2025:DHC:11860-DB

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 23rd DECEMBER, 2025

IN THE MATTER OF:

\+ **CRL.A. 53/2020**

KULDEEP SINGH SENGAR .....Appellant

Through: Mr N Hariharan Sr Adv, Mr SPM Tripathi, Mr. Amit Sinha, Mr. Deepak Sharma, Mr. Rahul Poonia, Mr. Ambuj Singh, Mr. Ashish Tiwari, Ms. Aishwarya Senger, Mr. Gaurav Kumar, Mr. Saurabh Dwivedi, Ms. Punya Rekha, Ms. Angara, Ms. Vasundhara N, Mr. Aman Akhtar, Ms. Sana Singh, Ms. Vasundhara Raj Tyagi, Mr. Arjan Singh Mandla, Ms. Gauri Ramachandran, Advs.
Mr. Manish Vashisht, Sr. Advocate with Ms. Aishwarya Sengar, Mr. Vedansh Vashisht, Mr. Swapan Singhal, Advs.

versus

CENTRAL BUREAU OF INVESTIGATION .....Respondent

Through: Mrs. Anubha Bhardwaj SPP for CBI Along with Mr. Vijay Mishra & Ms. Ananya Shamshery Advs.
Ms. Urvi Mohan, Advocate for DCW
Mr. Mehmood Pracha, Mr. Sanawar, Mr. Jatin Bhatt, Mr. Kshtij Singh and Mr. Kumail Abbas Advocates for Complainant

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD
HON'BLE MR. JUSTICE HARISH VAIDYANATHAN SHANKAR

JUDGMENT

SUBRAMONIUM PRASAD, J.

CRL.M.(BAIL) 359/2022

1. The present application has been filed by the Appellant under Section 389(1) read with Section 482 of the Code of Criminal Procedure, 1963 ["**CrPC**"] seeking regular suspension of sentence during the pendency of the appeal.

2. The Appellant herein has been convicted for offences punishable under Sections 376/363/366 of the Indian Penal Code, 1860 ["**IPC**"] read with Sections 5(c)/6 of the Protection of Children from Sexual Offences Act, 2012 ["**POCSO Act**"] *vide* judgment dated 16.12.2019 passed by the learned District & Sessions Judge – West District, Tis Hazari Courts, Delhi ["**learned Trial Court**"] in Sessions Case No. 448/2019 arising out of FIR No. 96/2018 registered at Police Station Makhi, Unnao, Uttar Pradesh, re-registered as RC-08(S)/2018, PS CBI/ACB/Lucknow ["**Impugned Judgment**"]. *Vide* a separate order on sentence dated 20.12.2019 passed by the learned Trial Court, the Appellant has been sentenced to undergo life imprisonment for the remainder of life, along with a fine of Rs. 25,00,000/- and an additional compensation of Rs. 10,00,000/- payable to the mother of the survivor. Against the Impugned Judgment as well as the Order on sentence, the Appellant has approached this Court by way of the Criminal Appeal No. 53 of 2020, which is pending adjudication.

3. For a proper adjudication of the present application seeking suspension of sentence during the pendency of the Appeal, this Court deems it fit to postulate the background which gives rise to the Appeal.

4. The incident of rape upon the Victim/Survivor came to be registered under Case No. SC – 448/2019 arising out of FIR No. 96/2018 at PS Makhi, Unnao under Sections 363, 366, 376, 506 of the IPC and Sections 3 and 4 of the POCSO Act. Investigation into these allegations was handed over to the Central Bureau of Investigation ["**CBI**"] *vide* a Notification dated 12.04.2018 issued by the Government of Uttar Pradesh, after which a case RC 08(S)/2018 dated 12.04.2018 came to be registered in the ACB, CBI, Lucknow Branch.

5. Pertinently, apart from RC 08(S)/2018 which involved the allegation of rape upon the Victim/Survivor, the CBI was also entrusted with the investigation into the following two cases:

(i) RC 09(S)/2018 under Sections 323, 504, 506 IPC and Sections 3/25 Arms Act, lodged against father of the Victim/Survivor; and

(ii) RC 10(S)/2018 under Sections 147, 323, 504 read with Section 302 IPC, lodged by the mother of the Victim/Survivor for the alleged assault upon her husband.

6. Subsequently, another case arising out of FIR No. 316/2018 dated 20.06.2017 under Sections 363, 366, 376D IPC pertaining to alleged offences of kidnapping, confinement for sexual exploitation and gang rape upon the Victim/Survivor was transferred to CBI for further investigation *vide* Order dated 13.04.2018 passed by the High Court of Judicature at Allahabad in WP (PIL) 01/2018. Resultantly, RC 11(S)/2018 dated

16.06.2018 under Sections 363, 366, 376D IPC and Sections 3 and 4 POCSO came to be registered at CBI, ACB, Lucknow Branch.

7. A chargesheet was filed by the CBI before the Special Judge (POCSO) CBI – IV, Lucknow on 11.07.2018, which was also supplied to the Appellant as per Section 207 CrPC, and the matter remained pending awaiting the FSL Report. In the meanwhile, applications for discharge were filed by the Appellant, however, thereafter, the court fell vacant and no meaningful proceedings could take place.

8. Subsequently, by an order dated 01.08.2019 passed by the Apex Court in Suo Motu Writ Petition (Criminal) No. 01/2019 ["**SMW (Crl.)**"], all the four cases transferred to CBI Court at Lucknow were directed to be tried by the learned Trial Court.

9. Sum and substance of allegations levelled against the Appellant in RC 08(S)/2018 are that on 04.06.2017 at about 8:00 PM, one 'SS' who was the Accused No. 1 (A-1) in the RC 08(S)/2018, enticed and induced the Victim/Survivor to accompany her, on the pretext of providing a job at the residence of the Appellant. The Victim/Survivor was taken by 'SS' inside the house of the Appellant from the rear portion of the property where there were no security guards, whereby the Appellant then forcibly raped the Victim/Survivor.

10. It is noted in the Final Report filed under Section 173 CrPC, that the Victim/Survivor did not reveal the incident to anyone, as she was threatened by the Appellant, to the effect that were the Victim/Survivor to speak anything about it, some untoward harm would entail. However, the Victim/Survivor later came to confide in her uncle (PW-9), who then relayed the facts to his sister-in-law, being the Victim/Survivor's mother (PW-8), at

whose instance the FIR was registered. However, since the local police did not take any action, mother of the Victim/Survivor was constrained to approach the Court of Additional Sessions Judge, POCSO Act, Unnao, UP, alleging *inter alia* that the Appellant threatened the Victim/Survivor to kill her and her family, were the details of the incident that occurred on 04.06.2017 revealed to anyone.

11. The Final Report also takes note of the circumstances surrounding the death of the father of the Victim/Survivor in judicial custody. It has been stated that upon returning to Village Makhi on 03.04.2018 father of the Victim/Survivor was assaulted by the brother of the Appellant at District Court, Unnao, and later, was planted with a country made pistol/gun with four live cartridges, allegedly under the supervision of the Appellant. In any event, father of the Victim/Survivor was sent to judicial custody, where he succumbed to his injuries in the early morning of 09.04.2019. This incident is the subject matter of RC 09(S)/2018 under Sections 323, 504, 506 IPC and Sections 3/25 Arms Act, lodged against father of the Victim/Survivor.

12. Based on the statement of the Victim/Survivor in her statement under Sections 161 and 164 CrPC as well as the date of birth recorded as 17.08.2001 at the time of her primary education in Akbal Bahadur Singh ["**ABS**"] Public School, Saidapur, Sarei Khande, Post Chhiblaj, District Raebarely, Uttar Pradesh, the investigation of CBI concluded that the Victim/Survivor was a child within the meaning of Section 2(d) POCSO.

13. In support of its case, the Prosecution examined the following witnesses before the learned Trial Court:

(i) PW-1Praduman Nath Shrivastava, being the Draftsman from Public Works Department, Unnao, who testified that he visited

village Makhi along with the CBI team, where at the instance of the Victim/Survivor, a Site Plan (Ex.PW-1/1 or D-12) dated 28.04.2018 was prepared;

(ii) PW-2Dhirender Kumar Yadav, Village Panchayat Officer, who was a witness to the preparation of the Site Plan (Ex.PW-1/1 or D-12) dated 28.04.2018 and also testified that he handed over the extracts of the family register of Sarai Thok, Makhi for house nos. 655 to 928.

(iii) PW-3 Arun Kumar Singh, who was the principal of ABS Public School, who testified that during the investigation he handed over the original admission register of the students from the year 2005 to 2010 to the CBI, which is marked as Ex. PW-3/2. According to the testimony of PW-3, date of birth of the Victim/Survivor is recorded as 17.08.2001, and this register was handed over to the CBI.

(iv) PW-4 Virender Singh, being the Assistant Teacher at ABS School, who testified to have recorded the date of birth of the victim/survivor in the admission register of ABS School as 17.08.2001.

