



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 342 OF 2026
IN
CRIMINAL APPEAL NO. 48 OF 2026

Devidas Sheshrao @ Shashikant Kundhare,

Age : 26 years, Occ :

R/o : Varkhed, Taluka Newasa,

District Ahmednagar.

... Applicant

Versus

1. State of Maharashtra

2. PARTY X Y Z

... Respondents

.....

Mr. S. G. Ladda, Advocate for the Applicant

Mr. B. B. Bhise, APP for Respondent No.1-State

Mr. K. N. Shermale, Advocate for Respondent No.2

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CORAM : ABHAY S. WAGHWASE, J.

Reserved on : 07.04.2026

Pronounced on : 16.04.2026

ORDER :

1. Present application is for suspension of sentence and grant of bail in consequence to conviction recorded by learned Special Judge (POCSO) and Additional Sessions Judge, Newasa, District Ahmednagar in Special Case (POCSO) No. 4 of 2022, for offence under sections 363, 366 and 376 of IPC as well as Section 6 of the Protection of Children from Sexual Offences Act (POCSO Act).

2. Heard. Sum and substance of arguments of learned counsel Mr. Ladda for the applicant is that, according to prosecution, victim was 15 years of age at the time of alleged incidence. However, he criticizes such prosecution case primarily for want of cogent, reliable and convincing evidence, i.e. on the point of age of victim. He would point out that, admittedly there is fundamental burden on prosecution, in cases of such nature involving provisions of POCSO Act, at the threshold to prove that victim was a “child” as contemplated under Section 2(d) of POCSO Act, i.e. below 18 years of age.

3. He would strenuously submit that here, evidence on behalf of prosecution lacks the necessary documents which are required to be considered in view of various legal pronouncements, including the recent one of P. *Yuvaprakash v. State Represented by Inspector of Police* (2024) 17 SCC 684 reported in (2024) 17 SCC 684. He invited attention of the Court to the observations of Hon’ble Apex Court in paragraphs 13, 14, 16, 17. Learned counsel also invited attention of this Court to the observations in the case of *Rishipal Singh Solanki v. State of U.P.* (2022) 8 SCC 602 and *Abuzar Hossain v. State of West Bengal* (2012) 10 SCC 489, which are taken into account by the Hon’ble Apex Court in above referred case, and would submit that

here, apparently and admittedly what prosecution is banking on here is a bonafide certificate which, according to him, does not qualify for consideration to prove age.

4. Learned counsel further strenuously submitted that, here, statement of victim recorded under Section 164 of Cr.P.C. is silent on date of birth and as such, it is his submission that, the solitary piece of evidence on behalf of prosecution in trial court was bonafide certificate which, according to him, is a certificate issued by school authorities merely acknowledging the pupil or student to be taking education in that particular institution and nothing beyond it, and as such, it has no probative value. According to him, here, neither document of first school where victim allegedly took education, nor birth certificate issued by School, Municipal Counsel/Corporation or Grampanchayat is handed down by either of the parents nor there is any document gathered by the Investigating Officer which is allegedly issued by any of the competent authorities, of whom there is reference in above referred series of judgments of the Hon'ble Apex Court. Learned counsel also pointed out that there is no medical evidence on the point of age of victim even by radiological means.

5. Learned counsel very emphatically submitted that, law obligates court dealing with the issue of age of person or victim, to conduct detailed inquiry on the said point. On this count, he invites attention of this Court to the provisions in Section 34 of the POCSO Act. It is his submission that, having due regard to the trial court, here, no such exercise has been undertaken by learned trial court. At this juncture, learned counsel submits that in the light of above quality of evidence on record in trial court, there is a good ground on merits to be dealt at appellate stage.

6. To sum up, he reiterated his case as well as case of prosecution and would submit that there is weak evidence on the point of age of victim which is crucial and decisive. That, apparently from the face of record, required documents which are expected to be relied for ascertaining age of victim are not finding place in the record. According to him, in view of scope and object of Section 389 of Cr.P.C., when very issue of minority of the victim is questionable, and when it knocks the prosecution's case at the bottom, accused qualifies for relief of suspension of sentence and he urges to exercise the discretionary powers in favour of accused.

