

**HIGH COURT OF TRIPURA
AGARTALA
Crl. Rev. P. No.18 of 2024**

Sri Tapan Debnath @ Badal
S/O Late Harilal Debnath,
Of Chelagang Samatal Para,
P.S.- Nutanbazar, District- Gomati.

----Petitioner

Versus

The State of Tripura
Represented by the Secretary,
Department of Home,
Government of Tripura,
Agartala.

---- Respondents

For Petitioner(s)	:	Mr. Alik Das, Adv.
For Respondent(s)	:	Mr. Raju Datta, P.P.
Date of hearing & Judgment & Order	:	12.04.2024
Whether fit for reporting	:	NO

HON'BLE MR. JUSTICE BISWAJIT PALIT

Judgment & Order(Oral)

Heard Mr. Alik Das, Learned Counsel representing the petitioner and also heard Learned P.P. Mr. Raju Datta representing the State.

2. This revision petition under Section 397 read with Section 401 of Cr.P.C. is filed for setting aside the order dated 13.03.2024 passed by Learned Special Judge, Gomati District, Udaipur in connection with case no.Special no.22 of 2023(POCSO).

3. At the time of hearing, Learned Counsel for the petitioner submitted that the aforesaid case is pending before the Court of Learned Special Judge, Gomati District, Udaipur and before the said Court, the accused-petitioner filed an application for discharging the accused under Section 227 of Cr.P.C on the ground that the victim of this case although has been projected as a minor but from the copy of birth certificate, it appears that she was major on the day of the alleged occurrence of offence. So, no charge can be framed against the accused-petitioner under Section 4 of the POCSO Act. But the Learned Trial Court did not consider the petition and rejected the application of the petitioner-accused and fixed the case for framing of charge.

4. Learned P.P. Mr. Raju Datta representing the prosecution strongly countered the submissions made by Learned Counsel for the petitioner and submitted that there are sufficient materials against the accused-petitioner to frame charge under Section 4 of the POCSO Act in addition to the other charges levelled under IPC and at the stage of framing of charge, there is no scope to consider the application of the accused-petitioner legally. Learned P.P further submitted that during investigation, no such document was submitted stating that the victim of the case was a major one at the time of alleged occurrence of offence. Learned P.P further submitted that it was the duty of the victim to rely upon that document and to submit application to the Court rather the accused-

petitioner has come forward with the prayer and moreso, the victim is a Bangladeshi national. So, without verification, there is no scope to rely upon the birth certificate submitted by the accused-petitioner and further submitted that to ascertain the actual age of the victim, the I.O. during investigation arranged for conducting ossification test of the victim from which it appears that she was a minor. So, Learned P.P. prayed for dismissal of the petition filed by the accused-petitioner.

5. I have heard detailed argument of both the sides and gone through the record of the Learned Court below which is called for.

6. In the instant matter, on the basis of suo moto complaint laid by one SI Sandipan Deb of Natunbazar P.S. Amarpur under Gomati District to O/C NTB P.S. under Amarpur Sub-division. The O/C, NTB P.S. registered NTB P.S. case no.40/2023 under Section 366(B)/370/120-B/201/376(3) of IPC and Section 4 of POCSO Act and after completion of investigation, the I.O. has laid charge-sheet against the accused-petitioner vide NTB P.S. C.S. no.38/2023 under Section 366(B)/370/120-B/201/376(3) of IPC and Section 4 of POCSO Act. Accordingly, cognizance was taken by the Special Judge and the case is pending for disposal before the Learned Special Judge, Gomati District, Udaipur.

7. In course of hearing of argument, Learned Counsel for the accused-petitioner submitted that during investigation, the accused-petitioner was released on bail by this Court vide order

dated 18.10.2023 in connection with BA/48/2023 and at the time of hearing of bail application, the accused-petitioner submitted the birth certificate of the victim from which it appeared that her date of birth was 12.01.2004 and the birth certificate was issued by the authority of the Government of Bangladesh. However, the I.O. during investigation without relying upon the same proceeded for conducting ossification test of the victim and submitted that the victim was a minor and accordingly, laid charge-sheet under the relevant provisions of law including the POCSO Act.

