IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR
BEFORE

HON'BLE SHRI JUSTICE VISHAL MISHRA

ON THE 22nd OF MARCH, 2022

MISC. CRIMINAL CASE No. 11936 of 2022

Between:-

PRETAM MANDAL S/O PRABHAS MANDAL , AGED ABOUT 21 YEARS, OCCUPATION: BUSINESS SALIWADA CAMP, CHOPNA, BETUL (MADHYA PRADESH)

.....APPLICANT

(BY SHRI HIMANSHU TIWARI, ADVOCATE)

AND

THE STATE OF MADHYA PRADESH THROUGH POLICE STATION CHOPNA POLICE STATION CHOPNA (MADHYA PRADESH)

.....RESPONDENT

(BY SHRI SHAILENDRA MISHRA & SHRI AKSHAY PAWAR, PANEL LAWYERS)

MISC. CRIMINAL CASE No. 12535 of 2022

Between:-
AJIT S/O LATE TEKCHAND GODANE, AGED ABOUT 28 YEARS, OCCUPATION: LABOUR VILLAGE DAHAEDI, P.S.KRINAPUR, DISTTRICT BALAGHAT (MADHYA PRADESH)

.....APPLICANT

(BY SHRI SANJAY SHARMA, ADVOCATE)

1. THE STATE OF MADHYA PRADESH THROUGH POLICE STATION

KIRNAPUR POLICE STATION KIRNAPUR (MADHYA PRADESH)

2. VICTIM 'A' D/O NOT MENTION OCCUPATION: NILL NOT MENTION (MADHYA PRADESH)

.....RESPONDENTS

BY SHRI SHAILENDRA MISHRA & SHRI AKSHAY PAWAR, PANEL LAWYERS)

MISC. CRIMINAL CASE No. 12233 of 2022

Between:-
KHAITAN @ CHOTU GOND S/O MUNNA SOUR , AGED ABOUT 18 YEARS, OCCUPATION: LABOUR R/O RAGOLI TAPARIYA POLICE STATION SANODHA TEHSIL SHAHGARH DISTRICT SAGAR M.P. (MADHYA PRADESH)

.....APPLICANT

(BY SHRI ASHISH KURMI, ADVOCATE)

AND

1. THE STATE OF MADHYA PRADESH THROUGH POLICE STATION SANODHA DISTRICT SAGAR M.P. (MADHYA PRADESH)

2. VICTIM A S/O NOT MENTION OCCUPATION: NIL NOT MENTION (MADHYA PRADESH)

.....RESPONDENTS

BY SHRI SHAILENDRA MISHRA & SHRI AKSHAY PAWAR, PANEL LAWYERS)

These applications coming on for admission this day, the court passed the following:

ORDER

1. Senior Counsel Manish Datt and Shri Sankalp Kochar, Advocate were appointed at *Amicus Curiae* in the matter to argue the cases, but only Shri Sankalp Kochar, Advocate has marked his presence before this Court to argue the matter as an *Amicus Curiae*.

2. With the consent of the parties, all the matters are finally heard.

3. Facts as far as M.Cr.C. No.11936/2022 is concerned, this is a Second bail application under Section 439 of Cr.P.C. filed by the applicant for grant of bail. His first bail application was dismissed as withdrawn vide order dated 09.11.2021, passed in M.Cr.C. No.20927/2021.

4. The applicant has been arrested on 20.01.2021 by Police Station Chopna, District Betul (M.P.) in connection with Crime No.4/2021 for the offence punishable under Sections 363, 376 (3), 376 (2) (n) of the Indian Penal Code and Sections 5 (L) and 6 of the Protection of Children From Sexual Offences Act, 2012.

