

GAHC010220292023



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

Case No. : I.A.(CrI.)/939/2023

AHED ALI
S/O LT. GAFUR ALI, R/O VILL. BALAJAN, P.S. BAGHBAR, DIST. BARPETA,
ASSAM-781308

VERSUS

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

2:AJUFA KHATUN
W/O ALLAUDDIN
R/O VILL. BALAJAN
P.S. BAGHBAR
DIST. BARPETA
ASSAM-78130

Advocate for the Petitioner : MR. JYOTIRMOY ROY

Advocate for the Respondent : PP, ASSAM

Linked Case : CrI.A./404/2019

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Advocate for : MR. JYOTIRMOY ROY
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM AND ANR

BEFORE
THE HON'BLE MR JUSTICE ARUN DEV CHOUDHURY
ORDER

25.04.2024

1. Heard Mr. NJ Dutta, learned counsel for the petitioner. Also heard Mr. M Goswami, learned Additional Public Prosecutor, Assam.
2. The present application is filed under Section 389 of the Criminal Procedure Code, 1973 praying for suspension of the sentence dated 17.08.2019 passed by the learned Special Judge (POCSO), Barpeta in Special POCSO case No. 15/2018 whereby the applicant was sentenced to undergo rigorous imprisonment for 10 years and also to pay a fine of Rs. 2,000/-, in default thereof to undergo simple imprisonment of 1 year for commission of offence under Section 4 of the POCSO Act, 2012.

3. The connected appeal has been already been admitted and the LCR has also been received.
4. Mr. Dutta, learned counsel for the petitioner argues that the foundational fact of age has not been laid by the prosecution. Neither any document for the purpose of ascertaining that the victim was minor was laid nor any other materials were produced even to lay the foundation that the victim was a minor inasmuch as the PW1, the Doctor has categorically deposed during his cross-examination that actual age was not determined.
5. Per contra, Mr. Goswami, learned Additional Public Prosecutor submits that the material available on record including the deposition of the investigating officer clearly shows that the birth certificate of the victim was seized and exhibited as Ext. 5. Therefore, the learned court below has rightly held the victim to be a minor.
6. Considered the arguments advanced by the learned counsel for the parties. Also perused the materials available on record including the deposition of the prosecution witnesses.
7. The Hon'ble Apex Court in the case of Jarnail Singh Vs State of Haryana reported in (2013) 7 SCC 263 held that the age of alleged minor victim of rape should be determined in the manner provided under Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 for the reason that there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law and a child who is victim of crime.
8. Subsequently, an identical provision to that of Rule, 12 in the shape of Section 94 was incorporated in the Juvenile Justice (Care and Protection of Children) Act, 2015.

Section 94 of the JJ Act, 1015 provides the followings:

“ 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.”

9. Thus it is prima-facie view of this court that the foundational fact regarding age of the victim/ minority of the victim was not laid by the prosecution to take presumption under Section 94 (3) of the JJ Act, 2015 and also to convict the accused under the said POCSO Act.
10. There is no doubt that victim has deposed in her 164 statement as well as

during her testimony before the learned trial court to be minor. However, in terms of the mandate of the POCSO Act, the age is to be determined in the same manner as that prescribed under Juvenile Justice (Care and Protection of Children) Act, 2015. Further, in a case involving under the POCSO Act the foundational fact that victim is a minor is to be laid by the prosecution.

11. In the case in hand, though the PW8 exhibited the seizure list as Ext. 5, by which the birth certificate of the victim has allegedly been seized, however, such birth certificate, prima-facie, was not exhibited and not available on record. No other documents like school leaving certificate etc. has also not been exhibited. The record also shows there was no specific determination of age by Medical Board or by any competent authority as prescribed under the aforesaid rules of the JJ Act. PW1, the Doctor, who examined the victim has also deposed that the actual age of the victim was not ascertained.
12. In view of the aforesaid, this court, subject to final determination that can be made in the appeal, is of the prima-facie view that the foundation of a POCSO case i.e. the age of the victim has not been laid by the prosecution in the case and therefore there is a reasonable probability of acquittal of the petitioner for offences committed under POCSO Act.
13. In view of the aforesaid, this court is of the further view that the petitioner is entitled for the relief as prayed for. Accordingly, it is directed that the petitioner be released on bail on his furnishing a personal bond in the sum of Rs.25,000/- (Rupees Twenty Five Thousand Only) with one solvent surety in the like amount to the satisfaction of the learned Special Judge (POCSO), Barpeta.
14. While parting with this record it is made clear that the observations made in the order are for the purpose of determination of this Interlocutory Application and the same shall not be treated as any determination of the final merit of the case.

15. IA stands disposed of.

JUDGE

Comparing Assistant