8. Per contra, Learned P.P. submitted that the trial of the case has not yet been commenced and the accused-petitioner shall have the liberty to adduce all the relevant documents during trial specifically during his evidence and if he desires to produce the same. But, since that document was not seized by I.O. during investigation, so, no reliance can be placed upon that. During investigation, the mother of the victim-girl submitted one application to the High Court for allowing her to meet her daughter who was lodging in a Children's home namely Alor Dishari, Kakraban, Udaipur. Learned P.P. submitted that this Hon'ble High Court allowed the prayer of the mother of the victim girl and allowed her to meet with her daughter. Now, the victim is staying in Bangladesh.

Admittedly, before the Learned Special Court, no such prayer was submitted on behalf of the mother of the victim or

by the victim herself. The case is pending for disposal before Learned Court below.

9. Now, at this stage, it is to be decided as to whether there is any scope to interfere with the order of the Learned Trial Court passed under Section 227 of Cr.P.C. For the sake of convenience, I would like to refer hereinbelow the relevant portion of Section 227 of Cr.P.C which provides as under:

"227. Discharge.- If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

From the aforesaid provision, it appears that the Court is to consider the materials on record and to hear both the sides before discharge of the accused.

10. Here, in this case, the alleged birth certificate was submitted by the accused before the Learned Special Court for discharging him from the charge of the POCSO Act as the I.O. laid the charge-sheet against the accused-petitioner under Section 4 of the POCSO Act in addition with the other sections of the Indian Penal Code. As already stated, the I.O. during investigation did not seize the alleged birth certificate of the victim either from the custody of the victim or from the custody of the mother of the victim girl.

11. Learned Counsel for the petitioner referred the provision of Section 94 of the Juvenile Justice(Care and Protection of Children) Act, 2015 and submitted that the I.O.

violated the provision of Section 94(2) of the said Act and proceeded for conducting ossification test of the victim. For the sake of convenience, I would like to refer hereinbelow the relevant provision of Section 94 of Juvenile Justice(Care and Protection of Children) Act, 2015:

"94. Presumption and determination of age.-

(1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under Section 14 or Section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining –

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person."

From the aforesaid provision, it appears that this power is vested with the Board or the Committee and only in absence of the birth certificate issued from the school or matriculation certificate or equivalent certificate of the Board and the birth

certificate of the Municipal Corporation Authority, there is scope for conducting ossification test or any other latest medical age determination test conducted on the order of the Committee or the Board.

12. From the charge-sheet, it appears that the I.O. did not proceed for collecting the birth certificate either from the victim or from the mother of the victim during investigation to ascertain the actual age of the victim rather proceeded for conducting ossification test and from the ossification test, it appears that the concerned Medical Officer has opined that the age of the victim was more than 14 years but less than 15 years on 15.10.2023. As per Section 2(2) of the Juvenile Justice(Care and Protection of Children) Act, 2015, "Child" means a person who has not completed 18 years of age. Similarly, Section 2-D of the POCSO Act, 2012 defines child as any person below the age of 18 years. Now, if it is found that on the date of alleged occurrence of offence, the victim was below 18 years of age and there is/are material(s) to frame charge against the accused then the Court shall definitely proceed to frame charge against any accused under the POCSO Act. In the given case, the trial of the case has not yet been commenced.

13. In **Srilekha Sentilkumar v. Deputy Superintendent of Police, Central Bureau of Investigation, ACB, Chennai** dated 01.07.2019 reported in **(2019) 7 SCC 82**, Hon'ble the Apex Court in para nos. 9 & 10 observed as under:

"9. In other words, we are of the view that the issues urged by the appellant and the same having been refuted by the respondent are such that they can be decided more appropriately and properly during trial after evidence is adduced by the parties rather than at the time of deciding the application made under Section 239 CrPC.

10. It is for this reason, we have refrained ourselves from mentioning the facts of this case in detail nor do we wish to discuss much less to record any finding on the issues urged else any observation or/and finding made by this Court while deciding this matter at this stage would cause prejudice to the parties concerned while facing the trial on merits. Needless to say, parties will be at liberty to raise all such pleas on facts and law in the trial."