(v) PW-5 Chander Pal Singh, being the maternal grandfather of the Victim/Survivor, who testified that his maternal granddaughter or the Victim/Survivor lived with him during her childhood along with his family in their house at village Khande Sarai, where she studied in the ABS Public school up to 5th standard.

(vi) PW-6 Dhirender Singh, being the maternal uncle of the Victim/Survivor who also testified that the Victim/Survivor

resided with him at their village where she completed her primary education from ABS Public School up to 5th standard.

(vii) PW-7 Constable Maulendra Kumar from the office of CO, Safipur, Unnao, who handed over document D-45 to the IO of CBI, which is reflected in the seizure memo Ex. PW-7/A (D-39).

(viii) PW-11 Ms. Nitika Rajan, being the Civil judge, Junior Division, Kannauj UP, who testified that on 04.05.018, she was posted as Civil Judge, Junior Division (North), Unnao, UP, where she claimed to have recorded the statement of the mother of the Victim/Survivor under Section 164 CrPC. She also testified that she had recorded the statements of the wife of PW-9 as well as mother of the Victim/Survivor verbatim, as per the facts disclosed by them.

(ix) PW-12 Constable Vipin Kumar, who was from Police Station Makhi, Unnao, who deposed that he was posted as a Computer Assistant at P.S. Makhi on 12.04.2018 and had recorded the FIR in the instant case.

(x) PW-13 being the Investigation Officer of the CBI, DSP R.R. Tripathi.

14. On the other hand, the following witnesses were examined by the Appellant:

(i) DW-1 Radhey Shyam, who testified that since September 2012 till 18.09.2017, he was the in-charge of security of the Appellant, and on 04.06.2017, DW-1 joined the Appellant at his village at about 9:00 AM, after which he along with the Appellant left for the City Office in Unnao, where they stayed till around 8:45 PM.

(ii) DW-2 Ram Singh, who testified that he had spoken to the Appellant on 04.06.2017 at around 20:03:56 hours regarding some construction of a CC road near a college in Maholia.

(iii) DW-3 Smt. Hira Singh, who testified that she had subscribed to a mobile SIM card with last six digits being 802913 in the name of her daughter Priya and one day, her phone fell, due to which its battery and cover got separated. DW-3 stated that the phone was picked by the Victim/Survivor, who returned the phone to DW-3, while retaining the SIM card with herself.

(iv) DW-4 Brahmdeen, being a government school teacher who had retired as a Principal from the Government Primary School, Khande Sarai in the year 2009. He deposed about the admission book obtained from the Government School and that the Victim/Survivor was admitted to the school by her maternal grandfather and maternal uncle, and that her date of birth was recorded as 05.07.1998.

(v) DW-5 Ibrar Khan, who testified that on 04.06.2017, he had called the Appellant at around 8:29 PM, since he wished to invite the Appellant for a social gathering/Roja Iftaar party.

(vi) DW-6 Neeraj Tiwari, working as Manager Marketing (Advertisement) with Hindi Daily Rashtriya Sahara at Unnao since 2016, deposed that he had called the Appellant on 04.06.2017 at around 7:30 PM, to speak about some advertisement/publicity in connection with World Environment Day.

(vii) DW-7 Dinesh Singh, a resident of Village Makhi, testified that a Panchayat was convened by the Appellant on 21.06.2017 at around 9:00 AM, where apart from the Appellant himself, SS/A-1, her husband, daughter, PW-9 Mahesh Singh, mother of the Victim/Survivor, Suresh Mishra, Salil, Salil, Ramji, Rahul, Ram Kishore Tiwari, Suresh and two-three more persons had joined and discussion revealed that the Victim/Survivor had eloped with Naresh Tiwari and also been speaking to Shubham Singh, who probably had knowledge of their elopement. At this panchayat, PW-9 Mahesh Singh proposed the marriage of the Victim/Survivor to Shubham Singh, which was not accepted, which in turn led to a heated exchange of words, which was when the Appellant intervened since he did not want any innocent person to be involved in any criminal action/prosecution.

(viii) DW-8 Amit Singh, being the cousin brother of the Appellant, deposed that his elder brother called the Appellant in DW-8's presence at 9:00 PM on 04.06.2017, to ask as to when the Appellant would arrive at the venue for celebrating the ear-piercing ceremony of his two sons. DW-8 further testified that the Appellant reached the venue at Amrawati Palace, Hamirpur Road, Kanpur at about 9:30 PM accompanied by his two gunners, namely Radhey Shyam and Pankaj, besides drive Suno and Jagrup, attendant Simple @ Vinay Mishra.

(ix) DW-9 Vinay Kumar Mishra @ Simple Mishra, associated with the Appellant since 2011, deposed that on 04.06.2017, the Appellant

was at his Unnao City Office till about 8:30/8:45 PM, after which they left for a function at Amravati Palace, Kanpur.

15. While dealing with the age of the Victim/Survivor, the learned Trial Court observed that the Victim/Survivor and her family members were able to establish that she studied in ABS Public School, Saidapur, Raebarely, U.P., and in view of Section 94 of the JJ Act, ossification test or any other medical evidence need not be looked into. Accordingly, the learned Trial Court concluded that the CBI was able to prove that the Victim/Survivor was a 'child' within the meaning of Section 2(d) of the POCSO Act, as on the date of commission of the alleged offence.

16. The learned Trial Court has also observed that it is an "inescapable conclusion" that the IO of CBI did not conduct a fair investigation in the matter, resulting in a disadvantage to the case of Victim/Survivor and her family members. This, according to the learned Trial Court, was done by simultaneously investigating RC-11(S)/2018 for a long period of time and belatedly filing chargesheet on 03.10.2019.

17. While dealing with the Appellant's plea of alibi, the learned Trial Court observed that the Appellant failed to prove, even by preponderance of probabilities that he was not present at his residence or that it was difficult for him to have access to his house in a short time during the course of the day on 04.06.2017.

18. While dealing with the question as to whether the Appellant is a public servant for the purpose of POCSO Act or not, the learned Trial Court, while answering in the affirmative, observed that a 'public servant' is one who enjoys an official position, status and is mandated to perform certain duties under the Constitution being a State functionary. The definition or

import of the words 'public servant' is to be understood in the overall context of the POCSO Act, and by doing so, the conclusion that emerges is that if an MLA or elected representative is found to have committed such offence, he would be covered by the rigors of Section 5(c) of the POCSO Act, and only this interpretation would be in line with Section 42A of the POCSO Act.

19. Against the above observations, the Appellant approach this Court by way of the Appeal being Crl. A. 53/2020, which is pending adjudication.

20. Learned Senior Counsel appearing for the Appellant has submitted as under:

(i) Entire case of the Prosecution to bring out an offence under the POCSO Act rests on their claim that the Victim/Survivor is a minor, though the same is contradicted by the Admission Register of ABS Public School wherein the name of the survivor is written at Serial Number 45, in which her date of birth is recorded as 17.08.2001, however, the same is without any supporting document. Rather PW-3 who is the principal of ABS Public school, admits that the entry at Serial Number 45 of the admission register to have been "***rubbed and rewritten***" in his testimony.

(ii) Further doubt is cast on the veracity on the Admission Register of ABS Public School, as PW-3 admits that certain entries in the Admission Register were recorded on a Sunday.

(iii) The Transfer Certificate seized from ABS Public School has been found to be a forged document by the investigating authorities and has been concluded as such by the learned Trial Court as well.

(iv) While testifying before the learned Trial Court, the Victim/Survivor deposed that her date of birth is August 2002. Even the mother of the Victim/Survivor has not stated any date of birth of her own daughter.

(v) On the contrary, the documents of the Government Primary School, Khande Sarai, Raebareli shows that the date of birth of the Victim/Survivor was 05.07.1998. During the course of the trial, the defense called one of the witnesses dropped by the Prosecution from the Government Primary School, whose testimony proved the fact in relation to the date of birth of the Victim/Survivor to be as per the documents of the Government Primary School and not ABS Public School.

(vi) In view of the conflicting and inconclusive dates of birth of the Victim/Survivor, the CBI had to opt for determination of the Victim/Survivor's age on the basis of medical and forensic evidence. As per the opinion of CMO at the District Hospital, Unnao, which was recorded in the MLC dated 21.06.2017, the age of the Victim/Survivor was concluded to be 19 years and five months.

(vii) As per the report of the radiologist at Ram Manohar Lohia Hospital ["**RML**"], Lucknow, on the basis of an X-Ray report it was determined that the age of the Victim/Survivor was more than 18 years.

(viii) Seeing that there was a discrepancy even in the two medical opinions, that is, one from the District Hospital at Unnao, and another from RML Lucknow, the CBI requested both the doctors

for a joint memorandum. Resultantly as per the joint consultation memorandum dated 18.06.2018, it was observed that the age of the Victim/Survivor was more than 18 years.

(ix) Opinion was also sought from the Medical Board, constituted at AIIMS, New Delhi, which in its report dated 23.06.2018, opined that the age of the Victim/Survivor was more than 18 years on 22.06.2017.