7. Learned APP as well as learned counsel for victim, both put up stiff resistance to the above relief by pointing out that on detailed inquiry by the trial court, case of prosecution on the age of victim has been accepted by the trial court. That, the authority which issued certificate was examined before trial court and said authority had carried original record. Learned counsel for victim also justifies the order of conviction and they both again even question the maintainability of present application for suspension of sentence in the backdrop of ground of determination of age which, according to them, is a subject matter to be dealt at trial/appeal and not at this stage.

8. Heard each of the parties at length. Perused the papers and record which goes to show that present applicant, who is arraigned as accused no.2, has faced trial before the Special Court on accusations of commission of offence under Sections 363, 366, 376, 327, 201, 109 of IPC and provisions under Sections 4, 6 and 17 of POCSO Act.

Other five co-accused were also tried for above offences except offence under Section 376 of IPC and Sections 4 and 6 of the POCSO Act. Record shows that case of prosecution is based on evidence of as many as 10 witnesses.

9. Here, each of the parties has sought reliance on various judicial pronouncements of Hon'ble Apex Court and of this Court. It would be thus necessary to dwell on the same at the initial stage.

10. Mr. Ladda, learned counsel for the applicant has primarily relied on the judgment of Hon'ble Apex Court in the case of *P. Yuvaprakash* (supra), *Aman Kumar and another v. State of Haryana* (2004) 4 SCC 379 and even judgment of this Court at Nagpur in *Deepak s/o Jitendra Sawant v. The State of Maharashtra* [Criminal Appeal No. 246 of 2015 decided on 23.01.2017]. By pointing to the above rulings and observations therein, it is tried to be projected before this Court that Section 34(1) of POCSO Act obligates on the part of Special Court, which is trial court, for formulating the question whether person is child or not and, according to him, the provision contemplates detailed inquiry. He would submit that thus a detailed inquiry on the point of age is required to be undertaken by Special Court who deals with cases of such nature. According to him, no such detailed inquiry has been conducted in the case in hand on the point of determination of age.

11. **Aman Kumar** (supra) is relied to buttress the contention that, there has to be sufficient corroboration to the testimony of prosecutrix, and that there must be clear and cogent evidence about penetration to attract offence of rape.

12. By pointing to paragraph 9 of the judgment of this Court in **Deepak s/o Jitendra Sawant** (supra), it is strenuously submitted that degree of proof is heavy and more particularly in view of stringent nature of provisions of the POCSO Act, and he would thus submit that here, there has to be conclusive proof on the point of age of prosecutrix.

13. Learned APP has placed reliance on the judgment of the Hon'ble Apex Court in the case of **The State of Uttar Pradesh v. Anirudh and Another** reported in 2026 INSC 47. By seeking reliance on the observations made in para 18 of the said judgment, he would vehemently submit that the issue of age which is raised at this stage of suspension of sentence is devoid of merits as, according to him, the Hon'ble Apex Court has categorically concluded that, question of age is to be raised at the time of hearing of the appeal. He would add that here, learned Special Court has conducted inquiry as contemplated under Section 34 of the POCSO Act, and the bonafide certificate

carrying date of birth gathered by Investigating Officer from the very school where victim studied, has been rightly relied by learned Special Court.

14. On the other hand, learned counsel Mr. Shermale appearing for the victim, would also strongly oppose relief of suspension of sentence and grant of bail on the ground that on full fledged trial, both, age as well as offence, are proved beyond reasonable doubt. According to him also, issue of age cannot be raised at this stage of dealing with entitlement of suspension of sentence. He too seeks reliance on the judgment in ***Shivani Tyagi v. State of UP & another*** in Criminal Appeal Nos. 1957-1961 of 2024 decided by the Hon'ble Apex Court on 05.04.2024 and would submit that in this case, the Hon'ble Apex Court had noted that High Court of Jharkhand had failed to consider the parameters for grant of bail on suspension of sentence. Equally, he also placed reliance on the judgment of the Hon'ble Apex Court in the case of ***Jamnial v. State of Rajasthan and Another*** reported in 2025 INSC 935 [SLP (Crl.) No. 69 of 2025 decided on 06.08.2025] and pointed out that even in this case, the Hon'ble Apex Court has held that antecedents of the accused were not considered and appreciated while dealing with application for suspension of sentence under Section 389 Cr.P.C.