5. It is pointed out that applicant has been falsely implicated in the case and has not committed any offence in any manner. It is submitted that the applicant is in custody since 20.01.2021. Charge-sheet has been filed in the matter. The allegation against the present applicant is that he

has promised marriage with prosecutrix, who was a minor and has taken her away on a motorcycle from Chopna to Gujrat. Thereafter, he has solemnised marriage with the prosecutrix and made physical relations with her consent. The age of the prosecutrix as per the prosecution story is 15 years and 11 months. The statement of the prosecutrix has been recorded before the trial Court; wherein, she has supported the prosecution story and has categorically stated that on the promise of marriage, she went with the present applicant and resided in a room at Gujarat; where she has made physical relations with the applicant. They have solemnized marriage in a temple. He has placed reliance upon several judgments of this Court as well as the other Courts allowing the bail applications looking to the age of the victim finding it to be more than 16 years on the ground that she was in a condition to give the consent and was well aware of the pros and corns of the act, which she was doing. Looking to the present scenario of the Society and in this age of internet the children are getting maturity at an early date. It is argued that keeping the applicant in custody will amount to pre-trial conviction. The applicant is ready to abide by all terms and conditions that may be imposed by this Court while considering his application for grant of bail. On these ground, he prays for grant of bail.

6. Per contra, State counsel has vehemently opposed the application contending that victim was a minor and there is no value of consent given by her.

7. Facts as far as M.Cr.C. No.12535/2022 is concerned. This is the Second bail application under Section 439 of Cr.P.C. filed by the applicant for grant of bail. His first bail application was dismissed as withdrawn vide order dated 22.12.2021, passed in M.Cr.C. No.54766/2021.

8. The applicant has been arrested on 17.08.2021 by Police Station Kirnapur, District Balaghat (M.P.) in connection with Crime No.256/2021 for the offence punishable under Sections 363, 366, 376 of the Indian Penal Code and Sections 3/4 and 5N/6 of the Protection of Children From Sexual Offences Act, 2012.

9. It is pointed out that applicant has been falsely implicated in the case and has not committed any offence in any manner. It is submitted that the age of the victim is 14 years and 7 months. Applicant is in custody since 17.08.2021. The allegations as per the prosecution story is that the applicant has taken the victim to Balaghat where he has kept her in a room and has made physical relations with her without her consent. The affidavit has been sworn by the parents of the victim to the effect that no such incident has taken place and they have no objection if the

applicant is enlarged on bail. The statement of the victim is recorded before the trial Court; wherein, to certain extent she has not supported the prosecution story and has declared hostile, but she has admitted her signatures on the documents, which have been prepared by the prosecution. She has further disputed her date of birth as per her school records stating therein that her father and mother are not educated persons and they have wrongly got entered her age in the school records. Applicant is in custody since17.08.2021. Looking to the age of the victim, she is in a position to understand the pros and corns at which she is committing. The applicant is ready to abide by all terms and conditions that may be imposed by this Court while considering his application for grant of bail. He has prayed for grant of bail.

10. Per contra, State counsel has vehemently opposed the contentions stating therein that the age of the victim is only 14 years and 7 months and her FSL report is found to be positive. She has categorically given the statement under Section 164 of Cr.P.C. against the present applicant. In such circumstances, no case for grant of bail is made out against the present applicant. He has prayed for rejection of the application.

11. Facts as far as M.Cr.C. No.12233/2022 is concerned. This is the First bail application under Section 439 of Cr.P.C. filed by the applicant for grant of bail.

12. The applicant has been arrested on 21.07.2020 by Police Station Sanodha, District Sagar (M.P.) in connection with Crime No.221/2020 for the offence punishable under Sections 363, 366, 376 (3) and 342 of the Indian Penal Code and Sections 5(A)(i) and 6 of the Protection of Children From Sexual Offences Act, 2012.

13. It is pointed out that applicant has been falsely implicated in the case and has not committed any offence in any manner. It is further submitted that the applicant is in custody since 21.07.2020. The allegation against the applicant is that, he has abducted the prosecutrix from the lawful custody of her parents on 16.07.2020. The age of the victim is 15 years. It is submitted that the victim is not coming forward before the trial Court for a considerable period. The order-sheets to that extent has been filed by the applicant. Looking to the tender age of the applicant as well as the prosecutrix, the prayer for grant of bail is made out.

14. Per contra, State counsel has vehemently opposed the contentions stating therein that the age of the victim is only 15 years and there is an allegation of committing offence in her statement recorded under Section 164 of Cr.P.C. against the present applicant.