(x) The learned Trial Court failed to appreciate that the solitary admission register pertaining to ABS Public School did not fulfill the fundamental ingredients of Section 35 of the Indian Evidence Act, being that the record must be proved to be maintained regularly in the ordinary course of business, the record must be proved to be maintained by an official in the performance of his duty and lastly, the record must be proved to have been maintained in consequence of a duty enjoined by law upon the official in question. It is the submission of the learned Senior Counsel for the Appellant that the documents pertaining to the Government Primary School affirmatively fulfilled the above-noted criteria of the said provision.

(xi) In light of the above discrepancies between the records of ABS Public School and the Government Primary School, as also the medical opinions regarding the age of the Victim/Survivor, which lean more towards the conclusion that the victim/survivor was, in fact, a major at the time of the incident, the learned Trial Court wrongly observes that the victim/survivor was most probably a minor. On this aspect, the law is clear, that in absence of

documents prescribed under Section 94 of the Juvenile Justice Act, 2015 ["**JJ Act**"], the medical evidence brought on record has to be looked into. Notably, the Admission Register of the ABS Public School on which the learned Trial Court has based its conclusion that the Victim/Survivor was a minor, does not qualify as either a document prescribed under Section 94 of the JJ Act or medical evidence.

(xii) Learned Senior Counsel further states that it is a well-settled position in law that a margin of two years must be taken on the upper side in case of discrepancies having arisen in the age determination, and the benefit must accrue to the accused and not the victim. Reliance in this regard is placed on the judgments of the Apex Court in P. Yuvaprakash v. State **(2023) SCC OnLine SC 846**, Court on its Own Motion v State of NCT of Delhi **Crl. Ref. 2/2024** as well of a Coordinate Bench of this Court in State (Govt. of NCT Delhi) v. Shailesh Kumar**(2019) SCC OnLine Del 8318**.

(xiii) It has been vehemently contended by the learned Senior Counsel that the Appellant on 04.06.2017 was not present at his residence in Village Makhi at the relevant time that is, from 8 PM to 8:30 PM, but was at his Unnao City Office, which is at a distance of 14 km from his residence.

(xiv) It is an admitted case as per the prosecution documents, that the Appellant from 12:20 PM till around 8:30 PM-8:45 PM was at his Unnao City Office, where after he left for Kanpur in order to attend a private ceremony of his cousin brother DW-8.

(xv) The Appellant used two mobile handsets which were always in his possession – one of Samsung make having 2 SIM slots and carrying mobile numbers 9415905570 and 9839120151 of the service providers BSNL and Vodafone respectively, and the second of Apple iPhone make carrying mobile number 8052616161 of the service provider Vodafone.

(xvi) The CDRs of the two mobile phones belonging to the Appellant were completely in sync with the travel patterns and position of the applicant on 04.06.2017. Rather from 7:30 PM to 8:30 PM, all the three mobile phone numbers as per their CDRs were not located in village Makhi at all.

(xvii) The learned Trial Court commits a fatal error in as much as, if the Appellant allegedly committed rape upon the Victim/Survivor from 8 PM to 8:30 PM, in a matter of 53 seconds, he could not have covered a distance of around 14 km to reach his office in order to attend a call at 20:30:53 at his Unnao City Office, which fact is captured by the cell tower located at Civil Lines, Unnao, which is at a distance of 300 meters from the said City Office. Thus, even the CDRs indicate that the Appellant had a valid alibi and by no stretch of imagination could have committed the acts alleged by the prosecution.

(xviii) The learned Senior Counsel has also contended that the Victim/Survivor in her statement under 164 CrPC recorded on 22.06.2017 does not mention the alleged incident of 04.06.2017. It is submitted that the allegations against the Appellant were reported for the first time on 17.08.2017, in a letter addressed to

the Chief Minister of Uttar Pradesh after a delay of about two months and ten days. In this letter, it was alleged by the Victim/Survivor that in the evening hours at around 10 PM on 11.06.2017, SS/A-1 gave a telephone call to the victim/survivor, asking her to immediately come to her house as a job was fixed for her at Kanpur, and one vehicle was ready to go to Kanpur. Victim/Survivor alleges that she went upon this call to the house of SS/A-1 and subsequently, it was portrayed that she was gang-raped by one Shubham Singh, who is the son of SS and one Naresh Tiwari, who is the family Driver of SS in the car which she got in for going to the house of SS. In the very same letter, the Victim/Survivor is also found to have contended that SS took her to the residence of the Appellant on 04.06.2017 at 2 PM, where allegedly she was raped by the Appellant. It is the submission of the learned Senior Counsel that these allegations are strange and unnatural, as in the event that the Victim/Survivor was raped on 04.06.2017, it is beyond understanding as to why she would go again on 11.06.2017 by being called to the same place on the same pretext by SS/A-1.

(xix) It is further submitted by the learned Senior Counsel that this handwritten complaint of the Victim/Survivor is nothing but an afterthought since the same was filed after the chargesheet was filed in FIR 316/2017, which gave rise to RC-11(S)/2018.

(xx) It is further submitted that in an interview given by the Victim/Survivor to the media on 12.09.2017 the timing of the alleged incident is stated to be 6 PM.

(xxi) At paragraph 104 of the impugned judgement on conviction, the learned Trial Court observes that there are some improvements in the statement under Section 164 CrPC of the Victim/Survivor, yet still overlooks that the Victim/Survivor gives altogether a different version where she seeks to dissociate from the earlier case set up and now states that on 11.06.2017, rather than SS/A-1 giving her a mobile call at 10 PM in the night and offering her a job at Kanpur, she stated that at around 9 PM, she had gone to a tap where some persons abducted and forcibly put her in a car subsequent to which she was gangraped by Shubham Singh and Naresh Tiwari. Therefore, it is submitted that the entire story set up by the prosecution completely falls on itself as the Victim/Survivor herself is unable to put forth a coherent version of events.

(xxii) It is further submitted by the learned Senior Counsel that the Victim/Survivor was using a mobile number 8112802913 from 29.05.2017 to 10.06.2017. Moreover, the CDR reveal that the Victim/Survivor was using this mobile number at the relevant period of the alleged incident, that is from 7:30 PM to 8:30 PM on 04.06.2017. As such, it is submitted that, since the Victim/Survivor was intermittently talking on her phone from 7:52 PM up to 8:30 PM and even at 9 PM, she could not have been subjected to rape by the Appellant at the very same time period.

(xxiii) Moreover, it is submitted that PW-13, being the IO of the CBI has conclusively found that it was, in fact, the Victim/Survivor who was the user of the mobile number 8112802913.

(xxiv) It is submitted that the Appellant has already undergone a considerable period of time, that is, more than eight years under custody which warrants the temporary suspension of sentence during the pendency of the present Appeal.

(xxv) Lastly, the learned Senior Counsel submits that the learned Trial Court has erroneously convicted the Appellant under Section 376(2) IPC and Sections 5(c) and 6 POCSO relying on the judgement of L.K. Advani v. CBI, **1997 Crl. L. J. 2559**, wherein the accused MLA was held to be a public servant within the meaning of Section 2(c) the Prevention of Corruption Act, while on the contrary, the law is clear that in terms of Section 2(2) of POCSO, the definition of a 'public servant' is imported from the definition prescribed under Section 21 IPC according to which an MLA is not a public servant.

21. Opposing the suspension of sentence of the Appellant, learned Special Public Prosecutor ["**SPP**"] appearing on behalf of the CBI has submitted as under:

(i) Given the facts and circumstances of the present case wherein the Appellant who is a four-time MLA has been convicted for committing the offences under Section 376 IPC and Sections 5(c) and section 6 of POCSO, it is it not in the fitness of things to suspend the sentence of the Appellant, since the law is well settled on the point that once a person is convicted, normally an appellate court will proceed on the basis that such person is guilty as there is no presumption of innocence post-conviction.

(ii) Whether the Victim/Survivor was minor or not at the time of the incident is not a question which can be gone into by this court at the stage of suspension of sentence, as the appellate court cannot alter the findings of the learned Trial Court at this stage. Even on this aspect, the law is well settled that the court should not appreciate the evidence at the stage of considering an application under Section 389 CrPC. Reliance in this regard is placed on the judgement of the Apex Court in Lilaben v. State of Gujarat, **2025 SCC OnLine 833**.

(iii) Even otherwise, with regard to the age of the victim/survivor, it is submitted that the Admission Register of ABS Public school, the testimonies of PW-3 and PW-4 clearly establish that the Victim/Survivor was in fact, a minor at the time of the incident. This is also supported by the testimonies of the Victim/Survivor herself, the mother of the Victim/Survivor, PW-8, the maternal Uncle of the Victim/Survivor, PW-6, the maternal grandfather of the Victim/Survivor, PW4, who have all in unison stated that the Victim/Survivor was indeed studying at ABS Public school for her primary education.

