

**THE HIGH COURT OF MADHYA PRADESH**  
**PRINCIPAL SEAT AT JABALPUR**

**M.Cr.C.No.17991/2021**

*Vishal*

Versus

*The State of Madhya Pradesh*

Date of Order	04/05/2021
Bench Constituted	Single Bench
Order delivered by	Hon'ble Shri Justice Sanjay Dwivedi, J
Whether approved for reporting	<b>YES</b>
Name of counsels for the parties	For Applicant: Shri Satyam Agrawal with Shri Deepak Sahu, Advocates. For Respondent-State: Shri Gaurav Tiwari, Panel Lawyer.
Law laid down	<ul style="list-style-type: none"> <li>➤ Exception 2 of Section 375 of IPC is irrational. Marriageable age in India is 18 years, giving consent for sexual intercourse is also 18 years.</li> <li>➤ Exception is inconsistent with the provisions of POCSO Act. Definition of "Child" as per Section 2(1)(d) is below 18 years.</li> <li>➤ The preamble also provides that "sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed" This is directly in conflict with Exception 2 of Section 375 of IPC.</li> <li>➤ Section 42-A of POCSO Act gives overriding effect on the other provision of any other law in force includes IPC.</li> <li>➤ Exception needs to be struck down, benefit cannot be given in bail.</li> </ul>
Significant Para Nos.	6, 7, 8 and 9

Reserved on: 28/04/2021

Delivered on: 04/05/2021

**ORDER**

This first bail application under Section 439 of the Code of Criminal Procedure has been filed by the applicant for grant of bail in connection with Crime No.216/2020, registered at Police Station

Parvati District Sehore, for the offence punishable under Section 363, 366-A, 376(2)(n) of IPC and Section 5/6, 16/17 of POCSO Act. Applicant is in arrest since 15/01/2021.

2. Counsel for the applicant submits that in view of the statement of the prosecutrix recorded under Section 164 of Cr.P.C she has very categorically stated that she had gone with the applicant voluntarily, got married with him and he made physical relation with her consent. He further submits that as per the case of prosecution at the time of the incident, the age of the prosecutrix was 16 years and one month and as such considering the Exception 2 of Section 375 of IPC sexual intercourse by a man with his own wife, not being under 15 years of age, is not rape. He submits that considering the said explanation and the case of the prosecution as prosecutrix herself has admitted that she got married with the applicant and was aged about 16 years one month, no case of rape is made out and the applicant is accordingly entitled to be released on bail.

3. Per contra, Shri Tiwari appearing on behalf of the State has opposed the bail application and submits that the consent of a girl below 18 years of age is no consent in the eye of law and if any physical relation is made to a girl who is below 18 years of age even with her consent amounts to a rape and as such application deserves to be dismissed.

4. Considering the rival contentions of the parties and perusal of case diary, I am of the opinion though the applicant is relying upon Exception 2 of Section 375 of IPC submitting that the case of rape is not made out but that does not convince me for the reason that the marriageable age of a girl in our country is 18 years and any marriage solemnized below that age is considered to be void. It is also clear that a girl below 18 years is not capable of giving consent to have sex and legally she cannot marry and as such if she even otherwise admits that she got married with the applicant, the same cannot be a ground to release the applicant on bail by giving benefit

of Exception 2 of Section 375 of IPC, which reads as under:-

Exception 2- Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

5. However, I am not convinced with submission made by counsel for the applicant because if the statement of prosecutrix is accepted, even otherwise, she can't be considered a legally married wife, and relation between applicant and prosecutrix cannot be that of a husband or wife, simply because marriage of a girl below 18 years of age is void *ab initio*, and the husband, therefore, cannot get the benefit under Exception 2(2) of Section 375 of IPC. It is also pertinent to mention that Section 198(6) of Cr.P.C applies to a case of rape of wife below 18 years of age, clearly indicating that the act of the applicant, even otherwise amounts to rape.

6. I am also of the opinion that when minimum marriageable age is 18 years then fixing a lower age under Exception-2 of Section 375 of IPC is totally irrational. The magic figure of 15 years is not based on any scientific evaluation, but is based on the mere fact that it has been existing for a long time. The age of 15 years in Exception 2 was fixed in the year 1940 when the minimum age for marriage was also 15 and the age of consent was 16 but at present the age for marriage has been fixed at 18 years and age of consent is also fixed at 18 years, keeping the age under Exception 2 at 15 years, cannot be said to be right, just and fair. Infact, it is arbitrary and oppressive to the girl child.

7. Further, in the present case, the applicant is also facing an offence under the POCSO Act which is a special enactment introduced with reference to Article 15(3) of Constitution. The preamble recognizes that the best interest of a child should be secured, a "child" being defined under Section 2 (1)(d) as any person below the age of 18 years. Infact, securing the best interest of the child is an obligation cast upon the Government of Indian having acceded to the *Convention on the Rights of the Child*.

8. The preamble also provides that “sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed.” This is directly in conflict with Exception 2 to Section 375 of IPC which effectively provides that the sexual exploitation or sexual abuse of a girl child is not even a crime, let alone a heinous crime-on the contrary, it is a perfectly legitimate activity if the sexual exploitation or sexual abuse of the girl child is by her husband.

9. In my opinion also, Section 42-A inserted in the POCSO Act by an amendment made on 03/02/2013 with an intention that the same has overriding effect on the provisions of any other law in force includes IPC.

Section 42-A reads as under:-

“42-A Act not in derogation of any other law –  
The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.”

10. The consequence of this amendment is that the provisions of the POCSO Act will override the provisions of any other law (including IPC) to the extent of any inconsistency.

11. According to the provisions of POCSO Act, applicant has committed an offence of rape and as such by giving benefit of said Exception he cannot be considered to be innocent.

12. The Supreme Court had an occasion to consider the provisions of Exception 2 of Section 375 of IPC in case of **Independent Thought Vs. Union of India and another** reported in **2017(10) SCC 800** and Supreme Court finally was of the opinion that such an Exception is arbitrary and needs to be struck down. The Supreme Court in the said case has held as under :-

Exception 2 to Section 375 IPC insofar as it relates to a girl child below 18 years is liable

to be struck down on the following grounds:

(i) it is arbitrary, capricious, whimsical and violative of the rights of the girl child and not fair, just and reasonable and, therefore, violative of Articles 14, 15 and 21 of the Constitution of India :

(ii) it is discriminatory and violative of Article 14 of the Constitution of India; and

(iii) it is inconsistent with the provisions of the POCSO Act, which must prevail.

**13.** A similar situation was seen before the Allahabad Court in the case of **Pradeep Tomar and another Vs. State of U.P and another** in a petition preferred under Article 227 of the Constitution of India in Case No.4804/2020 against the order passed by the Judicial Magistrate, Hapur under Section 363 of IPC, whereby the Court directed a girl of 16 years one month to go with her husband relying upon Exception 2 of Section 375. The Allahabad High Court relying upon a judgment of **Independent Thought (supra)** has set aside the said order and also observed that such an Exception is arbitrary and in conflict with the provisions of POCSO Act which have overriding effect and as such said provision is liable to be struck down.

**14.** Considering the aforesaid legal position, I am also of the opinion that the present applicant is not entitled to be released on bail by taking benefit of Exception 2 of Section 375 of IPC. The bail application is accordingly **dismissed**.

**(Sanjay Dwivedi)**  
**Judge**

sushma

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