

GAHC010204162022



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

Case No. : I.A.(Crl.)/611/2022

SHAJIT AHMED @ SAJIT AHMED .
S/O RAFIKUL ISLAM
RESIDENT OF VILLAGE KAJIAMATI
PO AND PS GOBARDHANA
DIST BAKSA
ASSAM

VERSUS

THE STATE OF ASSAM AND ANR.
REPRESENTED BY PP ASSAM

2:BILLAL HUSSAIN
S/O LATE ABDUL GANI
RESIDENT OF VILLAGE SATIPUR
PS DHALIGAON
DIST CHIRANG
ASSAM

Advocate for : MR A W AMAN
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM AND ANR.

BEFORE
HONOURABLE MR. JUSTICE SUMAN SHYAM
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

16.12.2024**(Suman Shyam, J)**

Heard Mr. S. Nawaz, learned counsel appearing for the applicant. We have also heard Ms. B. Bhuyan, learned Addl. P.P., Assam appearing on behalf of the State. Ms. L. Devi, learned Legal Aid Counsel is present on behalf of the informant/respondent No.2.

By the judgment and order dated 24.08.2022 passed by the learned Special Judge (POCSO), Chirang in Special POCSO Case No.05 of 2020 the applicant herein was convicted under Section 6 of the POCSO Act, 2012 read with Section 376(3) of the Indian Penal Code and sentenced to undergo rigorous imprisonment for a period of 20 years and also to pay fine of Rs.500/- , in default, to undergo imprisonment for three days. Since then, the applicant is in Jail.

By filing Criminal Appeal No.252/2022, the applicant has assailed the judgment and order dated 24.08.2022 passed by the learned trial Court. The present I.A. has been filed by the applicant/appellant by invoking the jurisdiction of this Court under Section 389 of the Cr.P.C. with a prayer to suspend his Jail sentence and to release him on bail.

By referring to the materials available on record, Mr. Nawaz, learned counsel for the applicant submits that although the conviction of the applicant is under Section 736(3) IPC read with Section 6 of the POCSO Act, yet, the prosecution has failed to establish the age of the victim and thus, the question of minority of the victim was never proved during trial. Under the circumstances, the conviction of the applicant is not sustainable in the eyes of law. Contending that it is a case of consensual sexual relationship between the victim and the applicant, Mr. Nawaz submits that the version of the victim/prosecutrix is full of

contradictions inasmuch as she has never stated before the I.O. as regards sexual intercourse taking place between herself and the applicant. He submits that the testimony of the victim is full of contradictions. Thirdly, submits Mr. Nawaz, the trial itself stood vitiated since there was no Public Prosecutor in this case and the trial was conducted by the learned Special Judge in the absence of a Public Prosecutor.

By referring to the decision of the Privy Council rendered in the case of **Adan Haji Jama and others Vs. The King** reported in **1948 0 AIR(PC) 63** as well as the subsequent decision of the High Court of Judicature at Karnataka in the case of **State of Karnataka Vs. Ramachandra Bhimrao Bhamane** reported in **2003 0 AIR (Kar) (HCR) 2973** Mr. Nawaz has argued that any trial conducted by the Judge himself, in the absence of any Public Prosecutor, would stand vitiated in the eyes of law and therefore, the order of conviction shall be liable to be set aside on such count alone. Under the circumstances, Mr. Nawaz submits that this is a fit case where the applicant, who was aged about 19 years at the time of the occurrence, deserves to be released on bail.

Opposing the said submission, Ms. B. Bhuyan, learned Addl. Public Prosecutor, Assam has argued that the father of the victim viz., PW-6 has exhibited the birth certificate as Material Ext-1 to show that the victim was a minor girl at the time of the incident. In so far as the version of the prosecutrix is concerned, according to Ms. Bhuyan, she has revealed a consistent story indicating the sexual relationship between the applicant and the victim. Contending that since the victim was a minor, consent in this case would be of no significance. On the third plea regarding absence of a Public Prosecutor in conducting the trial, Ms. Bhuyan submits that the said issue is subjudice before this Court in

another proceeding which was fixed on 22.01.2025 and therefore, this appeal be heard together with Criminal Appeal No.174/2023.

We have considered the arguments made at the Bar and have also gone through the materials available on record. It is no doubt correct that the PW-6 i.e. the father of the victim had exhibited the birth certificate of the victim issued by the Department of Health Services as Material Ext-1 wherein, the date of birth of the victim has been reflected as 07.03.2004. Going by that date, the victim was around 15 years old on the date of the incident i.e. 02.09.2019. However, what would be significant to note herein that the PW-6 himself had stated in his cross-examination that the date of birth of the victim reflected in the birth certificate is not correct. According to PW-6, the actual date of birth of the victim was more than what was reflected in Material Ext-1, which document was obtained purely for the purpose of getting admission in the schools in the State of Kerala, keeping in mind, the minimum age requirement for admission in such schools. If that be so, the age of the victim reflected in Material Ext-1 does not appear to be the correct age. On the contrary, it *prima-facie* appears that the victim was aged about 18 years at the time of the occurrence. As per the medical evidence and doctor's opinion brought on record by the prosecution, the age of the victim was found to be above 18 years on 09.11.2011 which was barely two months after the alleged occurrence. If that be so, it *prima-facie* appears that the victim was not a minor at the relevant point of time. Moreover, from the materials available record, it also appears to us that the victim was in a love relationship with the applicant and had also eloped with him and thereafter, spent days together. Therefore, the possibility of a consensual sex between the applicant and the victim cannot be ruled out in this case.

We also find substance in the argument advanced by Mr. Nawaz that in the absence of a Public Prosecutor, the learned trial court could not have conducted the trial. On such count the trial itself may stand vitiated. However, since the said question is subjudice before this Court in another appeal as noted above, we refrain from making any further comment in this regard.

Having regard to the facts and circumstances of the case as well as the materials placed before us, we are of the view that the applicant has made out a strong *prima-facie* case for his release on bail.

We, accordingly, direct that the applicant Shajit Ahmed @ Sajit Ahmed be forthwith released on bail on furnishing a bond of Rs.50,000/- (Rupees Fifty Thousand) with one surety of like amount to the satisfaction of the learned Special Judge (POCSO), Chirang. It will be open for the learned Special Judge (POCSO), Chirang to impose any other additional condition for the release of the applicant on bail, if deemed necessary.

Before parting with the record, we make it clear that the observations made herein above are purely for the purpose of this I.A. and the same shall not have any bearing at the time final hearing of the appeal.

With the above observation, the I.A. stands disposed of.

JUDGE

JUDGE

Comparing Assistant