

GAHC010193562023



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

Case No. : I.A.(CrI.)/790/2023

RAHUL MODAK
S/O DULAL MODAK, VILL.- OLD COLONY, P.S.- BONGAIGAON, DIST.-
BONGAIGAON, ASSAM.

VERSUS

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

2:SHIVA ROY
S/O SHIVA ROY
R/O UDAY NAGAR
WARD NO. 9
P.S.- BONGAIGAON
DIST.- BONGAIGAON
PIN- 783380

Advocate for the Petitioner : MR. N SARKAR, MS A HUSSAIN,MR M RAHMAN,MR P K BASU,MR A BANERJEE

Advocate for the Respondent : PP, ASSAM, MR D K BHATTACHARYYA, AMICUS CURIAE FOR R-2

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

Date : 10.09.2024

1. Heard Mr. N. N. Choudhury, learned counsel for the applicant. Also heard Mr. P. Borthakur, learned Additional Public Prosecutor for the State as well

as Mr. D. K. Bhattacharyya, learned Amicus Curiae for the respondent No. 2.

2. This interlocutory application has been filed by the applicant under Section 389 of the Code of Criminal Procedure, 1973 praying for suspension of the sentenced imposed on the applicant by the Judgment dated 13.07.2023 passed by the learned Special Judge, Bongaigaon, in Special (POCSO) Case No. 7(BGN)/2020 whereby the applicant was convicted under Section 4 of the POCSO Act, 2012 and was sentenced to undergo imprisonment for ten years and in default of payment of fine to undergo simple imprisonment for three months.

3. The applicant has impugned the aforesaid judgment by filing the connected criminal appeal, which has been registered as Criminal Appeal No. 322/2023. The learned counsel for the applicant has submitted that in the connected appeal filed by the applicant, there is strong probability of getting a favourable order by the applicant, as there are some errors, which are apparent on perusal of the judgment, which have been committed by the learned Special Judge, Bongaigaon while passing the impugned judgment.

4. The learned counsel for the applicant has submitted that the victim girl was examined as PW-3, by the prosecution side, in the Special (POCSO) Case No. 7(BGN)/2020. The learned counsel for the applicant has submitted that on perusal of the testimony of PW-3 i.e., the victim girl it would be apparent that the relationship between the victim girl and the applicant was consensual in nature. It is also submitted by the learned counsel for the applicant that the only reason for conviction of the applicant was that the victim girl was held to be a minor and, therefore, her consent was not taken into consideration.

5. However, the learned counsel for the applicant submits that the learned Special Judge, Bongaigaon erred in ignoring the evidence which was available on record which suggested that the victim was major on the date of the alleged offence. He submits that after the alleged incident, the medical examination of the victim girl was conducted on 26.08.2024 and as per the ossification test conducted on that day, the age of the victim girl was more than 21 years on the date of the alleged incident, therefore, he submits that the victim was major on the date of the alleged incident.

6. The learned counsel for the petitioner has also submitted that the Special Judge also erred in taking into consideration the material Exhibit-1 exhibited by PW-7 which is transfer certificate issued in favour of the victim girl wherein her date of birth was mentioned as 06.06.2002. The learned counsel for the petitioner submits that the "transfer certificate" is not a document which is included in the category of documents which can be relied upon for ascertaining the age under Section 94(2)(iii) of the Juvenile of Justice (Care and Protection of Children) Act, 2015. He also submits that the Trial Court was wrong in relying on the said documents in ascertaining the age of the victim and treating her to be minor. In support of his submission, he has cited the rulings of the Apex Court in the Case of "***P. Yuvaprakash Vs. State Rep. by Inspector of Police***" reported in "***2023 SCC OnLine 846***".

7. The learned counsel for the petitioner has submitted that there are other contradictory evidence adduced by PW-4 and PW-5 which were not considered by the Trial Court while arriving at the conclusion of guilt of the present applicant.

8. The learned counsel for the applicant, therefore, submits that there is

every possibility of the appellant getting a favourable order in the connected criminal appeal filed by him impugning the judgment by which he was convicted and sentenced and, therefore, he has prayed for staying the operation of the sentence imposed on him by the impugned judgment.

9. On the other hand, Mr. D. K. Bhattacharyya, learned Amicus Curiae as well as Mr. P. Borthakur, learned Additional Public Prosecutor made similar submissions to that effect that the Trial Court has not only considered the Material Exhibit-1 i.e., Transfer Certificate for arriving at the age of the victim girl but also considered the "school register" which was exhibited as Ext.-7 by PW-7.

10. The learned Amicus Curiae as well as the learned Additional Public Prosecutor has submitted that if the victim is treated to be a minor, the applicant does not have a case under Section 389 of the Code of Criminal Procedure for suspension of sentence.

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

12. On perusal of the impugned judgment, it appears that the Trial Court has not considered the fact that the victim was a consenting party in the alleged incident only because of the fact of her minority on the date of alleged incident. The Trial Court considered the victim to be minor on the basis of Material Exhibit- 1 which is the "transfer certificate" in which her date of birth was mentioned as 06.06.2002.

13. However, it appears that the Section 94(2) of the Juvenile of Justice (Care and Protection of Children) Act, 2015 that neither the transfer certificate

nor the school register has been included in the category of documents which can be used for ascertaining the age of a juvenile. The three conditions stipulated under Section 94(2) of the Juvenile of Justice (Care and Protection of Children) Act, 2015 are that the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board may be considered firstly for ascertaining the age; in the absence of same, the birth certificate given by a corporation or a municipal authority or a Panchayat may be used, and in the absence of both the above mentioned documents, age shall be determined by an ossification test.

14. In the instant case, neither the birth certificate has been mentioned in Section 94(2)(i) nor the birth certificate mentioned in Section 94(2)(ii) has been produced in this case. The only method which remains as per Section 94(2) of the Juvenile of Justice (Care and Protection of Children) Act, 2015 was to rely on the ossification test. From the report of the ossification available on record, it appears that the age of the victim appears to be more than 21 years on the date of alleged incident.

15. Hence, considering the above facts, this Court is of considered opinion that the applicant has arguable case where the probability of getting a favourable order in the connected appeal and, therefore, this is a fit case where the operation of the sentenced imposed by the impugned judgment may be suspended during the pendency of the connected criminal Appeal No. 322/2023.

16. This interlocutory application is allowed.

17. The sentenced imposed on the applicant by the impugned judgment dated 13.07.2023 passed in Special (POCSO) Case No. 7(BGN)/2020 by the

learned Special Judge, Bongaigaon is hereby stayed.

18. The applicant is allowed to go on bail during the pendency of the connected Criminal Appeal No. 322/2023 on furnishing a bail bond of Rs.30,000/- (Rupees Thirty Thousand) subject to satisfaction of learned Special Judge, Bongaigaon with a condition that in the event of his appeal fails, he shall surrender before the learned Special Judge, Bongaigaon.

JUDGE

Comparing Assistant