15. Shri Sankalp Kochar, counsel appearing as an *Amicus Curiae* along with other counsels for the applicants has given assistance to the Court with respect to the factum of consideration of bail applications done by various Courts considering the age factor, their depositions recorded under Section 164 of Cr.P.C., the fact that they have not supported the prosecution story before the trial Court, but have supported the prosecution story in their statements recorded under Sections 161 and 164 of Cr.P.C. The factum of age of the prosecutrix whether at the age of 16 years or less she can be considered to be a minor. It is argued by the *Amicus Curiae* that recently the Division Bench of High Court of Karnataka in the case of **Hanumantha Mogaveera Vs. State of Karnataka**, **ILR 2021 KAR 3469** has considered all these aspects at length placing reliance upon the various judgements of the Hon'ble Supreme Court as well as various High Courts. It was categorically held by the Division Bench of Karnataka High Court that the evidence, which have been recorded under Section 164 of Cr.P.C. cannot be considered equivalent to that the evidence recorded under Section 35 of the POCSO Act because statements, which have been recorded under Section 164 of Cr.P.C. are only having the corroborative value and in the statement recorded under Section 164 of Cr.P.C. no opportunity to cross-examine the witnesses have been provided; therefore, the statements recorded

before the Court and recorded under Section 164 of Cr.P.C. cannot be equated. He has placed reliance upon the judgement passed by the High Court of Madras in the case of **Sabari Vs. Inspector of Police, Belukurichi Police Station and Ors.** (Criminal Appeal No.490/2018, decided on 26.04.2019); wherein, the factum of majority and relationship between the adolescent boys and girls was taken into consideration. Also considering the definition of a child defined under Section 2 (d) of the POCSO Act. It is argued that although the age of the child as per the POCSO Act is anything below the 18 years of age, but the factum that a girl below the 18 years of age involved in a relationship with a teenage boy could be a result of mutual innocence or biological attraction, such relationship cannot be conceived as an unnatural one and alien between the victim and the accused. It is pointed out that even when the girl was below 18 years of age she was in a position to understand the pros and cons of the act which she is committing and she was capable to understand everything and was capable to give consent for the relationship being mentally matured, but unfortunately stringent provisions of the POCSO Act gets attracted, therefore, the boy of a teenage has to face the stringent provisions. It is argued that the Hon’ble Court has considered that the fact that on profound consideration of the ground realities, the definition of 'Child' under Section 2(d) of the

POCSO Act can be redefined as 16 instead of 18. It was observed that any consensual sex after the age of 16 or bodily contact or allied acts can be excluded from the rigorous provisions of the POCSO Act and such sexual assault, if it is so defined can be tried under more liberal provision, which can be introduced in the Act itself and in order to distinguish the cases of teen age relationship after 16 years, from the cases of sexual assault on children below 16 years. Similar consideration was made by the High Court of Bombay in the case of **Sunil Mahadev Patil Vs. State of Maharashtr**a in Bail Application No.1036/2015; wherein, the age of the victim was 15 years. It is argued that after Nirbiya's case which was in the year 2014 the age of consent was increased from 16 years to 18 years and the punishment in all rape cases is now 7 years and for the offences which are covered under Section 376 (2) of IPC for minimum of 10 years. It is argued that these are the aggravated forms of the rape and most of them are the incidences where the accused is in control or the situation or having a dominant position. It is pointed out that in the case of **S.Varadarajan Vs. State of Madras** reported in **AIR 1965 942** though the age of consent as per law was 18 years, but when a girl has eloped with an accused when she was approximately 17 years and 9 months old, the Hon'ble Supreme Court distinguish Section 361 of IPC on the point of taking from guardianship

or enticing the girl and the girl herself leaving the house of the parents of her own and accused allowing her to be in his company, it was held that it is not a case of rape. It is argued that **S.Varadarajan** (supra) was decided in the year, 1967 when the women were not enjoying any freedom which today the women have; therefore, it can be safely inferred that the girl, who is a minor aged between 15 and 18 years it can be safely inferred that her consent was obvious then it is a mitigating circumstance. It is pointed out that the observation was made that some courts are taking strict view and accused are denied bail only on the ground that the prosecutrix being a minor below 18 years of age her consent is immaterial. It is pointed out that the Hon'ble Court has held in paragraph-12 of the aforesaid judgement has held as under:-

