

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

910 CRIMINAL APPLICATION NO. 2677 OF 2024
IN CRI. APEAL/940/2024
WITH
CRIMINAL APPEAL NO. 940 OF 2024

GANESH @ BHARAT ASHOK MALI (BHIL)
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER

...
Advocate for Applicant : Mr. Shaikh Tousif Saifuddin a/w. Mr. Samir Shaikh
APP for Respondent/State : Mrs. A.S. Mantri
Advocate for Respondent 2 : Ms. Devika Patil (appointed)

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CORAM : ARUN R. PEDNEKER, J.
Dated : August 06, 2025

PER COURT :-

1. Heard the learned counsel for the applicant, the learned APP for respondent/State and Mrs. Devika Patil, learned counsel appointed for respondent No. 2/victim.
2. Applicant/appellant is convicted by the learned Special Judge (POCSO) & Additional Sessions Judge, Dhule vide judgment and order dated 22.2.2024 passed in Special Case No. 49/2016. The relevant part of operative order is as under :-

"O R D E R

- 1) Accused Ganesh @ Bharat Ashok Mali (Bhil) is convicted vide Section 235(2) of the Code of Criminal Procedure for the offences punishable under section 376(2) and 420 of the Indian Penal Code and Section 4 and 6 of The Protection of Children From Sexual Offences Act, 2012.
- 2) He is sentenced to suffer Rigorous Imprisonment for ten years and to pay fine of Rs.1,00,000/- (Rs. One Lakh only) in respect of offence punishable under Section 6 of Protection of Children From Sexual Offences Act, 2012. In default of payment of fine, he is further sentenced to suffer Rigorous Imprisonment for one year.

3) He is sentenced to suffer Rigorous Imprisonment for five years and to pay fine of Rs.10,000/- (Rs. Ten Thousand only). In default of payment of fine, he is further sentenced to suffer Rigorous Imprisonment for two months in respect of offence punishable under Section 420 of Indian Penal Code.

4) Since sentence is awarded under Section 6 of POCSO Act, separate sentence for the offence punishable under Section 376(2) of IPC and Section 4 of POSCO Act, 2012 is not awarded in view of Section 42 of POCSO Act.

5)"

3. This Court by order dated 30.07.2025 has recorded the submissions of the learned counsel for the applicant as under :-

"2. The learned counsel for the applicant has pointed out the school leaving certificate of the victim which is at page No. 65 wherein her date of birth is mentioned as 19.11.1999. The learned counsel submits that the said document could not have been relied upon by the Trial Court in absence of deposition of the person who has taken the entry in respect of date of birth of the victim. For that purpose, the learned counsel has relied upon para No. 14 of the judgment of the Hon'ble Supreme Court in the case **Manak Chand alias Mani Vs. State of Haryana reported in 2023 SCC OnLine SC 1397**, which is as under :-

"14. This Court in *Birad Mal Singhvi V. Anand Purohit*, 1988 Supp SCC 604 had observed that the date of birth in the register of a school would not have any evidentiary value without the testimony of the person making the entry or the person who gave the date of birth.

"14. ...The date of birth mentioned in the scholar's register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. The entry contained in the admission form or in the scholar's register must be shown to be made on the basis of information given by the parents or a person having special knowledge about the date of birth of the person concerned. If the entry in the scholar's register regarding date of birth is made on the basis of information given by parents, the entry would have

evidentiary value but if it is given by a stranger or by someone else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value."

3. The learned counsel submits that in the present case, ossification test of the victim has been conducted and in terms of the ossification test, the age of the victim is shown to be 18 year (-) one year or (+) one year. The learned counsel submits that in POCSO case the age of the victim should be considered at higher side and from thereafter two years margin of error has to be considered to determine the age of the victim. For that purpose, the learned counsel has relied upon the judgment of Delhi High Court in the case of **Court on its Own Motion Vs. State of NCT of Delhi reported in 2024 SCC OnLine Del 4484**, more particularly para No. 1 wherein questions of law are formulated and the answers given at para No. 46, as under :-

"46. As an upshot of our foregoing discussion, the Reference is answered as under: -

(i) Whether in POCSO cases, the Court is required to consider the lower side of the age estimation report, or the upper side of the age estimation report of a victim in cases where the age of the victim is proved through bone age ossification test?

Ans: In such cases of sexual assault, wherever, the court is called upon to determine the age of victim based on 'bone age ossification report', the upper age given in 'reference range' be considered as age of the victim.

(ii) Whether the principle of 'margin of error' is to be applicable or not in cases under the POCSO Act where the age of a victim is to be proved through bone age ossification test.

Ans: Yes. The margin of error of two years is further required to be applied."

4. The learned APP as well as the learned counsel appointed for respondent No. 2 opposed the application filed for suspension of substantive by submitting that the incident in question happened 2 to 3 years prior to the registration of the offence and at the relevant time the victim was minor. The applicant failed to perform marriage with victim even after victim

delivered the child and therefore, the case is registered against the applicant for aforesaid offence.

5. Considered the above submissions and perused record produced before this Court. In the deposition, PW 2 – Dr. Ramesh has stated that history is narrated by the victim that she was having affair with applicant five years back and she had sexual intercourse with applicant prior to two years of 29.08.2016 when she was referred to medical examination. Ossification test in this case is conducted wherein doctor has opined that the age of the victim is 18 years (-) one year or (+) one year. As such, age of the victim at the time of offence would be 18 years (-) one year or (+) one year. In terms of judgment of Delhi High Court in the case of **Court on its Own Motion Vs. State of NCT of Delhi reported in 2024 SCC OnLine Del. 4484**, margin of error of two years is required to be applied. As such, at the relevant time, the victim is possibly major.

6. Having considered the above aspects of the matter, it appears that the applicant is in jail from last 18 months and sentence of 10 years is imposed on the applicant by the trial Court. It is stated that fine amount is already deposited by the applicant in trial Court. In view of the above, I hold that applicant has arguable case on merits on the age of the victim. The appeal will take its own time. No purpose would be served by keeping the applicant behind bars till the conclusion of the appeal. Hence, substantive sentence needs to be suspended.

7. In view of the discussion made above, the application filed for suspension of substantive sentence is allowed and disposed of. The above substantive sentence imposed by the trial Court on the applicant is suspended. Applicant shall be released on bail on such terms and conditions

which the trial Court may deem fit and proper.

8. Mrs. Devika Patil, learned appointed counsel to represent the cause of respondent No. 2 shall be paid fees of Rs.10,000/- by the High Court Legal Services Sub-Committee, Aurangabad.

9. Appeal is **admitted**. After admission, the learned APP waives service of notice for respondent/State and Mrs. Devika Patil, learned counsel waives service of notice for respondent No. 2.

10. Call R. & P.

(ARUN R. PEDNEKER, J.)

ssc/