



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPEAL NO.588/2023

Amit Chandrabhan Kokurde .Vs. The State of Maharashtra thr. PSO P.S. Bela, Dist.
Nagpur and another

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. Y. A. Khullarwar, Advocate for appellant.
Mrs. M. H. Deshmukh, A.P.P. for respondent no.1-State.
Ms C. Bhute, Advocate appointed for respondent no.2.

CORAM : ANIL L. PANSARE, J.

DATE : 12.09.2023

Criminal Application No.673/2023

Heard.

2. The applicant has filed the present application under Section 389 of the Code of Criminal Procedure, 1973 for suspension of sentence and for grant of bail.

3. The applicant has been convicted by the learned Additional Sessions Judge (Special Judge under POCSO), Nagpur by judgment and order dated 13.03.2023 in Special (Child Act) Case No.315/2018, for the offences punishable under Sections 363 and 376(3) of the Indian Penal Code, 1860. The maximum punishment awarded is Twenty years and fine.

4. Learned counsel for the applicant invited my attention to the evidence of the victim, who is/was 17 years old. He submits that the victim has admitted that she and the applicant were in a relationship. Her parents

opposed their friendship. Her parents wanted her not to keep relationship with the applicant. In her evidence as also in the evidence of the informant-mother, it has come on record that the victim has willingly eloped with the applicant.

5. Despite aforesaid evidence, the trial court has held the applicant guilty of the offence punishable under Section 363 of the IPC. He further submits that evidence of Doctor indicates that the opinion as regards sexual assault has been kept pending for further reports, which have been never brought on record before the trial Court.

6. The counsel for the applicant has relied upon the judgment in the case of **Ashik Ramjan Ansari Vs. State of Maharashtra and anr;** reported in **2023 LawSuit (Bom) 1208**, passed by coordinate bench of this court wherein, in similar set of facts where the victim was 17 years 9 months old, this Court has acquitted the accused therein on the count that the victim was mature enough to understanding the outcomes of her actions. The Court, in paragraph 29, observed thus:

“29. In the wake of the clear case of consensual sex, emerging from the prosecution case, between a girl aged 17 years and 5 months and a man aged 25, merely because the statute provide punishment for an act of sexual indulgence, as the girl has not attained the age of maturity i.e. 18, when it can be specifically inferred from her conduct that she was capable of understanding the consequences of her act, I am of the opinion that the learned Special Judge has erred in

convicting the appellant for committing the offence of rape under Section 376 of IPC as well as the offences under Sections 4 and 6 of the POCSO Act and awarded him the sentence in the impugned judgment.”

7. I respectfully record my descent to follow the ruling, for it is hit by the doctrine of *per incuriam*.

8. The Hon’ble Supreme Court in the case of Eera through Dr. Manjula Krippendorf Vs. State (NCT of Delhi) and anr; reported in (2018) 15 SCC 133, while dealing with the interpretation of Section 2(1)(d) of the POCSO Act, in context with the argument on ‘mental age’, in respect of mentally retarded person, has also considered the ‘mental competence’ of such a person and noted in paragraphs 80, 81, 93 and 94 as under:

“80. The learned counsel for the appellant relying upon the said provisions would contend that IPC prescribes protection on the basis of maturity of understanding to a child, and the same protection has been extended to persons suffering from unsoundness of mind and, therefore, it is limpid that a penal law sometimes makes departure from the chronological age by placing more emphasis on capacity to understand the nature and consequences of an act. On that basis, an argument has been structured to treat the mental age of an adult within the ambit and sweep of the term “age” that pertains to age under the POCSO Act. In this regard, I am obligated to say what has been provided in the IPC is on a different base and foundation. Such a provision does treat the child differently and carves out the nature of offence in respect of an

insane person or person of unsound mind. There is a prescription by the statute. Learned counsel would impress upon us that I can adopt the said prescription and apply it to dictionary clause of POCSO Act so that mental age is considered within the definition of the term “age”. I am not inclined to accept the said submission.