> ***"12. In the next decision, that is, that in Kumarasami's case, 2 Mad HCR 331 upon which the High Court has relied, I was observed that the fact that a married woman whom the accused was alleged to have taken or enticed away for certain purposes was a temptress, would make no difference and the accused who yielded to her solicitations would be guilty of an offence under S. 498 (b) of the Penal Code. This decision was approved of in In R, Sundara Dass Tevan 4 Mad HCR 20 a case to which also the High Court has referred. The basis of both these decisions appears to be that depriving the husband of his proper control over his wife, for the purpose of illicit intercourse is the gist of the offence of taking away a wife under the same section and that detention occasioning such deprivation may be brought about simply by the influence of allurement and blandishment. It must be borne in mind that while Ss. 497 and 498, I.P.C. are meant essentially for the protection of the rights of the husband,- S. 361 and other cognate sections of the Indian Penal Code are intended more for the protection of the minors and persons of unsound mind themselves than of the rights of the guardians of such persons. In***

this connection we may refer to the decision in State v. Harbansing Kisansing, ILR (1954) Bom 784: (AIR 1954 Bom 339). In that case Gajendragadkar J., (as he then was) has, after pointing out what we have said above, observed:

> *"It may be that the mischief intended to be punished partly consists in the violation or the infringement of the guardians' right to keep their wards under their care and custody; but the more important object of these provisions undoubtedly is to afford security and protection to the wards themselves."*

16. And thereafter, the bail application was finally allowed. He has further placed reliance upon the judgement passed by the High Court of Delhi in the case of **Rohit Kumar Jha Vs. State of Delhi** reported in **2021 SCC Onlince Del 4572;** wherein, almost in similar circumstances, when the girl was found to be less than 18 years of age, the Court considering the definition of the child as defined under Section 2 (d) of the POCSO Act has taken a similar view. It is argued that as far as the age of the victim was again taken into consideration by the Hon'ble Court and it was observed that it has to be seen that when a boy or a minor girl are in love with each other chose to live together without consent of their parents then whether the offence under the POCSO Act is made out is to be seen from the angle that whether the act which has been committed by the applicant is violent or not and whether he is having criminal antecedents or not. It is submitted that the similar view was taken by the Court in the aforesaid case and it was held that the girl above the age of 15 years is able to understand everything; and therefore, when she has surrendered to the physical desire of the applicant out of her love and affection then no offence has been committed as there is no forceful violent act been committed by the present applicant in making physical relations. She has voluntarily joined the applicant; therefore, at least applicant should have been entitled to bail. Further placing reliance in the

judgement passed by the High Court of Himachal Pradesh (Shimla) in the case of **Rohit Sharma Vs. State of Himachal Pradesh** in **Cr.MP(M) No.2001/2020 decided on 11.11.2020** that, the conduct of the victim is also required to be seen and as a material importance while considering the cases under the POCSO Act when she has initially gone with the applicant after having quietus with him and she has stayed with him for three weeks voluntarily; therefore, the applicant at-least is entitled for grant of bail. Again placing reliance upon the judgement passed by the High Court of Madhya Pradesh (Bench at Indore) in M.Cr.C. No. 41304/2021 in the case of **Rakesh Vs. State of M.P.** decided on 09.09.2021; wherein, under similar circumstances, placing reliance upon the judgements passed by the Bombay High Court, the bail application was allowed when the age of the prosectutrix was only 15 years. He has further relied upon the judgement passed by the High Court of Calcutta in the case of of **Ranjit Rajbanshi Vs. The State of West Bengal and Others** (Cr.A.No.458/2015); wherein, accused was 22 years of age and victim was 16 ½ years of age. The allegations of rape were against the accused, a similar view was taken by the court considering the definition of the child under Section 2 (d) of the POCSO Act with stringent provisions under Sections 3 and 4 of the POCSO Act. It is argued that the factum that the victim has accompanied the accused persons out of her

own will, when she was in a position to understand the pros and cons of the act, which she is committing; therefore, at-least he was entitled for grant of bail.

17. He has further brought to the notice of this Court, the order passed by the High Court of Delhi in the case of **Dharmander Singh @ Saheb Vs. The State (Govt. of NCT, Delhi);** wherein, similar view was taken by the High Court of Delhi.