In **State By Karnataka Lokayukta, Police Station v.**

M.R. Hiremath dated 01.05.2019 reported in **(2019) 7 SCC**

515, Hon'ble Supreme Court further in para no.25 observed as under:

"25. The High Court ought to have been cognizant of the fact that the trial court was dealing with an application for discharge under the provisions of Section 239 CrPC. The parameters which govern the exercise of this jurisdiction have found expression in several decisions of this Court. It is a settled principle of law that at the stage of considering an application for discharge the court must proceed on the assumption that the material which has been brought on the record by the prosecution is true and evaluate the material in order to determine whether the facts emerging from the material, taken on its face value, disclose the existence of the ingredients necessary to constitute the offence. In *State of T.N. v. N. Suresh Rajan* : (2014) 11 SCC 709, adverting to the earlier decisions on the subject, this Court held: (SCC pp.721-22, para 29)

"29. ... At this stage, probative value of the materials has to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court

has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage.””

In **Asian Resurfacing of Road Agency Private Limited and Another v. Central Bureau of Investigation** dated 28.03.2018 reported in **(2018) 16 SCC 299**, Hon'ble Supreme Court further in para no.37 observed as under:

“37. Thus, we declare the law to be that order framing charge is not purely an interlocutory order nor a final order. Jurisdiction of the High Court is not barred irrespective of the label of a petition, be it under Sections 397 or 482 CrPC or Article 227 of the Constitution. However, the said jurisdiction is to be exercised consistent with the legislative policy to ensure expeditious disposal of a trial without the same being in any manner hampered. Thus considered, the challenge to an order of charge should be entertained in a rarest of rare case only to correct a patent error of jurisdiction and not to reappreciate the matter. Even where such challenge is entertained and stay is granted, the matter must be decided on day-to-day basis so that stay does not operate for an unduly long period. Though no mandatory time-limit may be fixed, the decision may not exceed two-three months normally. If it remains pending longer, duration of stay should not exceed six months, unless extension is granted by a specific speaking order, as already indicated. Mandate of speedy justice applies to the PC Act cases as well as other cases where at trial stage proceedings are stayed by the higher court i.e. the High Court or a court below the High Court, as the case may be. In all pending matters before the High Courts or other courts relating to the PC Act or all other civil or criminal cases, where stay of proceedings in a pending trial is operating, stay will automatically lapse after six months from today unless extended by a speaking order on the above parameters. Same course may also be adopted by civil and criminal appellate/Revisional Courts under the jurisdiction of the High Courts. The trial courts may, on expiry of the above period, resume the proceedings without waiting for any other intimation unless express order extending stay is produced.”

In **State of Gujarat v. Dilipsinh Kishorsinh Rao** dated 09.10.2023 reported in **2023 SCC OnLine SC 1294**,

wherein Hon'ble Supreme Court in para nos.8, 9, 10, 11 and 12 observed as under:

"8. At the time of framing of the charge and taking cognizance the accused has no right to produce any material and call upon the court to examine the same. No provision in the Code grants any right to the accused to file any material or document at the stage of framing of charge. The trial court has to apply its judicial mind to the facts of the case as may be necessary to determine whether a case has been made out by the prosecution for trial on the basis of charge-sheet material only.

9. If the accused is able to demonstrate from the charge-sheet material at the stage of framing the charge which might drastically affect the very sustainability of the case, it is unfair to suggest that such material should not be considered or ignored by the court at that stage. The main intention of granting a chance to the accused of making submissions as envisaged under Section 227 of the Cr.P.C. is to assist the court to determine whether it is required to proceed to conduct the trial. Nothing in the Code limits the ambit of such hearing, to oral hearing and oral arguments only and therefore, the trial court can consider the material produced by the accused before the I.O.

