

ORDER BELOW EXH.5

(State of Maharashtra V/s. Akash Hanumant Indulkar)

1] Perused application and say filed by Investigating Officer and APP. Perused documents filed by both applicant and Investigating Officer.

2] According to applicant, on the date of incident i.e. on 25.11.2019 applicant was 15 years 10 months 24 days, therefore, it is necessary to transfer his case before Juvenile Justice Board in view of Juvenile Justice (Care and Protection) Act. Along with this application, Advocate of applicant filed on record copy of Aadhaar Card showing his birth date 01.01.2004.

3] Investigating Officer and APP filed say stating that date of offence is 25.11.2019 and birth certificate of applicant is obtained and filed in charge-sheet which shows birth date of applicant as 11.7.2001. In addition to that, there is School Leaving Certificate of applicant showing similar birth date. Therefore, on the date of offence applicant has completed 18 years of his age. Documents filed by applicant are not correct and they prayed to reject application.

4] As per recitals in F.I.R., incident took place on 25.11.2019. In charge-sheet itself birth certificate and school leaving certificate of applicant are filed showing his birth date 11.7.2001. It also appears that medical examination of applicant was conducted in which his age is mentioned as 18 years. So, in all police papers age of applicant is mentioned as 18 years. Advocate of applicant filed on record xerox copy of Aadhaar Card showing his birth date 1.1.2004 and submitted that his age is 15 years 10 months and 4 days. No other documentary evidence is filed. Moreover, original copy or verified copy of Aadhaar Card is not filed.

5] As per Section 34 of POCSO Act, if any question arises in proceeding before Special Court whether a person is child or not, such question shall be determined by Special Court. The provisions of POCSO Act and Juvenile Justice (Care & Protection) Act are co-related so far as determination of age is concerned. As per Rules 12 (3) (b) of Juvenile Justice (Care & Protection) Act and Section 94 of Juvenile Justice (Care & Protection of Children) Act, 2015, while determining the age of person (i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof, (ii) the birth certificate given by a corporation or a municipal authority or a panchayat; (iii) and only in absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board.

6] In present matter birth certificate of applicant is issued by Pune Municipal Corporation. Name of mother and father of applicant is clearly stated along with registration number. While arguing the matter it is submitted by Advocate of accused that in F.I.R., there are allegations of incident happened in year 2018 on which applicant removed panty of victim, but at relevant time no report was filed. F.I.R. is filed u/s. 354A, 376 of Indian Penal Code and S. 4,6,8, 12 of Protection of Children from Sexual Offences Act mainly in respect of allegations about the incident dt. 25.11.2019 and it is alleged that applicant took victim towards old school under pretext of giving guava to eat, removed her clothes, kissed her by saying to play game 'Kuchu Kuchu'. Victim in her statement narrated about the act and added that applicant slept on her person and she started paining at her private part. Medical report of victim shows evidence of vaginal

penetration. Therefore, on that basis offence u/s. 376 of Indian Penal Code and S. 4,6 of Protection of Children from Sexual Offences Act are added in this matter.

7] In that context, Advocate of applicant submitted that initially there were no allegations of penetrative sexual assault. Moreover, in supplementary statement of first informant it is stated that victim was discharged from hospital on 09.12.2019 and medicines about HIV disease were given to her. As per submission of Advocate of applicant, applicant is HIV positive and therefore, victim was infected, but not due to act which recently took place. However, due to act which were continued since 2018, therefore, in 2018 age of applicant was below 18 years even if his birth certificate is relied upon. Further, by relying on Aadhaar Card, he argued that applicant was below 18 years at the time of incidents which took place in 2018 and in 2019.

8] As discussed above, about the act of 2018 there are only allegations of removing panty of victim by applicant. Present case is mainly based on incident dt. 25.11.2019 on which applicant outraged modesty of victim on the basis of her statement and medical report offence u/s. 376 of Indian Penal Code and S. 4,6, of Protection of Children from Sexual Offences Act are added. On the basis of birth certificate of applicant, he is more than 18 years. The documents filed by applicant i.e. copy of Aadhaar Card is xerox one which is inadmissible. Moreover, even if it presumed that there was continuous act, the incident which lastly took place and age of applicant on that date is to be considered.

9] In this context, it is necessary to rely on authority cited in **Sayed Vs. State 2018 C.J.(Madras) 1026**, in which it is observed that on

strength of presumption under section 29 of POCSO Act and when First Information Report was filed, applicant was major. Therefore, due to continuation of offence it is proper to held applicant as major.

10] Ratio laid down in above cited ruling is noted. In present case, about incident dt. 25.11.2019 F.I.R. is filed and section addition report is filed, so it is main incident and age of applicant on that date is to be considered which is more than 18 years. Therefore, at the time of major offence in respect of which F.I.R. is filed, applicant was more than 18 years. Hence, it is not proper to declare applicant as child in conflict with law. Due to above reasons and legal provisions application deserves to be rejected with following order -

ORDER

Application is rejected.

Pune.
Date – 20.01.2021.

(R.V.Adone)
Addl.Sessions Judge, Pune.

“ I affirm that the contents of the P.D.F. File Judgment are same word for word as per original judgment.

Name of Steno	- Arya Nikam (Stenographer G-1)
Court Name	- Smt. R.V.Adone, Addl.Sessions Judge,Pune.
Date of Order	- 20.01.2021.
Order signed by P.O.	- 20.01.2021.
Order uploaded on	- 21.01.2021.

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