(iv) In terms of Rule 12 of the JJ Rules 2007, and taking into account the Admission Register of ABS Public School, the testimony of the relatives of the Victim/Survivor and the officials of the ABS Public School, the date of birth of the Victim/Survivor stood conclusively proved and therefore the learned Trial Court was right in arriving at the conclusion that the Victim/Survivor was a minor on the date of the incident.

(v) The learned SPP further submits that it is immaterial for Rule 12 of the JJ Rules 2007 to have applicability, whether the school from which the certificate is obtained is a recognized government school or an unrecognized private school.

(vi) In so far as the record of the Government Primary School, where the age of the Victim/Survivor is shown to be 05.07.1998, it is submitted that the same is not an official entry in the record of the school and rather is only a record maintained by DW-4 Brahmadeen for his personal purposes.

(vii) Merely because the record of the Government Primary School is admitted by the Appellant in terms of Section 294 CrPC, the same cannot be a conclusive proof of its genuineness as such admission does not stop the court from taking into consideration the probative value of such documents with respect to the facts in issue.

(viii) It is submitted that the medical examinations of the Victim/Survivor conducted by both the RML Hospital and AIIMS Medical Board, which have concluded that the Victim/Survivor was more than 18 years of age on 22.06.2017 cannot be looked into as it is only in the absence of school certificates that the court can resort to test any medical test to determine the age. Even otherwise, an ossification test is not conclusive proof of the age of the person and has a margin of error of two years, which will suggest that the Victim/Survivor was definitely a minor on the date of the unfortunate incident.

(ix) In so far as the Appellant's plea of alibi is concerned, the law is well settled on the point that such a plea must be proved with complete certainty so that any possibility of the person concerned at the place of occurrence is completely excluded. In this regard, the lower trial Court has rightly rejected the evidence of DW-1 and DW-9 who are both close associates of the Appellant and have both failed to provide any information with regard to the movements and program of the Appellant for any other day, apart from 04.06.2017.

(x) Even otherwise, accuracy of cell tower locations and the evidence obtained as a result, is not completely reliable because there is an error margin. Moreover, without these cell tower locations being substantiated by any expert witness, they cannot be considered as the gospel truth.

(xi) It is submitted that it is not beyond imagination that the Appellant manipulated the cell tower locations of his mobile phones in order to build a false defense of alibi since he was about to commit a crime.

(xii) It is submitted that the claim of the defense that on 04.06.2017, the Victim/Survivor was on a call during the time the unfortunate incident took place, is premised on the CDRs of the mobile phone number 8112802913, the testimony of DW-4 and the testimony of the IO, being PW-13. This claim has been rightly rejected by the learned Trial Court, observing that this mobile number was registered in the name of one Priya Singh, leading to the presumption that this Priya Singh was the user of the said mobile

phone, and even otherwise Priya Singh was never examined as a defense witness to prove the contrary.

(xiii) Even the testimony of DW-3, claiming that it was the DW-3 herself who was using this mobile phone number, and later when the phone fell down and was picked up by the Victim/Survivor, who returned the phone to DW-3, but did not return the SIM card is an unreliable testimony as the same is contrary to common sense and in no way explains as to why any person would pick up a phone to only use the SIM card and not the phone itself.

(xiv) In so far as the testimony of PW-13, being the IO of the CBI with regards to the conclusion arrived at by him in RC-11(S)/2018 that it was, in fact, the Victim/Survivor who was using this mobile number is of no evidentiary value as the law is very clear on the point that the conclusion in RC-11(S)/2018 is of no consequence to the present case since each case must be independently adjudicated. Even otherwise, mere opinion of an IO in a chargesheet has no evidentiary value and reliance in this regard is placed on the judgement of the Apex Court in Rajesh Ranjan Yadav @ Pappu v.CBI through its Director, **(2007) 1 SCC 70**.

(xv) Learned SPP on behalf of CBI has also responded to the Appellant's contention that a delay of more than two months in reporting the offence renders the version of the incident narrated by the Victim/Survivor as unreliable. The learned SPP states that this delay of about two months and ten days has occurred because the Victim/Survivor was threatened by the Appellant to keep quiet about the entire incident or her family would not be spared. This is

even corroborated by the fact that shortly after the incident was reported, associates of the Appellant started targeting the uncle of the Victim/Survivor as well as caused the father of the Victim/Survivor to be assaulted by his brother, falsely implicated in a case to the extent that he wound up in judicial custody. It also cannot be lost sight that the father of the Victim/Survivor ended up succumbing to the injuries while in judicial custody itself.

(xvi) It is also submitted that even assuming there was no explanation provided for the delay in reporting about the incident, given the multitudes of restrictions and taboos within which many women in rural areas are confronted, reporting of such an incident which implicates a politically powerful man cannot be considered to be an easy task. Reliance in this regard is placed on the judgement of the Apex Court in Satpal Singh v. state of Haryana, **(2010) 8 SCC 714**.

(xvii) Tackling the contention raised by the Appellant that he is not a 'public servant' for the purposes of the POCSO Act, the learned SPP has submitted that even though it has been held by the Apex Court in A.R.Antulay (supra) that an MLA is not a public servant as defined under Section 21 IPC, it is for the courts to adopt the principle of purposive construction by taking into account the objects and reasons of enactment of the POCSO act, which is a legislation aiming at the protection of children from sexual assault, harassment, and exploitation. Reliance in this regard is placed on the judgement of the apex court in X v. The Principal

Secretary, Health and Family Welfare Department, Government of NCT of Delhi and Others.

(xviii) It is also submitted by the learned SPP that criminal antecedents of a convict and impact on public confidence in the justice delivery system are relevant considerations for adjudication of an application under Section 389(3) CrPC, and as such, it is a pertinent factor that the Appellant has also been convicted under Sections 120B r/w Section 166,167,193,201,203,211,218,323,341 and Section 304(Il) IPC.

(xix) Conviction of the Appellant under Section 304(II) IPC is for the unfortunate incident of the demise of the father of the Victim/Survivor, who was assaulted by the brother of the Appellant and his henchmen in front of the jurisdictional police officers who remained mute spectators to the entire ordeal and falsely implicated him in a case causing him to be arrested. Thereafter, the Appellant used his political clout to ensure that the father of the Victim/Survivor does not get medical treatment, which eventually led to his death.

(xx) While the death of the father of the Victim/Survivor does not pertain to the instant case, but the same attains relevance for this Hon'ble Court to decide whether given his antecedents and the political clout that the Appellant commands, will the suspension of sentence in the present case not jeopardize security of the Victim/Survivor and whether she will not be forced to live the rest of her life under a perpetual shadow of threat. Reliance in this

regard is placed on the Judgement of the Apex Court in Suzane Lousie Martin us State of Rajasthan &Anr., **(2009) 4 SCC 376**.

22. Arguing that releasing the Appellant on bail and suspending his sentence during the pendency of the Appeal would not only be against the law but would also jeopardize the well-being and safety of the Victim/Survivor and her family, learned Counsel for the Victim submits as under:

(i) It is submitted that even though the case pertains to an incident which occurred on 04.06.2017, the FIR came to be registered only on 12.04.2018, that too only after the father of the Victim/Survivor died in judicial custody at the behest of the Appellant. In this regard, the learned Trial Court has very fairly found merit in the contention that as against the prosecution of minor offences purportedly committed by PW-9, immediate action was taken by the police officials of PS Makhi. However, no cognizance was taken by them in respect of the complaint of the mother of the Victim/Survivor, which was in violation of the directions contained in the judgement of the Apex Court in Lalitha Kumari v. state of Uttar Pradesh, (**2014) 2 SCC1**.

(ii) Even after the investigation was transferred to the CBI, fairness and impartiality were not ensured. This was also observed by the learned Trial Court, while noting that several documents were sought to be filed by the applicant in the simultaneous proceedings being conducted in RC-11(S)/2018, knowledge of which could only have been with the IO of the CBI.

(iii) The Appellant's plea of alibi is meritless, as there were several overlapping calls attended through the two mobile phones which the Appellant claimed to keep in his possession at all times.

(iv) The learned Trial Court has rightly concluded that the Victim/Survivor was a minor at the time of the incident and concluded DW-4 to have been an interested witness, who stated that he, being the Principal of the Government Primary School, was also maintaining attendance and admission registers, and also somehow remembered from memory the details of the day when the Victim/Survivor was allegedly admitted to the school – two facts that are highly unlikely and do not inspire confidence.

(v) On the other hand, the prosecution witnesses have successfully proved the factum of the Victim/Survivor having attended ABS Public School, the Admission Register whereof correctly records the age of the Victim/Survivor. Even though the Appellant has taken support of the alleged forged Transfer Certificate from ABS Public School, the learned Trial Court has rightly chosen the Admission Register to anyway reflect the correct age of the Victim/Survivor. In any event, the IO of the CBI worked in collusion with the Appellant in order to ensure that the relevant evidence regarding the age of the Victim/Survivor never sees the light of day and instead, false and fabricated documents prepared at the behest of the Appellant are produced.

