

GAHC010262952022



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

Case No. : I.A.(CrI.)/816/2022

KARNAP @ KARNAV BORA
S/O SHRI AKON BORA R/O PHULANI GAON P.O. PHULANI P.S.
HOWRAGHAT DIST KARBI ANGLONG ASSAM PIN-782481

VERSUS

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

2:BHASKAR DAS
S/O LT. KALAMONI DAS R/O VILL HALADHI ATI P.O. AND P.S. BAKALIA
DIST. KARBI ANGLONG ASSAM PIN-78248

Advocate for the Petitioner : MR. U K DEKA

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

ORDER

Date : 21-06-2023

1. Heard Mr. S. Borthakur, learned counsel for the applicant/appellant. Also heard Ms. S.H. Bora, learned Addl. P.P. for respondent No. 1 and Mr. A.A. Dewan, learned counsel for respondent No. 2/opposite-party No. 2.

2. The applicant has filed an application u/s 389 Cr.PC with prayer for suspension of sentence and bail.
3. It is submitted that the applicant is innocent and the victim eloped with the applicant which has been reflected in the evidence of the victim who testified as PW-5.
4. The learned Addl. P.P. and the learned counsel for the respondent Nos. 1 and 2 have raised objection stating that the victim being a girl of 17 years of age cannot consent to marriage. The evidence clearly reveals that marriage had taken place between the applicant and the victim and thus the applicant is liable u/s 4 of the POCSO Act.
5. The learned counsel for the applicant has also relied on the decision of the High Court of Judicature at Kolkata in *Ranjit Rajbangshi and State of West Bengal and Others*, reported in (2021) SCC OnLine Cal 2470 wherein it has been held that :-

“In the present case, the victim girl was admittedly 16 ½ years old and studied in Class XII at the relevant point of time. She was not naïve enough not to know the implication of sexual intercourse; rather, the victim admittedly had a physical relationship with the accused, who was also of a very young age, on several occasions prior to the incident. Although the consent of a minor is not a good consent in law, and cannot be taken into account as 'consent' as such, the expression 'penetration' as envisaged in the POCSO Act has to be taken to mean a positive, unilateral act on the part of the accused. Consensual participatory intercourse, in view of the passion involved, need not always make penetration, by itself, an unilateral positive act of the accused but might also be a union between two persons out of their own volition. In the latter case, the expression 'penetrates', in Section 3(a) of the POCSO Act might not always connote mere voluntary juxtaposition of the sexual organs of two persons of different genders. If the union is participatory in nature, there is no reason to indict only the male just because of the peculiar nature of anatomy of the sexual organs of different genders. The psyche of the parties and the maturity level of the victim are also relevant factors to be taken into consideration to decide whether the penetration was a unilateral and positive act on the part of the male. Hence, seen in proper perspective, the act alleged, even if proved, could not tantamount to penetration sufficient to attract Section 3 of the POCSO Act, keeping in view the admitted several prior occasions of physical union between the accused and the victim and the maturity of the victim.”

With such observation the appellant *Ranjit Rajbangshi* was thereby acquitted from the

charges u/s 376 IPC.

6. The learned counsel for the respondent No. 2 has submitted that:-

- i. Section 94 of I.T. Act, 2015 contemplates that age depicted in the documents is conclusive and that cannot be put to challenge in bail application i.e. I.A. case.
- ii. Offence disclosed in FIR is sufficient to trigger the presumption of guilt u/s 29 of POCSO, Act, 2012.
- iii. While considering bail, age is a factor.
- iv. Presumption u/s 94 of I.T. Act, 2015 and Section 29, POCSO Act, 2012 cannot prejudice the rights of accused at the stage of bail.
- v. POCSO Act is a special Act where the legislature made stringent provisions to protect the interest of victims who are minor.

7. Per contra, the learned counsel for the applicant has submitted that the evidence clearly reveals that the victim eloped with the applicant on her own volition. The applicant is a young lad aged only 22 years at present and when the incident occurred he was around 20 years of age.

8. After considering all aspects and in view of my foregoing discussions, the applicant is enlarged of bail of Rs. 50,000/- with a suitable surety of like amount to the satisfaction of the trial Court who may impose conditions as the Court deems fit and proper. The operation of the order of conviction in POCSO Case No. 55 of 2020 convicting him u/s 4 of the POCSO Act and sentencing him to undergo Rigorous Imprisonment of 10 years and pay a fine of Rs. 10000/- with default stipulation, is stayed until further order(s).

In terms of the above observations, the I.A. stands disposed of.

JUDGE

Comparing Assistant