

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
INTERIM APPLICATION NO. 741 OF 2024
IN
CRIMINAL APPEAL NO. 336 OF 2024

Ganesh Vijay Mahadik ... Applicant/Appellant
V/s.
State of Maharashtra and Anr. ... Respondents

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Dr. Abhinav Chandrachud with Ms. Sheetal Mhatre, for the
appellant/applicant.
Ms. Manisha Tidke, APP, for the respondent/State.
Ms. Gauri Velankar, for respondent no. 2

CORAM : KISHORE C. SANT, J.

DATE : 3RD MAY 2024.

PC:

1. Heard.
2. This application is for suspension of sentence and release of the applicant on bail. The applicant is held guilty by the learned Special Judge under POCSO Act, Borivali (Div), Dindoshi, Goregaon, Mumbai in Sessions Case No. 251 of 2021 dated 04/10/2023 for the offences punishable under section 376 of Indian Penal Code and under sections 4, 8 and 12 of Protection of Children from Sexual Offences

(POCSO) Act. The awarded sentences are as stated below:

Sr. No.	Sections	Punishment	Fine Amount
1.	376 of IPC	R.I. 10 years	Rs. 10,000/- and in default, to undergo RI for six months
2	4 of POCSO, no separate sentence in view of section 42	--	---
3.	8 of POCSO	R.I. 3 years	Rs.5,000/- and in default, to undergo RI for two months
4.	12 of POCSO	R.I. 1 years	Rs.1,000/- and in default, to undergo RI for 15 days

3. All the sentences are directed to run concurrently. Out of fine amount of Rs. 10,000/- was directed to be given to the victim.

4. Learned advocate for the applicant submitted undisputed facts that the alleged incident took place on 10/05/2021 in the night. On 11/05/2021 the accused came to be arrested. The date of birth of victim is 25/08/2024. On this admitted facts, it is argued that the prosecution has not examined any neighbour which was necessary in view of the allegations that the victim raised shouts at the time of incident. There is no sufficient medical evidence though the victim was

examined immediately on the next date i.e. 11/05/2021. There is no evidence of the Chemical Analyser to connect the accused with the alleged incident. From the evidence of the Doctor he pointed out that he did not find any fresh injuries on the person of the victim. In respect of hymen, he only states that it is breach in continuity. It is therefore, argued that the benefit should go to the accused. Learned advocate for the applicant relies upon the judgment in the case of **“Ashik Ramjaini Ansari vs State of Maharashtra and Anr.”**¹ **“State of Rajasthan and Babu Meena”**² and **“State of Maharashtra and Vasant Madhav Devre.”**³

5. Learned APP vehemently submits that the victim was below 17 years of age. Her evidence is corroborated by her mother. There is also Doctors evidence which shows that there was injury to the hymen as breach continuity and this evidence is sufficient to prove the guilt of the accused.

6. Learned advocate for the respondent no. 2 submits that in this case the victim is minor and consent, assuming if any, is of no use to the accused. As already observed this Court is not considering the application on the ground of consent.

7. This Court has held that when the victim is 17 years and

1 (2023) SCC Online Bom 1390

2 (2013) 4 SCC 206

3 (1988) SCC online Bom 403

above and the age gap between the accused and the victim is not much and they both have had consensual sex then the offence would not be said to be under POCSO act. Further learned advocate for the applicant relies upon the judgment in the case of “**State of Rajasthan and Babu Meena**” (supra) wherein victim had not raised shouts was taken as one of the considerations, come to the conclusion that there was consensual sex. Next judgment relied upon is in the case of “**State of Maharashtra and Vasant Madhav Devre**” (supra) this was again a case of consensual sex. This Court on facts find that these judgment are not applicable to the present case. In this case, victim is below 17 years of age.

8. This Court mainly considering as to whether the prosecution has proved the offence having taken place. In this case, material for the prosecution to prove on record is medical evidence and CA report. Considering the allegations that incident took place in night between 10th and 11th May 2021. The victim was examined next day on 11/05/2021 and still the prosecution could not produce on record the Forensic Lab Report. It was possible to collect the clothes of the victim and to send it for the CA report. There is no report connecting accused with the alleged incident produced on record and

in such a case this Court *prima facie* find that the benefit should go to the accused.

9. Considering the above position, this Court finds that the applicant is in jail since 11th May 2021. The maximum punishment awarded is of 10 years. Though the fine amount is not deposited, the same shall be deposited in the trial Court. Hence, the following order:

O R D E R

- i) Application is allowed.
- ii) Substantive sentence awarded by the Special Judge under POCSO Act, Borivali (Div), Dindoshi, Goregaon, Mumbai in Sessions Case No. 251 of 2021 dated 04/10/2023, stands suspended.
- iii) The applicant shall be released on bail on furnishing P.R. bond of Rs. 15,000/- and one solvent surety in the like amount. Subject to depositing of fine amount in the trial Court.
- iv) The applicant shall attend the police station once in month i.e. on second Saturday between 11.00 a.m to 1.00 p.m.
- v) The applicants shall not contact the victim.
- vi) The applicant shall not enter in the jurisdiction of Goregaon Police Station (W). Except for attending the police station.

vii) The applicant shall furnish details of residential address and other contact details such as mobile number etc. to the concerned police station. If there is any change in the contact details the same will be immediately informed to the concerned police station.

10. With this, the application is disposed of accordingly.

(KISHORE C. SANT, J)