

GAHC010136052023



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

Case No. : I.A.(Crl.)/545/2023

AKKASH ALI
S/O AFSAR ALI, VILLAGE NO. 1 BHANDARA, PS MANIKPUR, DIST
BONGAIGAON, ASSAM, 783390

VERSUS

THE STATE OF ASSAM AND ANR.
REPRESENTED BY PP ASSAM

2:MUSST. ANNA KHATUN
D/O SAHAR ALI
VILLAGE 1 NO. BHANDARA
PS MANIKPUR
DIST BONGAIGAON
ASSAM 78339

Advocate for the Petitioner : MR H R A CHOUDHURY

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

Date : 16.11.2023

1. Heard Mr. H. R. A. Choudhury, learned senior counsel assisted by Mr. A. M. Ahmed, learned counsel for the applicant/appellant. Also heard Mr. B. B. Gogoi, learned Additional Public Prosecutor for the State.

2. This interlocutory application has been registered on filing of an

application under Section 389 of the Code of Criminal Procedure, 1973 by the appellant, namely, *Akkash Ali* in the connected Criminal Appeal No. 224/2023 which has been filed by the present applicant/appellant impugning the judgment and order dated 31.05.2023 passed by the learned Special Judge, Bongaigaon, Assam in Special Case No. 40(M)/2021 arising out of Manikpur P.S. Case No. 05/2016 whereby the present applicant/appellant has been convicted under Section 376(1) of the Indian Penal Code as well as under Section 4 of the POCSO Act, 2012 and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.50,000/- and in default of payment of fine to undergo simple imprisonment for one year under Section 376(1) of the Indian Penal Code.

3. It is submitted by learned senior counsel for the applicant/appellant that though the present applicant/appellant was convicted both under Section 376(1) of the Indian Penal Code as well as Section 4 of the POCSO Act, 2012, however, in view of the provisions of Section 42 of the POCSO Act, 2012 he was sentenced only for the offence under Section 376(1) of the Indian Penal Code.

4. Learned Senior Counsel for the appellant/applicant has submitted that the learned Trial Court has wrongly arrived at the finding that the victim was minor at the time of commission of alleged offence and has wrongly convicted the present applicant/appellant under Section 4 of the POCSO Act, 2012. It is submitted that though the prosecution side had not submitted either date of birth certificate from the school or birth certificate given by any Corporation or Municipal Authority as required under Section 94(2)(i)(ii) of the Juvenile Justice (Care and Protection of Children) Act, 2015 and in absence of such a certificate, the age of victim ought to have been determined by an ossification test as per Section 94(2)(iii) of the Juvenile Justice (Care and Protection of Children) Act,

2015, however, learned trial court also relied on other documents like PAN card for ascertaining the age of victim girl. It is submitted that in the instant case, the radiological test of the victim shows that the age of the victim is above 16 years but below 18 years and it is submitted by learned senior counsel for the applicant/appellant that in case of such a determination of age by radiological test, a margin of two years of on either side shall have to be given as observed by Hon'ble Apex Court in many of its rulings. In support of the submissions made by learned senior counsel, he has cited a ruling of Hon'ble Apex Court in "**Jaya Mala –Vs- Home Secretary, Government of Jammu & Kashmir and Ors.**" reported in "**(1982) 2 SCC 538**" wherein it was observed as follows:-

*"9. Detenu was arrested and detained on October 18, 1981. The report by the expert is dated May 3, 1982, that is nearly seven months after the date of detention. Growing in age day by day is an involuntary process and the anatomical changes in the structure of the body continuously occur. Even on normal calculation, if seven months are deducted from the approximate age opined by the expert, in October 1981 detenu was around 17 years of age, consequently the statement made in the petition turns out to be wholly true. **However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side.** Undoubtedly, therefore, the detenu was a young school-going boy. It equally appears that there was some upheaval in the educational institutions. This young school-going boy may be enthusiastic about the students' rights and on two different dates he marginally crossed the bounds of law. It passes comprehension to believe that he can be visited with drastic measure of preventive detention. One cannot treat young people, may be immature, may be even slightly misdirected, may be a little more enthusiastic, with a sledge hammer. In our opinion, in the facts and circumstances of this case the detention order was wholly unwarranted and deserved to be quashed."*

5. Learned Senior counsel for the applicant/appellant has also cited another ruling of Hon'ble Apex Court in "**Ram Suresh Singh –Vs- Prabhat Singh Alias Chhotu Singh**" reported in "**(2009) 6 SCC 681**" wherein it was observed as follows:-

13. Even if we had to consider the medical report, it is now well known that an error of two years in determining the age is possible. In Jaya Mala v. Govt. of J&K [(1982) 2 SCC 538 : 1982 SCC (Cri) 502 : AIR 1982 SC 1297] this Court held: (SCC p. 541, para 9)

"9. ... However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side."