18. It is argued that from the analysis of the aforesaid judgement, it is apparently clear that the overall facts and circumstances of the case are required to be taken into consideration at-least while deciding the bail application under the POCSO Act. Although definition of "child" under Section 2 (d) of the Act is clear that any one below 18 years of age will be considered as a child and the stringent provisions of the POCSO Act will be attracted in offences, but the fact remains that there should be a distinction between the fact that whether there is a forceful sexual assault or there is a physical relationship with the consensus of the parties. Looking to the present scenario and in the age of an internet, the boys and girls of tender age are attaining maturity at an early date much earlier to that in olden days. They are well aware of every aspect of the Society and just with love and affection and certain biological factors, body structure development and the biological needs of the body, they get attracted and out of their love and affair with a consent get into the physical relations. These two aspects are required minute consideration by the Courts. Whether the act committed with the consent of the victim, who is above 15 years of age can be termed as a forceful sexual intercourse. In all the aforesaid cases, it is concurrently held by the Courts that at-least in these cases, the benefit of bail should be extended to the accused once the statement of the victim clearly establishes the fact that she has

compromised with the accused out of her own will and love and affection and she was in a position to understand the pros and cons of the act. It is argued that if the strict view with respect to the definition of the "child" under the POCSO Act is given then even a victim/child, who is 17 years and 364 days old and makes a physical relations with a boy then the stringent provisions of the POCSO Act will get attracted. Such is not an intention of the legislature to force the applicant in such circumstances to face the entire trial. Thus, the case of **Sabari** (supra) passed by the High Court of Madras has gone to the extent that the definition of "'child under Section 2(d) of the POCSO Act can be redefined as 16 years instead of 18 years because any consensual sex after the age of 16 years or bodily contact or allied acts can be excluded from the rigorous provisions of the POCSO Act and the girl less than 18 years of age, but is able to understand the pros and cons of the act and also the fact that she has developed physical relations out of love and affection with the accused then it should be considered that she was a consenting party to the act and stringent provisions of the POCSO Act should not be attracted.

19. It is argued that with respect to the statement of the victim which have been recorded under Section 164 of the Cr.P.C. specially in the circumstances, when is declared hostile before the trial Court, what will be the corroborative value of the statement of the victim under Section 164 of the Cr.P.C. where she is supporting the prosecution story. The aforesaid aspect was considered in detail by the Division Bench of High Court of Karnataka in the case of **Hanumantha Mogaveera (supra);** wherein, after considering the various judgements of the High Courts as well as the Supreme Courts as well as the various provisions, it was held that the statement of the victim recorded under Section 164 of the Cr.P.C. is only having a corroborative value because during the recording of the statement under Section 164 of the Cr.P.C. there is no provision for cross-examination of the witness, therefore, the same cannot be equated with the statement recorded under Section-35 of the POCSO Act before the trial Court. It is argued that the two co-ordinate Benches has taken a different view therefore, the matter was referred to the Larger Bench for consideration of the aspect for laying down the law with respect to recording of the statement under Section 164 of the Cr.P.C. and considering the provisions of POCSO Act. The Division Bench of High Court of Karnataka has categorically held down that the law laid down in the case of **Vinay Vs.**

State of Karnataka (Crl. P.No.1195/2017, decided on 13.07.2017) was declared to be not a good law. Further placing reliance upon the judgement passed by the Hon'ble Supreme Court in the case of **State of Himachal Pradesh vs Sanjay Kumar alias Sunny** reported in (**2017) 2 SCC 51** as well as in the case of **Ramkishan Singh vs. Harmeet Kaur** reported in **1972 (3) SCC 280,** in the case of **P. Palaniswamy Vs. State by Inspector of Police** reported in **2013 (2) MWN (Cr.) 525 (DB), in** the case of **Vishnu alias Undrya Vs. State of Maharashtra** reported in **2006 (1) SCC 283** and in several other cases; wherein, a similar view was taken by the Court with respect to recording of statement under Section 164 of the Cr.P.C. and it was held that the same cannot be equated with the statement recorded under Section 35 of the POCSO Act. In these circumstances, it was categorically held that the statement under Section 164 of the Cr.P.C. is only having a corroborative value and the other facts and circumstances of the case if the statement gathers confidence then only the same can be acted upon and can only be utilized for corroborating the statement of the victim at the time of recording of the statement.

