

GAHC010062932020



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

Case : I.A.(Crl.)/267/2020

BADSHAH ALI
S/O- LATE SAFAR ALI
VILL.- 1/2 BARUAJHAR
P.S. AND DIST.- DALGAON
ASSAM.

VERSUS

THE STATE OF ASSAM AND ANR
TO BE REP. BY THE PUBLIC PROSECUTOR
ASSAM.

2:KHALEDA JIA
D/O- ABDUL KALAM @ BADSHAH
VILL.- NO. 1/2 BARUAJHAR
P.O. JANGALPARA P.S. DALGAON
DIST.- DARRANG
ASSAMPIN- 784116.

Advocate for : MR H R A CHOUDHURY
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM AND ANR

BEFORE
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

ORDER

08.01.2024

Heard Mr. H. R. A. Choudhury, learned Sr. counsel for the petitioner assisted by

Ms. H. Ahmed, learned counsel for the applicant. Also heard Mr. B. B. Gogoi, learned Additional Public Prosecutor, Assam.

2. This application is filed under Section 389 Cr.P.C. praying for suspension of the judgment and order of conviction and sentence, dated 20.01.2020 passed by the learned Sessions Judge, Darrang, Mangaldoi in Special (POCSO) Case No. 12/2017 convicting the accused/appellant under Section 4 of the POCSO Act and to undergo R.I. for 10 years and to pay fine of Rs.5000/- in default RI for another six months.

3. Heard Mr. B. B. Gogoi, learned Additional Public Prosecutor who has submitted an objection against the bail petition.

4. Notice was issued to respondent No.2 but none has appeared. Office note dated 04.01.2024 in CrI. Appeal No. 118/2020 reflects that notice was served on respondent No.2.

5. It is submitted by the learned counsel for the petitioner that the petitioner is behind the bars since 10.11.2019.

6. The evidence of medical officer as PW-1 reflects that the radiological examination reveals that the age of the victim is approximately between 16 to 17 years. The higher side by two years ought to be considered. It is submitted that this is not a case of POCSO Act. If the radiological age of the victim is taken into consideration, this case may be under Section 376 of the IPC. It is also submitted that there is every possibility that the applicant will be acquitted in connection with the connected appeal. It is also submitted that there was an inexplicable delay of three months in lodging the FIR.

7. The learned Senior counsel has taken this Court through the cross-examination of the witnesses and the questions posed during the cross-examination of the witnesses. Learned Senior counsel also relied on a decision of Hon'ble the Supreme Court in *Criminal Appeal No. 3415/2023 in Vishnubhai Ganpatbhai Patel & Another vs State of Gujarat*, wherein it has been observed that:

“We may note here something about the approach of the High court while dealing with the application for suspension of sentence. Before the High Court, surprisingly, a submission was made on behalf of the State that sentence undergo only post conviction should be considered and therefore, a submission was made that the appellants had undergone only 05 months and 27 days. The High Court has accepted the said submission by recording that the appellants have not even completed 01 year of sentence. Apart from the fact that the said approach is incorrect, we may note here that there is no hard and fast rule which requires an accused to undergo sentence for a particular period before his prayer for suspension of sentence is considered.

Accordingly, the appeal is allowed.”

8. I have considered the submissions at the bar and relied on the decision of Vishnubhai Ganpathai (supra). The appeal has been pending since 2020 and it has not come up for hearing and it is not likely that the appeal will be disposed of sometime soon. The merits of the case are not at all taken into consideration at this juncture.

9. Considering the peculiar and unique nature of this case, the operation of the order of conviction and sentence dated 20.01.2020 of the learned Sessions Judge, Darrang, Mangaldoi in Special (POCSO) Case No. 12/2017 is stayed until further order and the applicant is enlarged on bail of Rs.50,000/- with one suitable surety of like amount to the satisfaction of the trial court. The trial court

may impose any bail conditions which the trial court deems fit and proper.

10. In view of above this Interlocutory Applications stands disposed of.

JUDGE

Comparing Assistant