6. Learned Senior Counsel for the applicant/appellant has submitted that if the benefit of margin of two years would have been given to the present appellant/applicant, the victim girl in this case would not have been adjudged as a minor and the provisions of POCSO Act, 2012 would not have been attracted against the present applicant/appellant. It is for the submitted by learned senior counsel for the applicant/appellant that the victim girl in her statements recorded under Section 161 as well as Section 164 of the Code of Criminal Procedure, 1973 had stated that she had love affair with the present applicant/appellant and they had sexual intercourse which according to learned senior counsel for the applicant/appellant appears to be consensual in nature and which has been ignored by the learned Trial Court while coming to the finding of the guilt of the present applicant/appellant.

7. Learned Senior Counsel for the applicant/appellant has submitted that there is a fair chance of the present applicant/appellant getting a verdict of

acquittal in the connected appeal and hence, this is a fit case where the sentence imposed on the present applicant/appellant maybe suspended during pendency of the connected appeal and he may be allowed to be released on bail during the pendency of the connected appeal i.e., Criminal Appeal No. 224/2023.

8. On the other hand, learned Additional Public Prosecutor has objected to the suspension of sentence imposed on the present applicant/appellant and allowing him to release on bail on the ground that the victim as well as other witnesses who were examined during the trial have implicated the present applicant/appellant and the learned Trial Court has correctly arrived at a finding of the guilt of the present applicant/appellant and have rightly convicted and sentenced the present applicant/appellant.

9. I have considered the submissions made by learned counsel for both sides and have perused the materials available on record.

10. It appears that the age of the victim girl in this case was assessed by radiological examination to be above 16 years and below 18 years at the time of examination. It also appears that at the time of medical examination, she has given a history of love affair with the present applicant/appellant for last 4(four) months. It also appears that while ascertaining the age of the victim girl, the learned Trial Court had not given benefit of margin of 2(two) years as ought to have been given in case of assessment of age through radiological examination as held by the Hon'ble Apex Court in the judgment cited by learned senior counsel for the applicant/appellant in "**Jaya Mala –Vs- Home Secretary, Government of Jammu & Kashmir and Ors.**"(supra) and "**Ram Suresh Singh –Vs- Prabhat Singh Alias Chhotu Singh**"(supra).

11. It also appears that the learned Trial Court also did not consider the statements of the victim which were recorded under Section 164 as well as Section 161 of the Code of Criminal Procedure, 1973 while assessing the reliability of her testimony which she gave in the Court as PW-1. It also appears that the contentions raised by the applicant/appellant in the memo of appeal have sufficient persuasive logic in it and there is a fair chance of getting success in the connected Criminal Appeal No. 224/2023. However, due to pendency of large number of criminal appeals in this Court, there is a likelihood that the disposal of the said appeal may be delayed, if the same is taken up for consideration in its normal course, hence, this Court is of considered opinion that this is a fit case where the sentence imposed on the present applicant/appellant by the impugned judgment and order dated 31.05.2023 may be suspended during the pendency of the Criminal Appeal No. 224/2023.

12. In view of the above discussions, the sentence imposed on the present applicant/appellant by the impugned judgment and order dated 31.05.2023 passed by learned Special Judge, Bongaigaon in Special Case No. 40(M)/2021 is hereby suspended during the pendency of the Criminal Appeal No. 224/2023 and the appellant/applicant is allowed to go on bail of Rs.50,000/- (Rupees Fifty Thousand) with one surety of like amount to the satisfaction of learned Special Judge, Bongaigaon, subject to the following conditions :-

1. The applicant/appellant shall not leave the State of Assam during the pendency of the Criminal Appeal No. 224/2023 without prior leave of the learned Special Judge, Bongaigaon, Assam;
2. The applicant/appellant shall not directly or indirectly make any inducement, threat or promise to the victim girl in any manner during the pendency of Criminal Appeal No. 224/2023;

3. The applicant/appellant shall not commit any offence similar to which he has been convicted in Special Case No. 40(M)/2021.

13. With the above observations, this interlocutory application (criminal) is hereby disposed of.

JUDGE

Comparing Assistant