

GAHC010071922024



2024:GAU-AS:11203

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

Case No. : Bail Appln./1028/2024

MD. NAUSED ALI @ NASHWED ALI
S/O LATE ALI AKBAR @ ALI AAKABAR,
R/O BHUJKHOWA CHAPORI, P.O. BALICHAPORI, P.S. TEZPUR
DIST. SONITPUR, ASSAM
PIN -784027

VERSUS

THE STATE OF ASSAM AND 2 ORS.
REP BY THE PP, ASSAM

2:FAIJUL ISLAM
S/O LATE ABDUL SATTAR
R/O BHUJKHOWA CHAPORI
P.O. BALICHAPORI
P.S. TEZPUR
DIST. SONITPUR
ASSAM
PIN-784027

3:XXXX
D/O FAIJUL ISLAM
R/O BHUKHOWA CHAPORI
P.O. BALICHAPORI

P.S. TEZPUR
DIST. SONITPUR
ASSAM

PIN- 78402

Advocate for the Petitioner : MR. R Deka, S I AKAND

Advocate for the Respondent : PP, ASSAM, MS. B SARMA (AS LEGAL-AID-COUNSEL FOR R-2)

**BEFORE
HONOURABLE MR. JUSTICE MANASH RANJAN PATHAK**

ORDER

18.11.2024

Heard Mr. S I Akand, learned counsel for the petitioner and Mr. B Sarma, learned Additional Public Prosecutor, Assam for the State. Also heard Ms. B Sarma, learned Legal Aid Counsel for the informant as well as the minor victim, opposite party Nos.2 and 3.

2) By this application filed under Section 439 Cr.P.C., 1973, the petitioner, namely, **Md. Naused Ali @Nashwed Ali**, son of Late Ali Akbar @Ali Aakabar, resident of Bhujkhowa Chapori, P.S.-Tezpur, District- Sonitpur, has prayed for his bail in **Special POSCO Case No. 179/2023** arising out of Tezpur Police Station Case No.832/2023, corresponding to GR No.1720/23, registered under Section 376 of the I.P.C. read with Section 4 of the POCSO Act, 2012, in which, he was arrested on 09.10.2023 and is in custody since then.

3) It is contended on behalf of the petitioner that he was arrested on 09.10.2023 in said Tezpur P.S. Case No.832/2023 under Section 376 of the I.P.C. read with Section 4 of the POCSO Act, 2012 and is in custody for more than 405 days, since 09.10.2023.

4) It is also stated on behalf of the petitioner that in the meanwhile, Charge-Sheet has been filed in the case and charges under Section 376 of the I.P.C. read with Section 4 of the POCSO Act, 2012 has been framed against him and the statement of the victim under Section 164 Cr.P.C. as well as her evidence has also been recorded and that the petitioner should be considered for his bail in said Special POSCO Case No. 179/2023 arising out of said Tezpur P.S. Case No.832/2023.

5) As per the FIR dated 08.10.2024 lodged by the informant, father of the victim, opposite party No.2, the case is that his minor daughter aged about 14 years and studying in class 6, while suffering from stomach ache, was taken to Tezpur for her medical examination.

- 6)** During such medical examination, informant's minor daughter was found to be pregnant for 7 months.
- 7)** While enquiring about the same, his minor daughter revealed that it is the petitioner who committed rape on her repeatedly on many occasions and impregnated her.
- 8)** On the basis of the said FIR dated 08.10.2023, Tezpur P.S. Case No.832/2023 corresponding to GR No.1720/23 under Section 376 of the I.P.C. read with Section 4 of the POCSO Act, 2012 was registered.
- 9)** In support of his case, Mr. Akand, learned counsel for the petitioner, relied upon the decision of the Hon'ble Supreme Court in the case of *Hussainara Khatoon & Ors Vs Home Secretary, State of Bihar, reported in 1980(1) SCC 115*, wherein, the Hon'ble Apex Court have held that when a person is accused of more than one offence, the sentences of imprisonment imposed on him are directed to run concurrently, but assuming the sentences of imprisonment may be consecutive, the undertrial prisoners have to suffer in incarceration for the maximum period, for which, they could be sent to jail for conviction of multiple offences.
- 10)** In said decision of *Hussainara Khatoon (Supra)*, their Lordships have also held that there is absolutely no reason why the undertrials be allowed to continue in jail for a moment longer, since such continuations of detention could be violative not only of human dignity but also of their Fundamental Rights under Article 21 of the Constitution.
- 11)** Mr. Akand, learned counsel for the petitioner, also relied on the decision of the Hon'ble Himachal Pradesh High Court reported in *2019 0 Supreme (HP) 651 (Dev Raj Vs State of Himachal Pradesh)* decided on 27.09.2019, wherein, an undertrial prisoner and an accused, in a case registered under Section 376 of the I.P.C. read with Section 4 of the POCSO Act, 2012, was granted bail during the trial of the case, on compliance of certain conditions imposed upon the said alleged accused/UTP.
- 12)** Perused the up-to-date case record that was called for by the Court vide order dated 08.04.2024.
- 13)** From the case record, it is seen that the statement of the victim was recorded by the concerned Investigating Officer of the case on 08.10.2023 and thereafter the victim

was sent for her medical examination on 09.10.2023.

