

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

CRIMINAL APPLICATION (BA) NO. 1283 OF 2022

ASHISH S/O GHANSHYAM RAUT

VS

STATE OF MAH. THR. PSO BRAMHAPURI DIST.CHANDRAPUR AND ANOTHER

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders.

Mr. A.M.Jaltare, Advocate for applicant.
Mr. N. R. Rode, APP for respondent.
Ms. Deepali Sapkal, Advocate for respondent No.2.

CORAM : ANIL L. PANSARE J.

DATE : 17/01/2023

Heard.

2. This application is filed by the applicant under Section 439 of the Code of Criminal Procedure. The applicant has been arrested on 02/02/2022 in Crime No.0049/2022, registered with Police Station, Bramhapuri, District – Chandrapur for the offence punishable under Sections 376(3) and 354(A) of the Indian Penal Code (IPC) and Sections 4 and 8 of the Protection of Children from Sexual Offences Act(POCSO).

3. Section 376 provides for punishment for committing rape on women under 16 years of age. Section 354-A provides punishment for sexual harassment. Section 4 of the POCSO Act provides for punishment for penetrative sexual assault and if the penetrative sexual assault has been committed against the child below 16 years of age, the punishment provided is imprisonment for term which shall not less than 20 years and which may extend to imprisonment for remainder of natural life. Section 8 of the POCSO Act provides for punishment for sexual assault.

4. The order passed by the learned Sessions Court indicates that the victim was 13 years old at the time of incident. The allegation against the applicant is that on 31/01/2020 at about 10.30p.m., he called victim at Hanuman Temple and committed penetrative sex. It appears that the victim and the applicant came in contact on social media. On the day of incident, they exchanged some messages. It appears that on 01/02/2022, when the family of victim was asleep, the victim went out of the house and met the accused again at the same place i.e. Hanuman Temple. The applicant took victim at one structure under construction and tried to kiss her and pressed her both breasts. At that time, the applicant

noticed that the father of the victim was standing near the temple. He got frightened. The parents of the victim then questioned her. She disclosed them regarding the incident that occurred on 31/01/2022. The mother of the victim reported the incident at Bramhapuri Police Station. The accused was arrested and after completion of the investigation, the charge-sheet has been filed.

5. Mr.Jaltare, learned counsel for the applicant has made a strange argument that the version of the victim is falsified on the ground that there was no injury over perineal region/genital area. He has invited my attention to the medical examination report dated 02/02/2022. The doctor of the Medical College has recorded following findings :-

- (i) Victim is menstruating at present. Day 2 of menses.
- (ii) Old hymeneal tear present at 6 'O' clock position.
- (iii) No injuries noted over body.
- (iv) No injuries, edema or bleeding noted over the perineal region/genital area.

6. Learned counsel for the applicant submits that there being old hymeneal tear and there being

no injury on genital area, the version of victim cannot be believed.

7. If this argument is to be accepted, the concept of consensual sex will have to be completely ignored. That apart, the argument suggests that in all cases of rape, there has to be fresh hymeneal tear, so also the presence of injuries on genital area. This argument does not consider the sufferance of the victim of the earlier penetrative assault, whether consensual or forcible. One cannot be oblivious to the fact that there can be yen number of reasons for having old hymeneal tear so also the absence of injury at genital area.

8. Learned counsel for the applicant has however, relied upon the following judgments in support of his contentions that presence of injury at genital part and fresh hymeneal tear is necessary.

(i) Kiran Chandrakant Ovhal vs. The State of Maharashtra and another reported in 2022 ALL MR (Cri) 1585.

(ii) Pralhad vs. State of Rajasthan reported in 2019 ALL MR(Cri) 793(S.C.).

9. I have gone through the above judgments. In the case of *Kiran Ovhal* (supra), the victim was six

years old, there was an enmity between the family of appellant and victim. There was no identification of person in FIR. The medical opinion was found to be not conclusive. The doctor expressed that the possibility of fingering can not be ruled out. The version of victim was that the accused did something, but did not tell exactly what he did. In that context, the doctor having observed no injury at perineal region and that hymeneal was intact and that there was no findings of penetrative vaginal intercourse and that attempt to vaginal fingering cannot be ruled out, the Apex Court granted benefit to the accused.

10. In the case of *Pralhad* (supra), the victim was eight years old. The allegations were that she was taken away by the accused on the pretext of giving chocolate from the shop. The victim, however, did not return back. Her body was found near the house of a villager. The victim's father lodged FIR making allegations of rape and murder against the accused. The Medical Officer found five injuries, which were on thighs, right leg, nose and right wrist. The post-mortem report indicated the cause of death to be hemorrhage shock. The Hon'ble Apex Court on the basis of evidence, found that the ingredients of offence under Section 302 of IPC were established but, there was no reliable material on record to

convict the accused for the offences under Sections 3 and 4 of the POCSO Act. There was no evidence of sexual assault.

11. Thus, in both the cases, the facts were such that there was hardly any possibility of finding injury at the genital region of the victim. In fact, in both the cases, there was no allegations by the victim of accused committing penetrative sex.

12. In the present case, the victim has stated that the applicant has committed penetrative sexual intercourse. The statement of victim indicates that the physical relation was consensual. That appears to be the reason, why there were no injuries at the genital region. The old hymeneal tear is indicative of previous sexual intercourse. This medical evidence cannot be taken aid of, even to argue that the ingredients of Section 376(3) of IPC or Section 4 of POCSO Act are not attracted. The submissions so made are accordingly rejected being without any substance.

13. Learned counsel for the applicant has not invited my attention to any other evidence to doubt the prosecution version and that therefore, there is no reason to disbelieve the same.

14. Learned APP has rightly argued that even if the theory of consensual intercourse is to be accepted, the consent given by the victim will be insignificant, she being thirteen years old at the relevant time. There cannot be any dispute that the offence in question is a serious offence. A thirteen years old child has been sexually exploited.

15. Learned counsel for the applicant has not sought relief on any other ground except that the version of victim cannot be believed.

16. The same having found without any substance, the applicant is not entitled to be released on bail at least at this stage. Hence, the application is rejected.

17. The observations made in this order are prima facie in nature and are made for deciding the present application only. The learned Judge, who is seisin of the trial, shall not get influenced with the above observations.

JUDGE