

**IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR**

BEFORE

HON'BLE SHRI JUSTICE ATUL SREEDHARAN

ON THE 28th OF FEBRUARY 2023

MISC. CRIMINAL CASE No. 4521 of 2023

BETWEEN: -

.....APPLICANT

(BY MS. ANKITA SHARMA - ADVOCATE)

AND

- 1. THE STATE OF MADHYA PRADESH
THROUGH POLICE STATION ISAGARH,
DISTRICT ASHOKNAGAR (MADHYA
PRADESH)**
- 2. ABHIYOTRI THROUGH POLICE THANA
ISHAGARH ASHOKNAGAR (MADHYA
PRADESH)**

.....RESPONDENTS

(BY SHRI NAVAL GUPTA - PUBLIC PROSECUTOR)

This application coming on for hearing this day, the court passed

the following:

ORDER

This is the third application for grant of bail in connection with Crime No.161/2018, registered at Police Station- Isagarh, District Ashok Nagar, for offence punishable under Sections 363,

366-A, 376(2)(N), 376 (2)(H) of the IPC and Section 5L/6, 5(J)(ii)/6 of the POCSO Act. The earlier applications were dismissed as withdrawn.

2. The nature of this case compels this Court to give an elaborate order which otherwise may be uncalled for in a bail application.
3. Briefly the facts of the case are as follows:- The applicant herein is alleged to have kidnapped the prosecutrix on 26/04/2018. The FIR is Crime No.161/2018, registered at Police Station Isagarh, District Ashok Nagar, for an offence punishable under Section 363 of the IPC (punishment for kidnapping a person from lawful guardianship). Thereafter, on 10/09/2020, the prosecutrix and applicant along with a son born to them on 26/06/2020, were recovered by the police from the house of one Prabhulal Kalawat (presently the father-in-law of the prosecutrix). The applicant was arrested on 10/09/2020 and continues to languish in prison as an under trial.
4. The prosecutrix has testified before the Ld. Trial Court on 18/01/2021 as PW1. She has been declared hostile as she did not support the case of the prosecution. She has denied even knowing the applicant much less having eloped with him. She has absolved the applicant of rape and has denied that her child has been fathered by the applicant. The Ld. co-ordinate bench while hearing the second application for bail, being M.Cr.C No. 40580/2021, allowed the application to be withdrawn vide order dated 29/09/21 without considering the same on merits. The Ld. co-ordinate bench however, fleetingly observed that the DNA report identified the applicant as the biological father of the child born to the prosecutrix. The first

application for bail was summarily withdrawn by the applicant as is reflected in the order passed by the co-ordinate bench in M.Cr.C No. 8616/2021 dated 17/02/21.

5. During the hearing of this application, this Court learnt that a child was born to the prosecutrix and so, directed the State, vide order dated 09/02/23, to enquire into the whereabouts of the infant and to file a report of the investigating officer in that regard. The report of the IO/SHO shall be adverted to in detail in this judgement. At this juncture, it would suffice to say that the report revealed that the prosecutrix and the infant were living with the parents of the applicant and the infant was being cared for.
6. The Court testimony of the prosecutrix when considered *prima facie*, reveals that this may be a case of statutory rape rather than one of forceful rape on account of the prosecutrix being below the age of consent on the date on which she eloped with the applicant. **Therefore, the application is allowed, and the applicant is enlarged on bail of Rs. 5000/- (rupees five thousand only) personal bond with one surety of the like amount, to the satisfaction of the Ld. Trial Court.**

**REQUEST TO THE HON'BLE LAW COMMISSION OF INDIA
(WITH SPECIFIC REFERENCE TO PARAGRAPH 21)**

7. The oppressiveness of the POCSO in its application to the marginalised sections of the society reeling under the combined negative effects of illiteracy and poverty, is most pronounced in the State of Madhya Pradesh. This Court feels it necessary to bring it to

the notice of the Hon'ble Law Commission of India, how the operation of the POCSO in certain cases is disrupting and devastating families in rural Madhya Pradesh by sending the sole bread winner in the family to jail for a minimum of ten years, at times leaving his wife and children to the vagaries of social exploitation if the parents and the in-laws of the prosecutrix/wife are not willing to keep her. Where the prosecutrix is unemployed as is mostly the case, the options for survival are dismal ranging from prostitution to crime. The State has no obligation under the POCSO to provide for the basic minimum required for survival of the so-called "survivor". The enforcement of the POCSO to such cases in its present form, does gross injustice.