On the same lines, he points out that, here also applicant has bad antecedents and he placed on record copy of FIR in crime no. 0811 of 2022 registered at Newasa Police Station for offence under Section 326 and other provisions of IPC.

15. On going through the above all citations, it is to be noticed that, whichever observations are taken recourse to during submissions, the above quoted judicial pronouncements of the Hon'ble Apex Court are apparently while deciding criminal appeals and most of which are for commission of offence under Section 302 of IPC. But here, this Court is concerned with entitlement of relief of suspension of sentence in a POCSO case pending appeal before this Court.

16. It would be profitable to give a brief account of the settled judicial precedent on the point of suspension of sentence. The Hon'ble Apex Court in the case of ***Omprakash Sahni v. Jai Shankar Chaudhary*** in Criminal Appeal Nos. 1331-1332 of 2023 decided on 02.05.2023 has elaborately dealt with scope and object of both, suspension of sentence and entitlement of grant of bail, by reflecting on judicial precedent on above point, more specifically from para 20 onwards. After reproducing the provision under Section 389 of Cr.P.C, the

Hon'ble Apex Court has taken into account the fine distinction between prayer for bail at pre-conviction stage and at post- conviction stage, viz Sections 437, 438, 439 and 389(1) of Cr.P.C. by analyzing the law of the same court in the case of ***Rajesh Ranjan Yadav alias Pappu Yadav v. CBI*** (2007) 1 SCC 70 wherein its own observations in previous judgment in the case of ***Kashmira Singh v State of Punjab*** (1977) 4 SCC 291 are quoted. Similarly, observations in the case of ***Ash Mohammad v. Shiv Raj Singh*** (2012) 9 SCC 466; ***Bhagwan Rama Shinde Gosai and others v. State of Gujarat*** (1999) 4 SCC 421; ***Sidhartha Vashisht alias Manu Sharma v. State (NCT of Delhi)*** (2008) 5 SCC 230; ***Hasmat*** (2004) 6 SCC 175; ***Kishori Lal v. Rupa and others*** (2004) 7 SCC 638; ***Vijay Kumar v. Narendra and Others*** (2002) 9 SCC 364; ***Ramji Prasad v. Rattan Kumar Jaiswal and Another*** (2002) 9 SCC 366; ***Vasant Tukaram Pawar v. State of Maharashtra*** (2005) 5 SCC 281 and ***Gomti v. Thakurdas and others*** (2007) 11 SCC 160 are dealt and taken into account and finally, following observations are made in paragraph 33 :

“33. Bearing in mind the aforesaid principles of law, the endeavour on the part of the Court, therefore, should be to see as to whether the case presented by the prosecution and accepted by the Trial Court can be said to be a case in which, ultimately the convict stands for fair chances of

acquittal. If the answer to the above said question is to be in the affirmative, as a necessary corollary, we shall have to say that, if ultimately the convict appears to be entitled to have an acquittal at the hands of this Court, he should not be kept behind the bars for a pretty long time till the conclusion of the appeal, which usually take very long for decision and disposal. However, while undertaking the exercise to ascertain whether the convict has fair chances of acquittal, what is to be looked into is something palpable. To put it in other words, something which is very apparent or gross on the face of the record, on the basis of which, the Court can arrive at a prima facie satisfaction that the conviction may not be sustainable. The Appellate Court should not reappreciate the evidence at the stage of Section 389 of the CrPC and try to pick up few lacunas or loopholes here or there in the case of the prosecution. Such would not be a correct approach.”

17. For deciding instant application and entitlement of relief, above judicial position has been kept in view and consideration.

18. On going through the judgment of the trial court, it is emerging that, learned trial Judge has formulated first point regarding age as, “Whether victim was below 18 years when offence of penetrative sexual assault or assaults were committed during 18.10.2021 to 23.12.2021?”, and discussion while answering the above point is