(vi) Even the local police from PS Makhi were working in collusion with the Appellant, which was evident from the fact that the Appellant moved an application under Section 91 CrPC on

26.08.2019, praying for calling of records of RC-11(S)/2018 arising out of F.I.R. No. 316 of 2017, in order to confront the Victim/Survivor, her uncle and mother with their statements in the case, which meant that the Appellant was aware of the contents of the said chargesheet before the same was even filed before the concerned trial court, notwithstanding the fact that the Appellant was not an accused in the said case.

(vii) It is submitted that the learned Trial Court has convicted the Appellant under Sections 376(2) IPC along with Sections 5 and 6 POCSO, however, the conviction should actually have been under Sections 376(2)(f) & (k) IPC, since the Appellant has "control or dominance" in the area of Village Makhi, as well as over the Victim/Survivor and her family.

(viii) During the course of oral arguments before this Court, learned Counsel for the Victim has laid special emphasis on the aspect of 'threat perception', being that allowing the instant application for suspension of the Appellant's sentence would entail dire consequences for the Victim/Survivor and her family.The learned Trial Court itself, *vide* its order dated 19.12.2020 on the point of sentence had, *inter alia,* observed that the CBI would continue to assess the threat perception to the life and security of the Victim/Survivor and her family members every three months and take adequate steps.

(ix) To further substantiate his claim on 'threat perception', learned Counsel for the Victim has submitted that the Appellant was also arraigned as an accused in an incident involving a road accident

that took place on 29.07.2019, which not only resulted in the Victim sustaining injuries but also ended up in the demise of death of the aunt of the Victim and the Victim's lawyer. This came to be registered as RC-12(S)/2019.

23. In his rejoinder arguments, learned Senior Counsel appearing for the Appellant has submitted as follows:

(i) Rebutting the argument advanced by the learned Counsel for the Victim that the Appellant should have been convicted under Section 376(2)(f) & (k) IPC, and not Section 376(2) IPC and 5 & 6 POCSO, learned Senior Counsel for the Appellant brought attention of this Court to the order dated 20.08.2019 passed by the learned Trial Court while disposing of an application moved on behalf of the Victim/Survivor for addition of charges under Sections 376(2)(f) & (k) IPC. However, the learned Trial Court in its order dated 20.08.2019 correctly observes that the mere fact of the Appellant being an MLA would not bring the case within the ambit of Sections 376(2)(f) & (k) IPC. This order dated 20.08.2019 passed by the learned Trial Court was never challenged by the Victim/Survivor or even the CBI.

(ii) In response to the argument on threat perception, learned Senior Counsel for the Appellant laid strong emphasis on the grant of benefit of suspension of sentence to the Appellant on four previous occasions (i.e., from 27.01.2023 to 01.02.2023, from 06.02.2023 to 10.02.2023, from 11.12.2024 to 20.01.2025 and from 23.01.2025 to 24.01.2025), wherein the Appellant never misused the liberty granted by this Court. Additionally, the

Appellant also stood discharged of all charges on 20.12.2021 in RC-12(S)/2019, and his conduct throughout the period of incarceration has also been good.

(iii) Responding to the argument raised by the learned Counsel for the Victim that DW-4 Brahmdeen maintained the Government School records for his personal use and that he was an interested witness, learned Senior Counsel for the Appellant submits that the Admission Register of the Government School was seized from the Primary School itself *vide* Seizure Memo dated 14.06.2018 and not from the custody of DW-4 Brahmdeen. Even the Original Entrance Register & Attendance Register pertaining to the Primary School, Khande Sarai, was seized *vide* Seizure Memo dated 11.05.2018 from the Block Education Officer.

(iv) Responding to the argument advanced by the learned Counsel for the Victim/Survivor that CBI's IO was hands-in-glove with the Appellant, did not conduct the investigation fairly and ensured that the Appellant knew about the investigation in RC-11(S)/2018, learned Senior Counsel for the Appellant submits that the Appellant moved four applications under Section 91 CrPC, all of which were allowed by the learned Trial Court. It is submitted that even the Apex Court allowed the Appellant to be confronted with the documents of RC-11(S)/2018.

(v) Undue emphasis has been placed on the Appellant being arraigned as an accused in RC-12(S)/2019, wherein the Appellant has been discharged

(vi) The Appellant has no criminal antecedents apart from the being investigated by CBI, which were in any event filed by the Victim/Survivor or his family, especially PW-9 Mahesh Singh against the Appellant to falsely implicate him, tarnish his reputation and goodwill.

ANALYSIS

24. Heard the learned Senior Counsel for the Appellant, SPP for the CBI as well as Counsel for the Victim/Survivor.

25. The learned Trial Court has convicted the Appellant for the offence under Section 376(2) of the IPC as well as Section 5(c), punishable under Section 6 of the POCSO Act. For the purpose of the present Application, this Court turns its focus to the Appellant's conviction under the POCSO Act.

26. Section 6 of the POCSO Act provides for the punishment of the offence of aggravated penetrative sexual assault defined under Section 5 of the POCSO Act, entailing a minimum punishment of twenty years which may extend to imprisonment for the remainder of natural life of the person. The Appellant has been convicted under Section 6 of the POCSO Act on the ground that the Appellant, who was a Member of Legislative Assembly, will come within the definition of a 'public servant' at the time when he committed the offence, within the ambit of Section 5(c) of the POCSO Act.

27. 'Public servant' has not been defined in the POCSO Act. Section 2(2) of the POCSO Act provides that the words and expressions used in the POCSO Act but not defined in the Act but defined in the IPC, Cr.P.C, JJ Act and the Information Technology Act, 2000 ["**IT Act**"], shall have the

meanings respectively assigned to them in the said Codes or the Acts. Section 2(2) of the POCSO Act reads as under:

> *"(2) The words and expressions used herein and not defined but defined in the Indian Penal Code (45 of 1860), the Code of Criminal Procedure, 1973 (2 of 1974), 2[the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016)] and the Information Technology Act, 2000 (21 of 2000) shall have the meanings respectively assigned to them in the said Codes or the Acts.*"

28. Meaning of 'public servant' is only provided in IPC under Section 21 and there is no definition of Public Servant either in the Cr.P.C, JJ Act or in IT Act. Section 21 of the IPC, which defines 'public servant', reads as under:

> "*Section 21. "Public servant".*
>
> *The words public servant denote a person falling under any of the descriptions hereinafter following, namely:*
>
> **********
>
> *Second. Every Commissioned Officer in the Military, [Naval or Air] Forces [*** of India];*
>
> *[Third. Every Judge including any person empowered by law to discharge, whether by himself or as a member of any body of persons, any adjudicatory functions;]*
>
> *Fourth. Every officer of a Court of Justice [(including a liquidator, receiver or commissioner)] whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve*

order in the Court, and every person specially authorised by a Court of Justice to perform any of such duties;

Fifth. Every juryman, assessor, or member of a panchayat assisting a Court of Justice or public servant;.

Sixth. Every arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court of Justice, or by any other competent public authority;

Seventh. Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;

Eighth. Every officer of the Government] whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience;

Ninth. Every officer whose duty it is as such officer, to take, receive, keep or expend any property on behalf of the Government], or to make any survey, assessment or contract on behalf of 7[the Government], or to execute any revenue-process, or to investigate, or to report, on any matter affecting the pecuniary interests of the Government, or to make, authenticate or keep any document relating to the pecuniary interests of [the Government], or to prevent the infraction of any law for the protection of the pecuniary interests of 7[the Government] ;

Tenth. Every officer whose duty it is, as such officer, to take, receive, keep or expend any property, to make any survey or assessment or to levy any rate or tax for any secular common purpose of any village, town or district, or to make, authenticate or keep any document

for the ascertaining of the rights of the people of any village, town or district;

[Eleventh. Every person who holds any office in virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election;]

[Twelfth. -- Every person --
(a) in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty by the Government;
(b) in the service or pay of a local authority, a corporation established by or under a Central, Provincial or State Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956).]

Illustration

A Municipal Commissioner is a public servant.
Explanation 1. Persons falling under any of the above descriptions are public servants, whether appointed by the Government or not.

Explanation 2. -- Wherever the words public servant occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation.

[Explanation 3. -- The word election denotes an election for the purpose of selecting members of any legislative, municipal or other public authority, of whatever character, the method of selection to which is by, or under, any law prescribed as by election.]"

