded that victim girl was 6 years old and CCL was 17 years old at the time of offence. The Court also noted apprehension of prosecution that if applicant is released on bail, there is every possibility his joining bad company. The previous application was rejected by Sessions Court vide order dated 17.11.2022 after considering the report of probation officer and report by Psychiatry department. It was observed that, it is not safe to release the appellant. The first order by Juvenile Justice Board refers to report of probation officer, report of S.J.P.U. and scope of Section 12 of the Act. It is relevant to note that the complainant had kept the CCL in the shop on 01.06.2022. Due to heavy and stormy rain, the roof was blown off and the house of complainant had collapsed. The complainant and his family resided on upper room located on above shop. On 05.06.2022 when the victim came at the room by

running, she told her mother that CCL took her at bathroom of abandoned house. He removed her clothes and inserted his private part in the urinal passage of the victim. At that time the first informant came to the spot and rescued the victim. CCL ran away from the place of incident. It is apparent that the CCL was aware about the nature of the act committed by him and its consequences. It is pertinent to note that the victim was aged around 6 years at the time of incident. She has stated that the CCL had subjected her to penetrative sexual assault. Statements of witnesses were recorded. The medical examination of the victim was conducted. Report mentions that, there was redness and tenderness present on inner aspect of labia and at the hymen. The CCL was aged around 17 years, 7 months & 13 days at the time of incident, whereas the victim was aged about 6 years. I have perused the Psychological Report as well as Probationary Officer's Report. The observations in the report's are referred to herein above. The Juvenile Justice Board in its order dated 13.07.2022 referred to report S.J.P.U., wherein it is stated that, if he released on bail he is likely to commit similar offence. The Juvenile Justice Board had observed that, release of CCL will put him in adverse situation. The order dated 17.11.2022 passed by learned Additional Sessions observed that the case does not fall under category described under Section 12 of

the Act to be released on bail. The order dated 20.02.2023 passed by Additional Sessions Judge, observed that seriousness of offence, mental agony of victim, if CCL is released on bail it would defeat ends of justice. Considering all the documents on record I am of the opinion that the case of appellant is covered by exceptions stipulated in proviso to Section 12 of the Act. There appears reasonable ground that CCL would be exposed to moral physical or Psychological danger and his release would defeat the ends of justice. The victim was too minor and was unable to understand anything about the alleged act. CCL was able to understand consequences of act. Considering all the above aspects, if the CCL is released on bail, it would defeat the end of justice. CCL has not made out any ground to release him on bail.

ORDER

Criminal Appeal No.445 of 2023 is rejected and disposed off accordingly.

(PRAKASH D. NAIK, J.)