8. The vision of the Law Commission of India is "Reforming the laws for maximizing justice in society and promoting good governance under the rule of law" and its mission is "The Terms of Reference of the Law Commission, inter alia, includes review/repeal of obsolete laws, to examine the Laws which affect the poor and carry out post-audit for socio-economic legislations, to keep under review the system of judicial administration to ensure that it is responsive to the reasonable demands of the times and in particular to secure, to examine the existing laws in the light of Directive Principles of State Policy and to suggest ways of improvement and reform and also to suggest such legislations as might be necessary to implement the Directive Principles and to attain the objectives set out in the Preamble to the Constitution, Examine the existing laws with a view for promoting gender equality and suggesting amendments there to, to revise the Central Acts of general importance so as to simplify

them and to remove anomalies, ambiguities and inequities, to examine the impact of globalization on food security and employment and recommend measures for the protection of the interests of the marginalised”¹.

9. An attraction amongst genders, ordained by nature for the preservation and perpetuation of the human race, has been criminalised by legislation. The intention of the legislature was undoubtedly noble, the same having been triggered by the infamous Nirbhaya Case which proved to be the proverbial “last straw” for a society horrified and shaken by the sheer magnitude of its brutality which was unlike any other, ever before. The case heightened a sense of urgency to legislate a new law to augment the existing law on rape, the provisions of which would be deterrent by being draconian. Thus, came into existence the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as “POCSO”). However, the POCSO does not make a distinction between ‘Rape’ and ‘Statutory Rape’.
10. Rape involves the sexual ravishment of, or assault on a woman, against her will/consent by a man, as provided u/. 375 IPC. The POCSO in contradistinction, is gender neutral and *inter alia* provides punishment for ‘Penetrative Sexual Assault’ (S.4), ‘Aggravated Penetrative Sexual Assault’ (S.6), ‘Sexual Assault’ (S.8), ‘Aggravated Sexual assault’ (S.10) and ‘Sexual Harassment’ (S.12), when committed on a child, as defined u/s. 2(1)(d), being ‘any person below the age of eighteen years’. Simply stated, the

¹ <https://lawcommissionofindia.nic.in/about-department/vision-mission/>

provisions of the POCSO make the offence of penetrative sexual assault/aggravated penetrative sexual assault/sexual assault, gender neutral, when committed against a child.

11. While rape is an offence *malum in se*, a veritable evil and punishable in all civilised societies, statutory rape is an offence *malum prohibitum* which is otherwise not repugnant to human conscience, but which is proscribed by legislation taking contemporary social mores into consideration, which prescribe an age at which it is permissible for man and a woman to indulge in consensual sex. In a case of statutory rape, the will and consent of the victim, who may have been an active participant in the sexual act, becomes inconsequential as the victim was below the age of consent which, in the Indian context is eighteen years and therein lies the problem.
12. A significant number of the Indian populace is illiterate, which on account of widespread illiteracy is unable to read or comprehend the draconian provisions of the POCSO and remains in complete ignorance of the same. As per the World Bank, the literacy rate of India as in 2018, of those who were fifteen years and above, was at 74%¹. The TIME magazine (January 2014), relying upon the report of the UNESCO, published that thirty seven percent of the illiterates in the world were from India and at two hundred and eighty-seven million, India had the highest number of illiterate adult population in the world in the year 2014.
13. Literacy rate in the State of Madhya Pradesh at 69.32% is pathetic.

¹ https://data.worldbank.org/indicator/SE.ADT.LITR.ZS?most_recent_year_desc=true

Of this, the male literacy rate is 78.73% and the female literacy rate is even lower at 59.24%. Close to 40% of the female population in the State of Madhya Pradesh is illiterate. In rural areas, the literacy rate is even lower at 74.74% for males and 48.49% for females. Thus, more than 51.5% of the rural female population in Madhya Pradesh is illiterate¹. Such being the sorry state of affairs relating to literacy in the State, it would be downright unjust to apply the rule of law that ignorance of the law is no excuse, as reflected in the maxim “*ignorantia juris neminem excusat*” without examining the repercussions. The application of the said rule for serious or grave offences which are *malum in se* has a rational basis else, the defence of ignorance of the law would be taken for an offence of murder also. But consensual sexual relations amongst the genders, outlawed only because legislation prescribes an age for consent and where the victim and the accused have married and are living together as a family with children then, in such cases, to apply the law literally, resulting in the husband being convicted for a period of not less than ten years [U/s. 4(1)] and for not less than twenty years if the wife was less than sixteen years at the time of elopement [U/s 4(2)] and again for a period of not less than twenty years for an offence u/s. 6 of the POCSO, is a travesty of justice. However, the Courts are helpless as they must enforce the legislative will as it is. The road to hell is indeed paved with good intentions.