29. A perusal of Section 21 of the IPC shows that the definition of 'public servant' does not include a Member of the Legislative Assembly. In this

line, the Apex Court in A.R. Antulay (supra)**,** has specifically held that an MLA is not covered within the definition of 'public servant' under the IPC. Relevant portions of the said Judgment read as under:

> "***66****. The last limb of the submission was that at any rate, the accused would be a public servant within the meaning of clause (7) of Section 21 IPC, which takes within its ambit "every person who holds any office by virtue of which he is empowered to place or keep any person in confinement". This limb of the submission was not placed for consideration of the learned trial Judge. And it has merely to be stated to be rejected. We, however, did not want to reject it on this narrow ground. Expanding this contention, it was urged that MLA is empowered to adjudge a person guilty of breach of privilege or contempt of the House and when prison sentence is imposed to keep him in confinement. Assuming for the purpose of this argument that MLA holds an office, is he a person empowered to place or keep any person in confinement. Power to impose punishment is independent of the power to keep a person in confinement. First is the power to impose a prison sentence, but second is the power flowing from the execution of the sentence to place or keep any person in confinement meaning thereby, there is an execution of warrant. Persons whose duty it is to deprive a person directed to be imprisoned to deprive him of his liberty to remain free and to keep or place him in confinement in due execution of the warrant would be comprehended in clause (3) [sic clause (7)]. It is difficult to accept the submission that MLAs as a body can keep or place any person in confinement. Reference was, however, made to some of the passages in Parliamentary Practice by Earskine May, twentieth edn. as also to Practice and Procedure of Parliament, third edition by Kaul and Shakdher, p. 208. The authors observed at p. 208 that "each House of the Legislature of a State, has the power to secure the attendance of persons on matters of privilege and to*

punish for breach of privilege or contempt of the House and commit the offender to custody or prison". At p. 212, it is observed that "each House has the power to enforce its orders including the power for its officers to break open the doors of a house for that purpose, when necessary, and execute its warrants in connection with contempt proceedings". We fail to see how these observations assist us in understanding the expression "empowered to place or keep any person in confinement". Broadly stated, the expression comprehends police and prison authorities or those under an obligation by law or by virtue of office to take into custody and keep in confinement any person. In M.P. Dwivedi case [AIR 1970 Guj 97 : 1970 Cri LJ 679] this Court observed that Seventh and Eighth clauses of Section 21 deal with persons who perform mainly policing duties. To say that MLA by virtue of his office is performing policing or prison officers' duties would be apart from doing violence to language lowering him in status. Additionally, clause (7) does not speak of any adjudicatory function. It appears to comprehend situations where as preliminary to or an end product of an adjudicatory function in a criminal case, which may lead to imposition of a prison sentence, and a person in exercise of the duty to be discharged by him by virtue of his office places or keeps any person in confinement. The decisions in Homi D. Mistry v. Shree Nafisul Hassan [ILR 1957 Bom 218 : 60 Bom LR 279] , Harendra Nath Barua v. Dev Kanta Barua [AIR 1958 Ass 160] and Edward Kielley v. William Carson, John Kent [(1841-42) 4 Moo PCC 63] hardly shed any light on this aspect. Therefore, the submission that MLA would be comprehended in clause (7) of Section 21 so as to be a public servant must be rejected.

67. Having meticulously examined the submission from diverse angles as presented to us, it appears that MLA is not a public servant within the meaning of

the expression in clause (12)(a), clause (3) and clause (7) of Section 21 IPC.

70*. Before we conclude let it be clarified that more often in the course of this judgment, we have used the words "office of MLA". It was debated whether the MLA holds seat or office? Our use of the expression "office" should not be construed to mean that we have accepted that the position of MLA can be aptly described as one holding "public office" or "office" for that matter.*

71*. To sum up, the learned Special Judge was clearly in error in holding that MLA is a public servant within the meaning of expression in Section 12(a) and further erred in holding that a sanction of the Legislative Assembly of Maharashtra or majority of the members was a condition precedent to taking cognizance of offences committed by the accused. For the reasons herein stated both the conclusions are wholly unsustainable and must be quashed and set aside.*"

[Emphasis Supplied]

30. The Trial Court has placed reliance primarily on the decision of the Apex Court L.K. Advani (supra) and by extension, on the definition of 'Public Servant' provided in the Prevention of Corruption Act, 1988. However, in the opinion of this Court, the definition of 'public servant' in the Prevention of Corruption Act would be of no use in the present case, for the reason that Section 2 of the POCSO Act does not include Prevention of Corruption Act. In view of the specific inclusion of IPC, Cr.P.C, JJ Act and IT Act in Section 2 of the POCSO Act, this Court cannot take aid of definition of 'public servant' on any other Act other than IPC, Cr.P.C, JJ Act and IT Act. Notably, Cr.P.C, JJ Act and IT Act do not provide for the definition of 'public servant'. Therefore, for the purpose of this Application,

this Court is inclined to come to the conclusion that Appellant cannot come within the scope of Section 5(c) of the POCSO Act, and the same reasoning applies for the Appellant's conviction under Section 376(2)(b) of the IPC.

31. With the above conclusion in mind, this Court shall turn to the contention of the learned Counsel for the Victim/Survivor, who has placed considerable reliance on Section 5(p) of the POCSO Act and Section 376 (2)(f) & (2)(k) of the IPC. The said provisions are extracted below:

> *"Section 5. Aggravated penetrative sexual assault.*
> ....
> *(p) whoever being in a position of trust or authority of a child commits penetrative sexual assault on the child in an institution or home of the child or anywhere else;"*
>
> *****
>
> *Section 376. Punishment for rape*
>
> ....
> *(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman*
> .....
> *(k) being in a position of control or dominance over a woman, commits rape on such woman;*

32. Learned Counsel for the Victim/Survivor has relied on the abovementioned provision to contend that the Appellant, even if he is found to not be falling within the definition of 'public servant' within the purview of Section 5(c) of the POCSO Act can still be sentenced to undergo imprisonment for the remainder of his natural life. This Court is not in a position to accept the said argument for the reason that this contention, to the extent of Section 376(2)(f) & (k) of the IPC, was specifically raised

before the learned Trial Court by filing an application for addition of charge under Section 376(2)(f) & (k) of the IPC and the learned Trial Court *vide* Order dated 20.08.2019 has rejected the said Application by holding as under:

> "*1. This order is in continuation of the earlier order on charge dated 09.08.2019, followed by order dated 14.08.2019, and the same may be read as part and parcel of this order.*
>
> *2. In a nutshell, an application is moved on behalf of the complainant/victim/survivor through Ld. Sr. PP for CBI, for addition of charges under Sections 376(2) (f) & (k) of IPC. Interestingly, the Ld. Sr. PP for CBI has urged, that his role is only to assist the Court and that submissions on the point of charge have already been made and the CBI has not relied on such provisions i.e., Section 376(2) (f) & (k) of IPC in basing its case against the accused Kuldeep Singh Sengar (A-2). It was urged by Sh. Ashok Bhartendu, Ld. Sr. PP for CBI, that since charges have already been framed under specific provisions of IPC and POCSO Act, to his mind, provisions of Sections 376(2) (f) & (k) of IPC are not squarely applicable.*
>
> *3. Ld. Counsel for the complainant sought permission to address arguments and on being allowed, he briefly urged, that A-2 is admittedly an elected MLA and therefore a "public servant", and, thus as per Section 376 (2) (f) of the IPC, being an MLA of the area he was in a position of trust or authority, since the subject i.e., the victim person, was a voter in the area. In reference to Section 376(2) (k) it is urged, that by the same analogy A-2 was in a position of control or dominance over the victim, or her family members, since they were voters of the constituency. It was urged, that it is the case of the prosecution, that A-2 had promised a job to the victim/survivor and on that*

allurement, she was sexually violated, and that addition of charge shall only lead to a severe punishment - imprisonment for life which shall also mean imprisonment for the remainder of that person's natural life, and such course is saved by Section 42 of POCSO Act.

4. Mr. Tanveer Ahmed Mir, Ld. Counsel for A-2, briefly urged, that since the Ld. Sr. PP for CBI made his submission against the applicability of provisions in question, the present application is non est in law.

5. Having heard the Ld. Counsel for the parties and on perusal of record, at the outset, I find no merit in the present application. Firstly, the said application has not been supported by the CBI. Moreover, since specific charge under Section 5(c) of the POCSO Act has already been framed, I do not see how Section 376(2) (f) & (k) of IPC become applicable merely because A-2 is a "public servant". A comprehensive reading of Section 375 and Section 376 of the IPC would show that it is only when a "public servant" commits rape on a woman who is under the custody of such public servant or in the custody of person subordinate to such public servant, that he is said to have committed an offence of rape as defined under Section 376(2)(b) of the IPC. Sub-Section (2)(l) & (k) to Section 376 IPC apply to altogether different situations. In sub-Section 2(l) of Section 376 IPC, the words "or a person in position of trust or authority have to be read ejusdum generis with the words relative, guardian or teacher, and refers to incestuous kind of sexual exploitation.

6. Likewise, sub-Section 2(k) to Section 376 of the IPC appears to be widely worded and it would apply where an offender is in a position of "control" or "dominance" over a woman. As per the Black's Law Dictionary, Tenth Edition, Thomson Reuters at page

403 the word 'control' is defined to mean "the direct or indirect power to govern the management and policies of a person or entity, whether through ownership of voting securities by contract, or otherwise, the power or authority to manage, direct, or oversee <the principal exercised control over the agent.