20. Heard the learned counsels for the parties and perused the record.

21. The first question which comes for consideration before this Court is that whether a victim attains the age of 16 years and below 18 years

can be considered a child for the purpose of Act, 2012 and whether the act of making physical relations with her consent does not fall the under the category of offence committed under SEction 376 of IPC and POSCO Act, 2012?

22. The second question which comes for consideration is that if the victim turns hostile before learned trial Court in her statement recorded under Section 35 of the Act, then whether the statement recorded under Section 164 of Cr.P.C. wherein she has supported the prosecution story can be taken into consideration and whether the accused can be punished only the basis of the statement under Section 164 of Cr.P.C.?

23. As far as the first question with respect of age and consent part is concerned, the basic object of enacting the Protection of Children From Sexual Offences, 2012 is required to be seen. The prime object of enactment of POCSO Act, 2012 is to project a child from all aspects so that he or she feels comfortable, protected and free from fear or horrible experiences and he or she experiences were child friendly atmospheres. The data collected by National Crime Records Bureau shows that there are increase in number of cases of sexual abuses offences against children in India which is duly corroborated by the study of Child Abuse India, 2007, which was conducted by the Ministry of Women and Child Development, therefore, need for a new act specifically for the protection

of the children from sexual offences was felt by the Legislature and the protection of children from sexual offences Act, 2012 was framed. The POSCO, 2012 is a comprehensive Act and provides as lawful protection of children from sexual assault, abuse, harassment or pornography etc. while safeguarding the interest over a child at every stage of case of judicial process and cooperating the child friendly mechnanism for recording of evidence, investigation and speedy trial of offence through designated special Courts.

24. The Act gives a definition of a child under **Section 2 (d) of the POCSO Act, 2012** which specially provides **"A child" means any person below the age of 18 years.**

25. The intent of the Legislature for keeping the age of a child to be below the age of 18 years was considering substantial increase in the cases of child abuse and sexual harassment.

26. The definition of a word in definition section may either be receptive of its ordinary meaning or it may be extensive of the same when a word is defined to mean anything the definition is *prima-facie* restrictive and exhaustive. The Hon'ble Supreme Court in the case of **Delhi Development Authority Vs. Bhola Nath Sharma** reported in **(2011) 2 SCC 54** have held that "definition must be read in context of phrase which would define it, the definition of a word must be given a

meaningful application where the context makes a definition given in the interpretation clause inapplicable, the same meaning cannot be assigned".

27. As a general principle a plain meaning is to be attached to a word or an expression use in legislation, but it cannot be divorced of a context and an isolated meaning attached to it. It means, it is necessary to assign a meaning which may be reasonably and harmoniously derived from a company of words and phrases preceding such expression.

28. The definition of the child was considered by the Hon'ble Supreme Court in the land mark judgement of **Ms. Eera Through Dr. Manjula Krippendorf Vs. State (Govt. Of Nct Of Delhi)** reported in (**2017) 15 SCC 133;** wherein the pivotal issue in the Appeal before the Hon'ble Supreme Court pertains to interpretation of Section 2 (1) d of POCSO Act, 2012, where a "child" defines to mean a person below the age of 18 years, should engulf and embrace, in its connotative expanse, the "mental age" of a person or the age determined by the prevalent science pertaining to psychiatry so that mentally retarded persons or an extremely intellectually challenged persons who even have crossed the biological age of 18 years can be included in the holistic conception of the term "child". The demand of such interpretation was morally supported in view of the Nirbhaya's Case **(Mukesh and Anrs. Vs NCT Delhi)** reported in **(2017) 6 SCC 1** and the requirement of enactment in defining the age of a child was felt by the legislature.