found in paragraphs 24 to 47. In paragraphs 29 to 32 of the judgment, it is noted that father, while lodging FIR, gave age of the victim as 15 years and she to be studying in 9th Standard whereas in his examination-in-chief he stated victim to be studying in 10th Standard. Victim in her statement recorded on 24.12.2021 has given her date of birth as 17.04.2007 and in her chief, she has given her date of birth as 17.02.2007 and to be studying in 9th standard. Noting variance on the point of actual Standard in which victim was said to be studying, it is observed that, it is not a serious discrepancy. In para 33 learned trial Judge noted about admission of father in his cross regarding not tendering any document on the point of age of the victim. After quoting Section 34 of the POCSO Act, learned trial court has referred to the judgment of this Court in Criminal Appeal No. 329 of 2018 and 673 of 2022 decided on 17.02.2022 and 26.04.2023 respectively, and also after relying on the judgment of the Hon'ble Apex Court in the case of ***P. Yuvaprakash*** (supra), it is finally concluded that, age of victim on the date of incident was less than 15 years and that school record shows that her date of birth is 17.04.2007, and considering the school record, version of victim and her parents, it is held that there is nothing contrary on record to disbelieve date of birth of the victim and as such, reliance is placed on the date of birth mentioned in the bonafide certificate, further

observing that it is not a case as such where other proof of date of birth would be required.

19. Here, before this Court, learned counsel Mr. Ladda takes serious objection to the above discussion and he reiterated that, bonafide certificate does not qualify for reliance on the point of age. As stated above, this Court is required to only answer whether during pendency of main appeal, in an application under Section 389 Cr.P.C., controversy on the point of actual age of victim can be gone into or not.

20. The Hon'ble Apex Court in the judgment of ***Lilaben v. State of Gujarat and Another*** 2025 INSC 519 [Criminal Appeal No. 2101 of 2025 decided on 21.04.2025, after dealing with question of entitlement of suspension of sentence from para 6 onward, made following observations in para 8 :

“8. In the present facts, Respondent No.2 has been convicted by the Trial Court. In its conclusion necessarily then, the victim had to be a minor. Whether or not the finding regarding the age of the victim is correct or not, or the manner in which was sought to be proved before the Trial Court, was in accordance with the law or not, is a question that is open for consideration in the

jurisdiction under Section 374 CrPC (emphasis laid) as may be provided therein, and not under Section 389 CrPC. Casting doubt upon a finding returned by the Court below, when the same isn't within immediate purview, cannot be justified.” (emphasis laid)

21. Similarly the Hon'ble Apex Court in the case of ***Jamnalala*** (supra) in para 17 dealt with its own earlier judgment in the case of ***Vijay Kumar v. Narendra*** (supra) and others reported in (2002) 9 SCC observed as under :

*“17. In ***Vijay Kumar v. Narendra and Others*** (2002) 9 SCC 364 this Court observed as follows:*

"10. On perusal of the record and on consideration of the submissions made by the learned counsel appearing for the parties, we are of the view that in the context of the facts and circumstances of the case the High Court was in error in passing the order releasing the respondents on bail. The High Court has neither given any reason nor has indicated any exceptional circumstance for granting bail to the respondents. In the above circumstances, it is difficult for us to even surmise the circumstance which prompted the learned Single Judge to consider the accused persons to be entitled to the discretionary relief of bail pending the appeal. The principle is well settled that in considering the prayer for bail in a case involving a serious offence like murder punishable under Section 302 IPC, the court

should consider the relevant factors like the nature of the accusation made against the accused, the manner in which the crime is alleged to have been committed, the gravity of the offence, and the desirability of releasing the accused on bail after they have been convicted for committing the serious offence of murder. Our attention has not been drawn to any material which would show that the learned Single Judge took into consideration the relevant factors while passing the bail order. We refrain ourselves from making any observation touching on merits of the case lest it may prejudice any of the parties. Suffice it to state that we do not consider this a fit case for grant of bail to the respondents during pendency of the appeal filed by them."

Though said in the context of 302 IPC, it applies with equal force to a case of present nature under the POCSO Act also". (emphasis laid)

22. In the light of above discussion, keeping in mind the above settled legal position, it is not open for this Court at this stage to dwell upon age determination of a victim of offence under provisions of the POCSO Act, and is thus the subject matter to be dealt at the time of hearing of the appeal.

Consequently, this Court having noted that before trial court, both, age and offence, are shown to be proved, coupled with the aspect of severity of the offences which are substantiated, and alleged

criminal antecedent of the accused, this Court does not find it a fit case to extend relief as prayed. Hence the following order :

ORDER

The application is rejected.

[ABHAY S. WAGHWASE, J.]

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