14. Coming back to the facts of this case. The prosecutrix appeared before this Court along with her infant son and mother-in-law. She

¹ <https://www.census2011.co.in/census/state/madhya+pradesh.html>

informed the Court that she eloped with the applicant to Indore and there got married to him had a child through the wedlock. She says that she is staying with her in-laws presently and is happy with them. When asked whom she wants to live with, she spontaneously answers that she wants to live with the applicant, her husband. This Court asked her about her educational qualification to which she replied that she has studied till the 7th standard. This Court asked her whether she can read the Hindi newspaper to which the answer is an emphatic 'No', which also raises the question as to what is being taught in the government schools of Madhya Pradesh that a child who has studied up to the seventh standard is unable to read a newspaper in Hindi? This also renders suspect the intention of the governance system in the State which apparently seeks to flourish from the illiteracy of its people.

15. The prosecutrix has already testified before the Ld. Trial Court and she has turned completely hostile. The Ld. Counsel for the State drew attention of this Court to the testimony of the prosecutrix where she has denied even knowing the applicant and having stated before the Ld. Trial Court that the applicant has not done anything with her and also that the applicant is not the father of her child. The desperation of the prosecutrix to get the applicant released can be sensed upon reading her Court testimony.
16. Pursuant to the order of this Court dated 09/02/23, the SHO of P.S. Isagarh has filed his report dated 15/02/23 which has been seen by this Court. The report reveals that the prosecutrix was called to the police station to enquire about the welfare of the infant. She

appeared and informed the police that she was staying with her in-laws and that the infant was being cared for. The statement of the prosecutrix was recorded by the police (which is not as per s. 161 Cr.P.C as it has been signed by the prosecutrix and the statement was not recorded in the course of investigation) in which she has stated that on 25/04/18 she, on her own volition, eloped with the applicant from whom she has a son who is being cared for by her and her in-laws. Several photographs have also been annexed with the report of the SHO, one of which is of the marriage between the applicant with the prosecutrix. All the other material witnesses, including the parents of the prosecutrix have all turned hostile, but the DNA report reveals that the applicant is the biological parent of the child born to the prosecutrix.

17. The prosecutrix does not know her date of birth. She also says that she does not know how literate or educated her husband is. She comes from a background where her father is a manual labourer and her mother works in the houses of others doing household chores like sweeping, washing dishes and clothes. A description of the society from which the prosecutrix hails from was felt necessary by this Court as case after case after case of offences registered under the POCSO Act in Madhya Pradesh, reveals the same dismal narrative. More than 90 % of these cases are from the strata of the society from which the prosecutrix in this case comes from, which is illiterate or quasi-literate, financially impoverished and socially backward. This coupled with the high rate of unemployment at 27.5% (as per May 2020 as per survey

conducted by the Centre for Monitoring Indian Economy) which hits rural Madhya Pradesh the hardest, sees many a young couple, where the girl is a minor, eloping to adjoining states in search of work as labourers in the unorganised sector, where they cohabit for a while till some day they are recovered by the police. Thus, when there is a complete abdication of the State on two crucial fronts being, (a) providing a meaningful education to its people and (2) creating employment opportunities for her people, the result is the inevitable instances like the present case.

18. In another case which was finally heard by this court (**Criminal Appeal No. 4693/2021 – Vijay@Cheeku Vs. State of Madhya Pradesh through P.S. Civil Lines, Datia**), the prosecutrix appeared in person with her youngest child in her arms on 27/03/23. The Bar was on strike, and she was unrepresented. She broke down before this Court and said she was living on the edge of penury and vagrancy. She said that the appellant is her husband who has been convicted on account of her having been less than eighteen years of age when she eloped with him. She eloped and got married and thereafter was recovered by the police and her husband was arrested and sent to jail. He was on bail during trial and in that period, she had three children with him and upon his conviction, was sentenced to ten years RI. Her own parents had disowned her and her in laws gave her a roof over her head but refused to do anymore expressing their financial inability. She further said that she had taken loans from relations to sustain her three children and herself and that even those relations were refusing to help her anymore. This court could

not consider the application for suspension as an earlier application had been rejected on merits and she did not have the wherewithal of approaching the Supreme Court. However, this court finally heard the matter on the same day and acquitted her husband. However, there are several more who languish in prison in near identical situations.