10. It is settled principle of law that at the stage of considering an application for discharge the court must proceed on an assumption that the material which has been brought on record by the prosecution is true and evaluate said material in order to determine whether the facts emerging from the material taken on its face value, disclose the existence of the ingredients necessary of the offence alleged. This Court in State of Tamil Nadu Vs. N. Suresh Rajan And Others:(2014) 11 SCC 709 adverting to the earlier propositions of law laid down on this subject has held:

"29. We have bestowed our consideration to the rival submissions and the submissions made by Mr. Ranjit Kumar commend us. True it is that at the time of consideration of the applications for discharge, the court cannot act as a mouthpiece of the prosecution or act as a post office and may sift evidence in order to find out whether or not the allegations made are groundless so as to pass an order of discharge. It is trite that at the stage of consideration of an application for discharge, the court has to proceed with an assumption that the material brought on record by the prosecution are true and evaluate the said

materials and documents with a view to find out whether the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. At this stage, probative value of the materials has to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage."

11. The defence of the accused is not to be looked into at the stage when the accused seeks to be discharged. The expression "the record of the case" used in Section 227 Cr.P.C. is to be understood as the documents and articles, if any, produced by the prosecution. The Code does not give any right to the accused to produce any document at the stage of framing of the charge. The submission of the accused is to be confined to the material produced by the investigating agency.

12. The primary consideration at the stage of framing of charge is the test of existence of a prima-facie case, and at this stage, the probative value of materials on record need not be gone into. This Court by referring to its earlier decisions in the State of Maharashtra vs. Som Nath Thapa (1996) 4 SCC 659 and the State of MP vs. Mohan Lal Soni (2000) 6 SCC 338 has held the nature of evaluation to be made by the court at the stage of framing of the charge is to test the existence of prima-facie case. It is also held at the stage of framing of charge, the court has to form a presumptive opinion to the existence of factual ingredients constituting the offence alleged and it is not expected to go deep into probative value of the material on record and to check whether the material on record would certainly lead to conviction at the conclusion of trial."

Referring the same, Learned P.P. drawn the attention of the Court that the Learned Trial Court below rightly rejected the application of the accused-petitioner under Section 227 of

Cr.P.C. and the principles of the aforesaid citations are very much relevant for decision of this case. So, Learned P.P. urged for taking into consideration those principles of law laid down by the Apex Court at the time of passing the order.

14. Here, in the case, I have also perused the Case Diary produced by the Learned P.P. and also the L.C. record. During investigation, the statement of the victim was recorded by Magistrate under Section 164(5) of Cr.P.C and also the statement of the victim was recorded by I.O. under Section 161 of Cr.P.C. There is no evidence on record that during investigation, the alleged birth certificate was seized by the I.O. but it is on record that during the time of hearing of Bail Application, a copy of birth certificate was produced before the High Court. In absence of recording evidence of the witness of the prosecution, at this stage it is hard to come to any conclusion as to whether any charge under POCSO Act would lie against the accused-petitioner or not as the matter is still sub-judiced before the Learned Trial Court for holding trial of the case.

15. It is also the settled position of law that the accused also during trial of the case before the Learned Trial Court shall have the liberty to adduce his evidence to substantiate his defence. And furthermore, the evidence of the victim is yet to be recorded by the Learned Trial Court. Rather, from the statement of the victim and also the medical examination report of the victim girl during investigation by the Medical Officer

prima facie it transpires that on the alleged day, the victim was minor and furthermore, in absence of any authentication, there is no scope to place any reliance on the alleged birth certificate relied upon by the alleged accused-petitioner since it was issued by the authority of another nation. But considering the facts and circumstances of the case and the materials on record and also from the principles of the aforesaid citation, at this stage I do not find any scope to entertain the application filed by the petitioner to set aside the order dated 13.03.2024 passed by Learned Special Judge, Gomati District, Udaipur.

16. In the result, the petition filed by the accused-petitioner under Section 397 read with Section 401 of Cr.P.C. stands rejected being devoid of merit at this stage. However, the accused-petitioner shall have the liberty to adduce his evidence if he so desires before the Learned Trial Court and the Learned Trial Court shall dispose of the said petition in accordance with law in due course of time. However, it is made clear that considering the subject matter of the prosecution, the Learned Trial Court shall take all endeavour to dispose of the case within a period of 06(six) months from the date of the receipt of copy of this order passed by this Court.

17. With this observation, this revision petition is disposed of on contest. Send down the LCR along with a copy of the order/judgment. Pending application(s), if any, also stands disposed of.

JUDGE