29. As far as, the interpretation is concerned, it is a cardinal principle that the Court in the name of interpretation of statues cannot legislate a law or derive a different meaning of any term used by legislation in any Act. Hon'ble Justice Shri Deepak Mishra in the case of **Ms. Eera (supra)** has held the following about the object and purpose of the Act "when two constructions are reasonable/possible preference should be given to one

which helps carry out beneficial purpose of the Act, without unduly expanding the scope of provisions. The Courts while construing provisions must ascertain intension of legislature, since it is an accepted principle that legislature expresses itself with use of correct words and in absence of any ambiguity or resultant consequence does not lead to any absurdity, no other interpretation tool may be looked for in the name of creativity."

30. The Hon'ble Justice Shri Rohinton Fali Nariman in the case of **Ms. Eera (supra)** has held that, "by reading the Act as a whole in the light of the Statement of Objects and Reasons, it is clear that the intention of legislator was to focus on children, as commonly understood that a person physically under the 18 years of age. The very purpose of this Act is to treat minors as different class and treat them separately to prevent the offences committed against them as regard to sexual assault, sexual harassment and sexual abuses. The POCSO Act makes a point clear that it is gender neutral, if the legislator purported to input the concept of mental age it could not have failed to define, mention and specify the same leaving no ambiguity for the interpretors. Thus, from the aforesaid, it is apparently clear that the definition of child under Section 2 (d) of POCSO Act, 2012 is to be considered as it is and there cannot be any deviation from the aforesaid definition as a basic object and intent of legislature is

required to be considered and seen. A Judge has to release himself from the chains of strict linguistic interpretation and pave the path that serves the soul of the legislative intention and in that event he becomes a real creative constructionist Judge.

31. The case laws which have been relied upon by the counsels appearing for the applicants as well as *Amicus Curiae* regarding the age of the victim, the aforesaid judgements does not show any consideration with respect to the object and intention of the legislature. In the aforesaid judgements, it is only considered that looking to the present scenario of the Society and the current age of internet and huge exposure of children, any child above the age of 15 years is in a position to understand the pros and cons of the deeds and the acts which they do, therefore, if a child or a victim below the age of 18 years gives a consent for making physical relations out of love and affection that can be considered as a consent, but the fact remains that in terms of the definition of Section 2 (d) of POCSO Act, 2012, the victim is still a child because she is below 18 years of age. Anything below 18 years of age under the POCSO Act, 2012 has to be considered as a child and the consent of a child is having no value as has been held by the Hon'ble Supreme Court in large number of cases. The victim under the age of 18 years if develops physical relations with her own will out of love and affection cannot be said to have given the consent for doing the same, as she still falls under the definition of child under the POCSO Act, 2012. Looking to the large number of increase in such cases in the Society and with an intent to stop such activities of the children and to avoid the marriages of victim below 18 years of age, the

special enactment of POCSO Act, 2012 was made. There was a direction contained in the Act, that the **POCSO Act, 2012 caste a duty on the Central and the State Government to spread awareness through media including the television, radio, print media at regular intervals to make the general public children as well as their parents and guardian aware of the provisions of POCSO Act. The aforesaid responsibility is casted upon the Government just to avoid all the circumstances and protect the child from sexual abuses, who is below 18 years of age.** Thus, from the aforesaid, it is apparently clear that the child has to be considered any victim below the age of 18 years in terms of Section 2 (d) of POCSO Act because the POCSO Act, 2012 being a special enactment. As far as, the fact that can a child below 18 years of age is in a position to consent for making physical relations. The answer is 'No'. Therefore, even if a person makes a physical relations with a child, who is below 18 years of age, his act clearly attracts the provision of POCSO Act, 2012 and he is liable for punishment under the Act. The accused has made physical relations with the person i.e victim a child below 18 years going well being aware of the fact that she is below 18 years of age. Therefore, the provisions of POCSO Act, 2012 are clearly attracted. The intention of the legislature that no leniency should be done in such cases is also to be taken into consideration by the Courts while

deciding the bail applications or deciding the cases under the POCSO Act finally.

32. The Hon'ble Supreme Court in the large numbers of cases has categorically stated held that the consent of a child is having no value. In the case of **Prahlad Vs. State of Haryana** reported in **(2015) 8 SCC 688**, **Dileep Vs. State of M.P.** reported in **(2013) 14 SCC 331;** wherein, the Hon'ble Supreme Court has gone to the extent that the issue of consent is no more *res-intigra* even in case where the prosecutrix was about 16 years of age. As far as the victim under the POCSO Act, 2012 is concerned, there cannot be a consent given by the victim, who is below 18 years of age because POCSO Act, 2012 is a special enactment and definition of a child under Section 2 (d) of the Act, 2012 is required to be taken into consideration while dealing with the case. Thus, a child below 18 years of age is not in a position to give consent for having sexual intercourse with her own will in terms of love and affection.