19. The POCSO is gender neutral and “Child” is defined in s. 2(d) as “any person below the age of eighteen years”. Therefore, how does the court proceed where both the girl and boy are below the age of eighteen and *de facto* consent is undisputed? In such a case, as both are below the age of consent, how will the court determine as to who is the victim and who the offender? Will the law require the prosecution of both as juveniles or will there be no prosecution at all under the POCSO? These are grey areas inviting a Pandora’s box to open.
20. The provisions of the POCSO, in so far as it relates to cases of penetrative sexual, aggravated penetrative sexual assault (rape) Sexual assault, aggravated sexual assault and sexual harassment of a child, are just and proper where the offender is an adult and *de facto* consent is absent. However, its provisions do not distinguish between rape (as in without consent) and statutory rape (as with consent but punishable because victim is below eighteen years of age). It is in cases of statutory rape that the POCSO has the propensity of destroying families where the victim, usually on the cusp of majority, elopes with the accused, gets married, has children and later, the accused is put to trial and convicted and sentenced to

a minimum of ten years rigorous imprisonment, which may extend to twenty.

21. Therefore, the Hon'ble Law Commission of India is requested to kindly consider the following and suggest the amendment of the POCSO to the Parliament (if the Hon'ble Commission so deems fit), to give discretion to the Special Judge where; **(a) Where the prosecutrix is below the age of consent but de facto consent is apparent, not to have a minimum sentence and instead, give the discretion to the Special Court (who is a senior Session Judge usually with more than twenty years of judicial experience) to impose a sentence as per the facts and circumstances of the case, which can extend up to twenty years and (b) Where the prosecutrix is below the age of consent and the relationship has culminated in marriage (with or without children), there should not be any sentence of imprisonment and instead the Special Court be empowered to impose alternate correctional methods like community service etc.**

REQUEST TO THE PRINCIPAL SECRETARY, DEPARTMENT OF PUBLIC RELATIONS

22. The State Government, in violation of the mandate u/s. 43 of the POCSO, has ignored its duty of fulfilling its obligation. In a state that has a dismal record in relation to literacy and education, there is deliberate abstinence of the state from discharging its obligations u/s. 43 of the POCSO, of disseminating the liabilities and consequences to be faced under the POCSO, which is a legislative imprimatur, requiring the State Government, to Print, Publish and

Broadcast the liabilities under the POCSO. S. 43 reads as under.

43. Public awareness about Act. -

The Central Government and every **State Government, shall** take all measures to ensure that-

(a) the provisions of this Act are given wide publicity through **media including the television, radio and the print media at regular intervals** to make the general public, children as well as their parents and guardians aware of the provisions of this Act;

(b) the officers of the Central Government and the State Governments and other concerned persons (including the police officers) are imparted periodic training on the matters relating to the implementation of the provisions of the Act

- 23.** Non-compliance of the State with the mandatory requirement u/s. 43, adds to the increasing number of POCSO cases in the State of Madhya Pradesh. Therefore, keeping in mind that most of the cases under the POCSO affect the illiterate/quasi literate from the rural areas it would be essential for the State Government that in addition to propagation of the provisions of the POCSO through the print media, it shall also ensure its dissemination through the television and radio.
- 24.** Therefore, this court requests the Principal Secretary, Department of Public Relations, State of Madhya Pradesh that he/she shall (a) forthwith publish, thrice a week the stringent provisions of the POCSO and the effect of its violation in all prominent Hindi newspapers having circulation in the state. (b) Disseminate through the local Television channels and FM/AM radio and (c) train the teaching staff of all state government schools to convey to the students, the liability under the POCSO. This shall commence forthwith this order being served upon the

aforementioned authority. This shall continue for three months as directed by this court and thereafter, the Department of Public Relations can reassess the frequency with which the directions have to be complied with. However, it shall continue at regular intervals as required u/s. 43.

- 25.** The failure to comply as required in paragraph 24, shall give this court the liberty to hold the Principal Secretary, Department of Public Relations, in contempt of this order, after due process, on a date post 10/05/2023, suo motu by this Court or by any permanent resident of the State of Madhya Pradesh.
- 26.** **The office is requested to transmit a copy of this order to the Hon'ble Law Commission of India and to the office of the Principal Secretary, Public Relations, State of Madhya Pradesh, forthwith.**
- 27.** The case stands disposed of.

Rashid

**(ATUL SREEDHARAN)
JUDGE**