7. Whereas at page 594 the word "dominance" is not found but it is derived from the word 'dominant' which is defined as "1. The act or activity of exercising thorough control over someone or something. 2. Control by the exercise of power or constituted authority; dominion; government. 3. Mental control.; esp., the emotional dominion by someone with superior ability or resources over an inferior often with arbitrary and capricious sway. 4. Patents. The effect that an earlier patent (usu. A basic one) has on a later patent (esp. one for improvements on the patented device) because the earlier patent's claims are so broad a generic that the later patent's invention will always infringe on the earlier patent's claims. Because the patent system is based on exclusion of others from an invention's subject matter, the earlier, basic patent's claims "dominato" the later-invented improvement, if the improvement is patented and worked, it infringes the basic patent. But the basic patent's owner cannot practice the Improvement without infringing on the improvement's patent. This stand-off effect encourages improvement and basic-patentees to seek licenses or cross-licenses with each other".

8. The word "dominance" is, however, defined in the Oxford Online Dictionary English Fast Dictionary to mean "power or influence over others". Interestingly, in Online Cambridge Dictionary, it is defined as "situation in which one company, product etc, has more power, influence, or success than others".

> *9. On the application of said grammatical meaning of the words 'control' or 'dominance', it appears that it envisages a case where someone is in position of master-servant relationship, or partners in a business, or Directors of a Company by virtue of share holding or power to make a policy decision (to cite a few). In the instant case, merely because A-2 happens to be an elected Member of Legislative Assembly of, would not make a case fall within the scope and ambit of sub-Section 2 (f) & (k) to Section 376 of the IPC. The application is accordingly dismissed.*"

33. The above Order dated 20.08.2019 passed by the learned Trial Court was not challenged by the Victim/Survivor, nor was it supported by the CBI. In view of the fact that the learned Trial Court did not deem it fit to add these two charges, even though the same was specifically argued before the learned Trial Court, the same would not fall for consideration in the present Application.

34. Similarly, the Appellant also cannot come within the four corners of Section 5(p) of the POCSO Act, as being in a position of trust or authority in relation to the Victim/Survivor, as there is no foundational basis, argument or finding by the learned Trial Court to this extent and, therefore, at the time of considering an application under Section 389 of the Cr.P.C, it would not be appropriate for this Court to consider these arguments.

35. In view of the above, this Court is of the *prima facie* view that for the purpose of suspension of sentence, the Appellant cannot be brought into the ambit of 'aggravated penetrative sexual assault' under Section 5 of the POCSO Act, punishable under Section 6 of the POCSO Act, or under Section 376(2) of the IPC, which provides for the punishment of imprisonment for remainder of his natural life. This being a *prima facie*

observation, this Court does not deem it fit to go into the merits of the case as to whether the Appellant could be then held guilty of offence under Section 3 of the POCSO Act or not. However, for the time being, applying the law as it stood then that is, before the amendment to the POCSO Act in 2019, the minimum punishment that a person can be given under Section 4 of the POCSO Act was seven years, which the Appellant has already undergone. The Appellant was sentenced for the remainder of his life and as on 30.11.2025, he has spent about 7 years and 5 months under incarceration, which is more than the minimum punishment prescribed under Section 4 of the POCSO, as it existed at the time when the offence was committed.

36. It is apposite to refer to Section 389 of the Cr.P.C., which reads as under:

> "***389. Suspension of sentence pending the appeal; release of appellant on bail .***—*(1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond:*
>
> *[Provided that the Appellate Court shall, before releasing on bail or on his own bond a convicted person who is convicted of an offence punishable with death or imprisonment for life or imprisonment for a term of not less than ten years, shall give opportunity to the Public Prosecutor for showing cause in writing against such release:*
>
> *Provided further that in cases where a convicted person is released on bail it shall be open to the Public Prosecutor to file an application for the cancellation of the bail.]*
>
> *(2) The power conferred by this section on a Appellate Court may be exercised also by the High Court in the*

> *case of an appeal by a convicted person to a Court subordinate thereto.*
> *(3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall,—*
> *(i) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or*
> *(ii) where the offence of which such person has been convicted is a bailable one, and he is on bail, order that the convicted person be released on bail, unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under sub-section (1); and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.*
> *(4) When the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced."*

37. Coming to the contention of the learned Counsel for the Victim/Survivor that since the Appellant has been sentenced to undergo imprisonment for the remainder of his natural life and therefore, the factum of the Appellant having undergone about seven years and five months of imprisonment is irrelevant for the purpose of an application seeking suspension of sentence, this Court is of the view that this issue is no longer *res integra*. The rationale behind the power of a court to release a person who has been sentenced to life imprisonment (or more) has been captured by the Apex Court in the judgment of Kashmira Singh v. State of Punjab, **(1977) 4 SCC 291**. The observations were made in the context of a sentence of life imprisonment in connection with offences under Section 302 IPC. Be that as it may, the same is relevant to the facts of the present case as well

because the sentence imposed in the present case is that of life imprisonment for the remainder of the Appellant's life. The Apex Court in Kashmira Singh (supra) observed as under:

> *"**2.** The appellant contends in this application that pending the hearing of the appeal he should be released on bail. Now, the practice in this Court as also in many of the High Courts has been not to release on bail a person who has been sentenced to life imprisonment for an offence under Section 302 of the Penal Code,1860. The question is whether this practice should be departed from and if so, in what circumstances. It is obvious that no practice howsoever sanctified by usage and hallowed by time can be allowed to prevail if it operates to cause injustice. Every practice of the Court must find its ultimate justification in the interest of justice. The practice not to release on bail a person who has been sentenced to life imprisonment was evolved in the High Courts and in this Court on the basis that once a person has been found guilty and sentenced to life imprisonment, he should not be let loose, so long as his conviction and sentence are not set aside, but the underlying postulate of this practice was that the appeal of such person would be disposed of within a measurable distance of time ,so that if he is ultimately found to be innocent, he would not have to remain in jail for an unduly long period. The rationale of this practice can have no application where the Court is not in a position to dispose of the appeal for five or six years. It would indeed be a travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. **Can the Court ever compensate him for his incarceration which is found to be unjustified? Would it be just at all for the Court to tell a person: "We have admitted your appeal because we think you have a prima facie case, but unfortunately we have no time to hear your appeal for quite a few years and,***

> ***therefore, until we hear your appeal, you must remain in jail, even though you may be innocent?" What confidence would such administration of justice inspire in the mind of the public? It may quite conceivably happen, and it has in fact happened in a few cases in this Court, that a person may serve out his full term of imprisonment before his appeal is taken up for hearing. Would a Judge not be overwhelmed with a feeling of contrition while acquitting such a person after hearing the appeal? Would it not bean affront to his sense of justice?*** *Of what avail would the acquittal be to such a person who has already served out his term of imprisonment or at any rate a major part of it? It is, therefore, absolutely essential that the practice which this Court has been following in the past must be reconsidered and so long as this Court is not in a position to hear the appeal of an accused within a reasonable period of time, the Court should ordinarily, unless there are cogent grounds for acting otherwise, release the accused on bail in cases where special leave has been granted to the accused to appeal against his conviction and sentence."*
>
> [emphasis supplied]

38. In Omprakash Sahni v. Jai Shankar Chaudhary and Anr., **(2023) 6 SCC 123**, the Apex Court rendered the following observations on the scope of Section 389 of the CrPC:

> "*22. Thus, when we speak of suspension of sentence after conviction, the idea is to defer or postpone the execution of the sentence. The purpose of postponement of sentence cannot be achieved by detaining the convict in jail; hence, as a natural consequence of postponement of execution, the convict maybe enlarged on bail till further orders.*
>
> *23. The principle underlying the theory of criminal jurisprudence in our country is that an accused is*

presumed to be innocent till he is held guilty by a court of the competent jurisdiction. Once the accused is held guilty, the presumption of innocence gets erased. In the same manner, if the accused is acquitted, then the presumption of innocence gets further fortified.

24. From perusal of Section 389 of the CrPC, it is evident that save and except the matter falling under the category of sub-section 3 neither any specific principle of law is laid down nor any criteria has been fixed for consideration of the prayer of the convict and further, having a judgment of conviction erasing the presumption leaning in favour of the accused regarding innocence till contrary recorded by the court of the competent jurisdiction, and in the aforesaid background, there happens to be a fine distinction between the prayer for bail at the pre-conviction as well as the post-conviction stage, viz Sections 437, 438, 439 and 389(1) of the CrPC.

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 Section389 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.