33. Now, the question with respect to the victim turning hostile before the learned trial Court, but supporting the prosecution story in her statement under Section 164 of Cr.P.C. is concerned and in the cases of absence of medical evidence, where the conviction can be made. The aspect of medical opinion was considered by the Hon'ble Supreme Court in large number of cases. In the case of **Radhakrishna Nagesh Vs. State**

of A.P. reported in **(2013) 11 SCC 688** dealing with the case; wherein, the hymen of the victim was found to be intact in medical examination. It was held that it cannot be a ground to acquit the accused even the slightest of penetration confirms the offence of rape and it is not be proven that the hymen was got torn as it is always was not necessary that the penetration lead to tearing of a hymen. Similar view was taken in the case of **Parminder alias Ladka Pola Vs. State of Delhi** reported in **(2014) 2 SCC 592**. It is held by the Hon'ble Suprme Court that if the evidence or the statement given by the victim under Section 164 of Cr.P.C. and one before the trial Court supporting the prosecution story then the same can be the sole basis of convicting the accused. In the case of **Jarnail Singh Vs. State of Haryana** reported in **(2013) 7 SCC 263** the Hon'ble Supreme Court relied on the sole testimony of prosecutrix as it was clear and consistent and was corroborative of the forensic evidence. Thus, it is apparently clear that even in the absence of any medical evidence or a definite opinion of a doctor in MLC regarding commission of rape the testimony of the victim can be the sole basis of conviction.

34. In cases, where the victim turns hostile before the trial Court but supports the prosecution story in her statement given under Section 164 of Cr.P.C., the same can also be treated to be a substantive peace of

evidence if it is corroborates with other medical evidence and facts and circumstances of the case. The applicant/accused can also be convicted in such cases. The aforesaid aspect was considered in detail by the High Court of Karnataka in the case of **Hanumantha (supra);** wherein, it was held that the statement recorded under Section 164 of Cr.P.C. is having a corroborative value and does not carry any substantive value, but if the statement is corroborated with other material available on record i.e. a medical evidence or Forensic evidence then the same can always be considered against the accused. In such circumstances, it is apparently clear that even if the victim turns hostile before the trial Court but the offence committed is duly corroborated with the medical evidence coupled with her statement recorded under Section 164 of Cr.P.C. then the accused can always be convicted. Even in cases where the MLC is not supporting the prosecution case and no definite opinion regarding commission of offence is given by the doctor and the family members of the victim as well victim turning hostile before the trial Court, but the victim getting pregnant and the F.S.L. report or the DNA report clearly supports the prosecution story the same can be the basis of convicting the applicant. In such circumstances, no case for grant of bail is made out.

35. Thus, from the analysis of the aforesaid settled proposition of law by the Supreme Court and also looking to the facts and circumstances of

the present cases, it is apparently clear that there is sufficient material available on record against the accused/applicant..

36. Thus, this Court does not deem it appropriate to consider these application for grant of bail.

37. Applications are hereby rejected.

(VISHAL MISHRA)
JUDGE

Taj/Irfaan/Sha/Pra

MOHD IRFAN SIDDIQUI

Digitally signed by MOHD IRFAN SIDDIQUI
DN: c=IN, o=HIGH COURT OF MADHYA PRADESH, ou=HIGH COURT OF MADHYA PRADESH, postalCode=482001, st=Madhya Pradesh, 2.5.4.20=9e52cc092beccf97fb4519f021aa0e6e655497f8e69e9c7c35b1dbc4f77fcd7e, pseudonym=86E40F74CB0AB63AB64AEB347484C77FD3BFFC0A, serialNumber=1558F76970FA278F70AC9D72554B919645B16E40E440A18ED2985A32F759DC97, cn=MOHD IRFAN SIDDIQUI
Date: 2022.05.06 16:51:55 +05'30'