81. In this regard, it is worthy to note that the legislature despite having the intent in its Statement of Objects and Reasons and the long Preamble to the POCSO Act, has thought it wise to define the term “age” which does not only mention a child but adds the words “below the age of 18 years”. Had the word “child” alone been mentioned in the Act, the scope of interpretation by the Courts could have been in a different realm and the Court might have deliberated on a larger canvass. It is not so.

82 to 92.

93. The situation can be viewed from another aspect. The POCSO Act has identified minors and protected them by prescribing the statutory age which has nexus with the legal eligibility to give consent. The Parliament has felt it appropriate that the definition of the term “age” by chronological age or biological age to be the safest yardstick than referring to a person having mental retardation. It may be due to the fact that the standards of mental retardation are different and they require to be determined by an expert body. The degree is also different. The Parliament, as it seems, has not included mental age. It is within the domain of legislative wisdom. Be it noted, a procedure for determination of age had been provided under Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules,

2000. The procedure was meant for determination of the biological age. It may be stated here that Section 2(12) of the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016) defines “child” to mean a person who not completed eighteen years of age. There is a procedure provided for determination of the biological age. The purpose of stating so is that the Parliament has deliberately fixed the age of the child and it is in the prism of biological age. If any determination is required, it only pertains to the biological age, and nothing else.

94. The purpose of POCSO Act is to treat the minors as a class by itself and treat them separately so that no offence is committed against them as regards sexual assault, sexual harassment and sexual abuse. The sanguine purpose is to safeguard the interest and well being of the children at every stage of judicial proceeding. It provides for a child friendly procedure. It categorically makes a distinction between a child and an adult. On a reading of the POCSO Act, it is clear to us that it is gender neutral. In such a situation, to include the perception of mental competence of a victim or mental retardation as a factor will really tantamount to causing violence to the legislation by incorporating a certain words to the definition. By saying “age” would cover “mental age” has the potential to create immense anomalous situations without there being any guidelines or statutory provisions. Needless to say, they are within the sphere of legislature.”

9. Thus, the Supreme Court has held that the age of child as stipulated in the POCSO Act is 18 years and to include the perception of mental competence of a victim

or mental retardation as a factor to vary with biological age, will create immense anomalous situations without there being any guidelines or statutory provisions. This judgment of the Supreme Court has not been considered by the co-ordinate bench of this Court in *Ashik's* case (supra) and is thus decision given *per incuriam*. The applicant cannot derive any benefit from the said judgment.

10. Coming back to the suspension of sentence, the learned A.P.P. and the learned counsel appearing for the victim have opposed the application on this very ground that the victim being below 18 years, her consent would be insignificant. To my mind, her consent may be insignificant for the offence punishable under the provisions of the POCSO Act. Her consent, however, for the offence punishable under Section 363 of the IPC would definitely be significant.

11. It appears that that the Special Court has not considered this aspect in proper perspective. Similarly, the medical evidence indicates that the opinion on the point of sexual assault is inconclusive.

12. That being so and considering the age of the applicant at the relevant time, which was 21 years and considering the fact that the applicant has made out a prima facie case to deal with the entire evidence and further considering the fact that the applicant has no criminal antecedents, in my considered view, this is a fit case where the sentence ought be suspended,

particularly when the applicant was on bail pending trial and has not misused the liberty. Hence, following order is passed.

ORDER

- (i) The application is allowed.
- (ii) The execution of sentence imposed upon the applicant by Additional Sessions Judge (Special Judge under POCSO), Nagpur by judgment and order dated 13.03.2023 in Special Criminal (Child) Case No. 315/2018, for the offences punishable under Sections 363 and 376(3) of the Indian Penal Code, 1860 is hereby suspended.
- (iii) Applicant – Amit Chandrabhan Kokurde, shall be released on bail on he furnishing PR. bond in the sum of Rs.50,000/- with one or two sureties in the like amount before the trial Court.
- (iv) The applicant shall remain present before this Court at the time of final hearing of the appeal.

The application is disposed of.

Registry to process the appeal for final hearing as per the rules.

(Anil L. Pansare, J.)