34. In the case on hand, ***what the High Court has done is something impermissible. High Court has gone into the issues like political rivalry, delay in lodging the FIR, some over-writings in the First Information Report etc. All these aspects, will have to be looked into at the time of the final hearing of the appeals filed by the convicts****. Upon cursory scanning of the evidence on record, we are unable to agree with the contentions coming from the learned Senior Counsel for the convicts that, either there is absolutely no case against the convicts or that the evidence against them is so weak and feeble in nature, that, ultimately in all probabilities the proceedings would terminate in their favour. For the very same reason we are unable to accept the contention coming from the convicts through their learned Senior Counsel that, it would be meaningless, improper and unjust to keep them behind the bars for a pretty long time till they are found not to be guilty of the charges.*"

[emphasis supplied]

39. In the recent case of Afjal Ansari v. State of U.P., **(2024) 2 SCC 187**, the Apex Court has further defined the contours of the power of the appellate court under Section 389 of the CrPC, and observed as under:

"***19.*** *This Court has on several occasions opined that there is no reason to interpret Section 389(1) CrPC in a narrow manner, in the context of a stay on an order of conviction, when there are irreversible consequences. Undoubtedly, Ravikant S.Patil v. Sarvabhouma S. Bagali [Ravikant S. Patil v.*

Sarvabhouma S. Bagali, (2007) 1 SCC 673, para 15 : (2007) 1 SCC (Cri) 417],holds that an order granting a stay of conviction should not be the rule but an exception and should be resorted to in rare cases depending upon the facts of a case. ***However, where conviction, if allowed to operate would lead to irreparable damage and where the convict cannot be compensated in any monetary terms or otherwise, if he is acquitted later on, that by itself carves out an exceptional situation.*** *Having applied the specific criteria outlined hereinabove to the present factual matrix, it is our considered view that the appellant's case warrants an order of stay on his award of conviction, though partially.*

25. *Having said so, we hasten to hold that societal interest is an equally important factor which ought to be zealously protected and preserved by the courts. The literal construction of a provision such as Section 389(1) CrPC may be beneficial to a convict but not at the cost of legitimate public aspirations. It would thus be appropriate for the courts to balance the interests of protecting the integrity of the electoral process on one hand, while also ensuring that constituents are not bereft of their right to be represented, merely consequent to a threshold opinion, which is open to further judicial scrutiny.*"

[emphasis supplied]

40. Learned Counsel for the Victim/Survivor has drawn the attention of this Court to a catena of points which have been highlighted in the earlier judgments to contend that the investigation has been faulty, the Appellant, who is in position of authority, has bent the law to his advantage and a premier institution like the CBI has been compromised in the nature and manner of collecting evidence. All these arguments cannot advance the case of the Victim/Survivor at this juncture. The Appellant has been found guilty

of an offence under Section 5(c) of the POCSO Act and punished under Section 6 of the POCSO Act. The Appellant has also been convicted in RC 09(S)/2018 and RC 10(S)/2018 and is undergoing imprisonment for a period of ten years for offences under Section 304 Part-II of the IPC. In the opinion of this Court, once this Court is *prima facie* of the opinion, for the purpose of the instant Application, that the offence under Section 5 of the POCSO Act is not attracted in the present case, and, therefore, the Appellant cannot be sentenced for the remainder of his life, the contention of the learned Counsel for the Victim/Survivor that investigation was compromised cannot be a ground not to suspend the sentence of the Appellant, more so looking at the period of incarceration already undergone.

41. Substantial arguments have been raised by both the sides on the question of alibi and on the question of age. Learned Senior Counsel for the Appellant has very strenuously contended that the learned Trial Court has erred in relying on the records of a private school and ignored the records of a Government school, wherein the latter shows that at the time when the offence was committed, the Victim/Survivor was not a minor. On the other hand, learned SPP for the CBI has relied on the Judgment of the Apex Court in Lilaben v. State of Gujarat (supra) to contend that the question of age ought not be gone into at the time of hearing an application for suspension of sentence. This Court, in any event, has made no observations on the discrepancy or otherwise in the age of the Victim/Survivor, in adherence to the findings in Lilaben v. State of Gujarat (supra).

42. In the opinion of this Court, at this stage, being satisfied that (i) offence under Section 5(c) of the POCSO Act is not made out against the Appellant on account of him not falling within the definition of a ‘public

servant', (ii) only an offence under Section 3 of the POCSO Act would be made out, and (iii) looking at the fact that the Appellant has already undergone about 7 years and 5 months under incarceration, which is more than minimum number of years under Section 4 of the POCSO Act prior to its amendment in 2019, this Court is inclined to suspend the sentence of the Appellant. Needless to state, all the issues regarding alibi, age, etc. can be gone into detail at the time of hearing of the Appeal.

43. The contention of the learned Counsel for the Victim/Survivor that the Appeal was admitted on 17.01.2020 and this Court ought to have heard the Appeal finally instead of deciding the instant Application for suspension of sentence is attractive, but for the fact that the learned Counsel for the Victim/Survivor has moved an application being CRL. M.A. 21475/2025 for advancing further evidence. Recording of further evidence, as prayed for in the said application, would entail examination of witnesses for which purpose, the matter would have to be referred back to the learned Trial Court. In such a situation, letting the Appellant be in Jail when he has already spent about 7 years and 5 months in jail, would be violative of Article 21 of the Constitution of India. In Hussainara Khatoon (V) v. Home Secy., State of Bihar, **(1980) 1 SCC 108**, the Apex Court has held that speedy trial is implicit in the broad sweep and content of Article 21 of the Constitution of India, which would apply to the Appellant as well. This principle has been reiterated in several Judgments of the Apex Court such as Kadra Pahadiya v. State of Bihar, **(1981) 3 SCC 671**, A.R.Antulay (supra), Kartar Singh v. State of Punjab, **(1994) 3 SCC 569** and Akhtari Bi v. State of M.P., **(2001) 4 SCC 355**. The number of years already undergone in incarceration is a very major factor while considering an Application under

Section 389 of the Cr.P.C and this Court cannot close its eyes to the fact that the Appellant has already undergone about 7 years and 5 months under incarceration as on 30.11.2025.

44. Learned Counsel for the Victim/Survivor has also laid great emphasis on the issue of life of the Victim/Survivor being in danger. Undoubtedly, the Trial was transferred by the Apex Court from Uttar Pradesh to Delhi keeping in mind this very fact of the Victim/Survivor being vulnerable and her father having been killed, for which the Appellant has been held guilty of the offence under Section 304-(II) of the IPC. It is also a fact that attempts have been made to harm the relatives and lawyers of the Victim/Survivor and, therefore, this aspect is a very important factor which this Court has to keep in mind. The Apex Court *vide* Order dated 01.08.2019 in SMW (Crl.) No. 1/2019 has granted CRPF cover to the Victim/Survivor and her family. However, *vide* Order dated 23.05.2025, the Apex Court has withdrawn security from the mother of the Victim/Survivor and other relative(s). However, the CRPF cover continues to be provided to the Victim/Survivor as on date. This Court expects that CRPF cover will continue in order to protect to the Victim/Survivor. At the same time, however, the argument of keeping the Appellant in custody because of threat perception to the Victim/Survivor, in the opinion of this Court is not a tenable argument to deny the benefit of Section 389 Cr.P.C to the Appellant, in view of the judgment of the Apex Court in Kashmira Singh (supra). The Courts cannot keep a person in custody being apprehensive that the police/paramilitary may not do its job properly. Such an observation or such a thought process would undermine the laudable work of our police/paramilitary forces. The concerned DCP of the area where the Victim

is currently residing, is directed to personally ensure and supervise the protection given to the Victim/Survivor during the pendency of the Appeal. The State is also providing for the accommodation of the Victim. The DCW is responsible to ensure that the Victim is provided with sufficient accommodation and such arrangement is directed to be continued till further orders. In any way, the appeal is in this Court and it is always open for the Victim to approach this Court, if required.

45. Considering all these issues and circumstances, this Court is inclined to suspend the sentence of the Appellant during the pendency of the Appeal, on the following conditions:

a. The Appellant shall furnish a security in the sum of Rs.15,00,000/- with three sureties of the like amount to the satisfaction of the concerned Jail Superintendant. The sureties must be residents of Delhi.

b. The Appellant is directed not to come within a 5 km radius of the place of residence of the Victim/Survivor.

c. The Appellant is directed to stay in Delhi during the pendency of the Appeal to ensure that the Appellant is available for completing the remaining part of the sentence in case he is found to be guilty.

d. The Appellant is directed not to threaten the Victim/Survivor or the mother of the Victim/Survivor.

e. The Appellant is directed to deposit his passport with the Trial Court.

f. The Appellant is directed to report in person to the Local Police Station once a week, i.e. on every Monday between 10:00-

11:00 AM and the Police is directed to ensure that the Appellant is not kept waiting unnecessarily and be released within an hour after completing the formalities.

46. It is made clear that violation of any of the above conditions will entail cancellation of the suspension of sentence.

47. The Application is disposed of in the aforesaid terms.

48. Let this Order be communicated to the concerned Jail Superintendent.

CRL.A. 53/2020 & CRL.M.A. 21475/2025

Subject to the orders of Hon'ble the Chief Justice, list before the Roster Bench on 15.01.2026.

SUBRAMONIUM PRASAD, J

HARISH VAIDYANATHAN SHANKAR, J

DECEMBER 23, 2025
AP