14) The statement of the victim was also recorded under Section 164 Cr.P.C by the learned Judicial Magistrate First Class, Sonitpur on 09.10.2023 and Charge-Sheet in said Tezpur P.S. Case No.832/2023 was filed against the petitioner on 31.10.2023 under Section 376 of the I.P.C. read with Section 4 of the POCSO Act, 2012.

15) The learned Special Judge (POCSO), Sonitpur, Tezpur on 08.01.2024, in said Special POCSO Case No. 179/2023, framed charge against the petitioner under Section 376(3) read with Section 6 of the POCSO Act, 2012.

16) It is seen from the records of the case that minor victim adduced her evidence on 18.07.2024 and she was also thoroughly cross examined by the defence.

17) It is also seen from the records that the informant of the case has also adduced evidence before the learned Special Judge (POCSO), Sonitpur, Tezpur on 12.08.2024, but defence took time for his cross-examination.

18) The case record further reveals that the concerned prosecution witness No.3 was present before the Court on the date fixed in September 2024 for adducing her evidence, but evidence of said PW-3 could not be recorded on the date fixed.

19) Case record reveals that police have seized the Birth Certificate of the minor victim, showing her Date of Birth as 04.12.2009 that was issued by the Registrar of Births and Deaths, Kanaklata Civil Hospital, Sonitpur, Tezpur, vide registration No. 4743 dated-10.12.2009.

20) It is also seen that after registration of the FIR in said Tezpur P.S. Case No.832/2023, the minor victim girl gave birth to a baby boy and police sent the blood sample of the petitioner, the minor victim girl and the baby boy born to the said minor victim to the Directorate of Forensic Science, Assam for the necessary DNA report.

21) The DNA report dated 25.07.2024, issued by the Directorate of Forensic Science, Assam indicated that blood sample of the petitioner matches with that of the baby boy that was given birth by the minor victim.

22) The petitioner was about 40 years old at the time of his arrest whereas the victim

girl was only 14 years 6 months old.

23) It is seen from the case record that the statement of the minor victim recorded under Section 164 Cr.P.C before the learned Judicial Magistrate First Class, Sonitpur on 09.10.2023 and her evidence before the learned Special Judge (POCSO), Sonitpur, Tezpur dated 18.07.2024 are found to be consistent.

24) Case record also reveals that after obtaining the DNA report dated 25.07.2024, noted above, from the Directorate of Forensic Science, Assam, the Investigating Officer of said Tezpur P.S. Case No.832/2023 submitted an additional Charge-Sheet before the learned Special Judge (POCSO), Sonitpur, Tezpur against the petitioner under Section 376(3) IPC read with Section 4 of the POCSO Act, 2012 instead of Section 376 of the I.P.C. read with Section 4 of the POCSO Act, 2012 as been charged.

25) Considering the materials in the case record and the evidence of the minor victim recorded by the learned Judicial Magistrate First Class, Sonitpur on 09.10.2023 as well as her evidence before the learned Special Judge (POCSO), Sonitpur, Tezpur in Special POCSO Case No.179/2023, this Court is of the view that it is not a fit case to grant bail to the petitioner, namely, **Md. Naused Ali @Nashwed Ali**, in said Special POCSO Case No.179/2023, considering his detention in custody since 09.10.2023.

26) Moreover, the decision of the Hon'ble Himachal Pradesh High Court placed by the petitioner, is not applicable to the present case as in the said case, the alleged accused was of 23 years of age and the victim was more than 16 years of age and both of them were having an affair and the Court considered the age of the alleged accused involved in the case as well as his detention in custody for granting bail to the alleged accused person.

27) In the other case decided by the Hon'ble Supreme Court, i.e., *Hussainara Khatoon (Supra)*, it was a case where the undertrial prisoners have been in jail for a period longer than the maximum term for which they could have been sentenced.

28) As such, said case of *Hussainara Khatoon (Supra)* placed by Mr. Akand, learned counsel for the petitioner, is also not applicable to the present case.

29) For the reasons above, this bail application of the petitioner, named above, in said

Special POCSO Case No.179/2023 stands rejected.

JUDGE

Comparing Assistant