

GAHC010080902023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : I.A.(Crl.)/360/2023

MAHABUR ISLAM @ MAHABUR ESLAM @ RAHMAN
S/O MD. ALI AHMED,
VILLAGE BARKUR,
PS DALGAON, DIST DARRANG, ASSAM.

VERSUS

THE STATE OF ASSAM AND ANR.
REP. BY THE PP, ASSAM

2:MISS BANESA KHATON
D/O MATLEB ALI
VILLAGE BARKUR
PS DALGAON
DIST DARRANG
ASSAM
78411

Advocate for the Petitioner : MR A. Ahmed

Advocate for the Respondent : Ms. B. Bhuyan, Addl. PP, ASSAM

**BEFORE
HONOURABLE THE CHIEF JUSTICE
HONOURABLE MRS. JUSTICE MITALI THAKURIA**

ORDER

Date : 11-05-2023

(M. Thakuria, J)

Heard Mr. A. Ahmed, learned counsel for the applicant. Also heard Ms. B. Bhuyan, learned Additional Public Prosecutor (Senior Counsel), Assam representing the respondent.

2. This application is filed under Section 389 of the Code of Criminal Procedure, 1973, praying for suspension of sentence and to release the accused/applicant on bail on the ground of juvenility.

3. It is submitted by the learned counsel for the applicant, Mr. A. Ahmed that the accused/applicant had filed a Criminal Appeal under Section 374(2) of the Code of Criminal Procedure challenging the impugned Judgment & order dated 23.12.2021, passed by the Court of learned Special Judge, Darrang, Mangaldai in Special (POCSO) Case No.24/2018, wherein the appellant was convicted under Section 4 of the POCSO Act. The impugned conviction and sentence was passed without appreciating the evidence on record properly, and on the basis of presumptions, inferences and assumptions, and therefore, interference of this Court is necessary. The learned Trial Court also failed to appreciate that the prosecution side failed to prove the case beyond reasonable doubts, and there is every chance of acquittal of the accused/applicant as the evidence of the vital witness, i.e. the victim, is not believable.

4. It is also submitted that the accused/applicant was born on 01.04.2000, and in support of his plea a School Certificate dated 08.04.2023 is annexed, which is issued by the Head-Master of No.3 Shyampur M.E. Madrassa, Kharupetia, Darrang District. The incident alleged to have been taken place on 01.02.2017 and at that time the accused/applicant was a juvenile and as per the School Certificate he was 16 years and 10 months, and as such he is entitle to get the benefit of juvenility. The appellant is not conversant with the statutory provisions and thus, he was bonafide precluded from taking the plea of juvenility during trial.

5. Considering the good behavior of the accused/applicant in jail, he was also released on parole on 22.03.2023, till 10.04.2023 for the period of 20 days. During the period of parole he had communicated with his engaged counsel and then only he came to know that he can take the plea of juvenility even at the appellate stage. Accordingly, as per the advice of his engaged counsel, he obtained School Certificate from the Head-Master of the said School. After, obtaining the School Certificate, he filed the present Interlocutory Application with a prayer for suspension of sentence and to release him on the ground of juvenility supported by the School Certificate.

6. Further, it is submitted by the learned counsel for the accused/applicant that the plea of juvenility was not raised before the learned Special Judge, Darrang, Mangaldai, due to lack of communication between the engaged counsel and the present applicant. After, coming to know about the provision, as well as fact that at the time of the alleged occurrence he was juvenile, this

present petition has been filed with a plea of juvenility.

7. The learned counsel for the applicant relied on a decision passed by the Hon'ble Apex Court in ***Rishipal Singh Solanki Vs. State of Uttar Pradesh & Others***, reported in ***(2022) 8 SCC 602***, wherein, it has been held that the plea of juvenility may be raised at any time even after final disposal of the case. The relevant paragraph of the aforesaid judgment is as follows:

"33. What emerges on a cumulative consideration of the aforesaid catena of judgment is as follows:

33.1. A claim of juvenility may be raised at any stage of a criminal proceeding, even after a final disposal of the case. A delay in raising the claim of juvenility cannot be a ground for rejection of such claim. It can also be raised for the first time before this Court."

8. By citing the above judgment, the learned counsel for the accused/applicant has prayed for suspension of sentence mainly on the plea of juvenility for allowing the accused/applicant to remain on bail till final disposal of the connected Criminal Appeal.

9. In this regard, Ms. B. Bhuyan, learned Additional Public Prosecutor (Senior Counsel), has submitted that while recording the statement under Section 313 Cr.P.C., the accused/applicant had disclosed his age as 24 years, which was recorded on 01.12.2020, and the alleged incident occurred in the year 2017, hence, the present accused/applicant cannot be treated as a juvenile at the time of the incident.

10. More so, during the entire trial and also while recording the statement under Section 313 Cr.P.C., the accused/applicant did not raise the plea of juvenility, but, only after disposal of this case, he raised this ground. Accordingly, learned Additional Public Prosecutor (Senior Counsel) has submitted that the plea of juvenility cannot be considered at this stage and this interlocutory application is liable to be dismissed.

11. We have considered the rival submissions made by the learned counsels for the parties and have carefully gone through the petition and also perused the documents placed on record.

12. It is an admitted fact, that the accused/applicant did not raise the plea of juvenility, during the entire trial before the Court of learned Special Judge, Darrang, Mangaldai. No doubt, in the statement recorded under Section 313 Cr.P.C., the applicant had disclosed his age as 24 years, but merely on this account, the applicant cannot be precluded from taking the plea only for the ground that he did not raise this issue during trial. The Hon'ble Supreme Court in ***Rishipal*** (*Supra*) has clearly expressed a view, that the accused/applicant has the right to take the plea of juvenility at any stage of proceeding, even after the disposal of the case.

13. In view of above observations, we find it appropriate to direct the learned Special Judge (POCSO), Darrang, to make an enquiry as per the provisions of Juvenile Justice Act and the Rules, so as to determine the actual age of the accused/applicant at the time of the alleged incident. The learned Trial Court

may also take the help of the Police Officials and Jail Authority in this regard. Furthermore, we do not find it justified to pass any order on suspension of sentence or releasing the accused/applicant on bail at this stage. The matter may be considered after receiving the enquiry report from the learned Special Judge, Darrang, Mangaldai.

14. LCR be sent back to the concerned Court with a direction to send back the same after completion of the enquiry along with the enquiry report. The enquiry shall be conducted by ensuing participation of the accused, the prosecution and the victim/complainant and will be completed within next 45 days.

15. With the above direction, this interlocutory application stands disposed of.

JUDGE

CHIEF JUSTICE

Comparing Assistant