

Form J(2)

**IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
Appellate Side**

**Present :
The Hon'ble Justice Bibek Chaudhuri**

**CRA (SB) 19 of 2022
With
CRAN 1 of 2022**

**Md. Karibilla Mondal @ Kari Billa @ Kori
Vs.
The State of West Bengal**

**For the Appellant : Mr. Kushal Kumar Mukherjee
Mr. Surajit Basu
Ms. Ranu Mondal**

For the State : Mr. Ranabir Roy Chowdhury

Item No.06

Heard on : 23.03.2022

Judgment on : 23.03.2022

Bibek Chaudhuri, J.

This is an application for bail in connection with appeal. At the time of hearing of the application, this Court is of the view that the instant appeal can be disposed of on perusal of the impugned judgment, appealed against.

Mr. Mukherjee, learned advocate for the appellant has led me to certain observations made in the judgment by the learned Judge Special Court, POCSO Act, Bashirhat, North 24 Parganas. No such document was exhibited on behalf of the prosecution.

Learned trial Judge proceeded with the statement of the victim girl to ascertain her age. In her statement recorded under Section 164 of the Code of Criminal Procedure the victim girl stated her age to be 16 years. During medicological examination the victim girl stated that she was 16 years of age. In order to ascertain the age of the victim the learned trial Judge placed reliance on the judgment of the Hon'ble Supreme Court in **Ram Murti versus State of Hariyana** reported in **AIR 1970 SC 1029**. The learned trial Judge failed to consider that in the said report the ossification test of the victim girl was done. The school certificate was produced and exhibited. Her birth entry P.L. was obtained showing that a daughter was born to Hansraj on 25th September, 1949. Considering all such documents the Hon'ble Supreme Court came to a decision that the victim girl was definitely below 18 years of age. In the instant case, the learned trial Judge

held the victim girl below 18 years of age on the basis of her statement made in course of her evidence and at the time of medicological examination.

Mr. Ranabir Roy Chowdhury, learned advocate for the State submits that this is a fit case where the case should be remanded back to the trial Court for ascertaining the age of the victim girl.

It is needless to say that when there is a doubt in the mind of the Court as to the age of the victim, it was the duty of the prosecution to take recourse of Rule 12(3) of the Juvenile Justice (Care and Protection Rules), 2013 in order to ascertain the age of the victim girl. The decision of the Hon'ble Supreme Court in the case of **State of Madhya Pradesh versus Anoop Singh** reported in **2015 AIR SCW 3985**.

Learned trial Judge did not take any such step.

The victim in her evidence stated that her marriage was held with the accused and they cohabited voluntarily. In the impugned judgment also the learned trial Judge observed that the victim girl admitted the factum of marriage with the appellant/petitioner. The learned trial Judge also held that "pre-marriage cohabitation with a minor cannot be said to have occurred by the consent of the V.G. especially when the V.G. herself alleged in cross-examination that the

first rape was committed forcibly.” The appellant was convicted in penetrative sexual assault under Section 4 of the POCSO Act.

Learned trial Judge failed to come to a specific conclusion on the basis of the material documents produced during trial regarding the age of the victim girl. Therefore, the ultimate decision of the learned trial judge cannot stand and he erred in arriving at such conclusion that the accused committed penetrative sexual assault upon the victim.

For the reasons stated above this Court is of the view that this is a fit case where the case should be remanded back to the trial Court with a direction to the learned trial Judge to take step for ascertainment of the age of the victim girl in accordance with the provisions of Rule 12(3) of Juvenile Justice (Care and Protection), Rules, 2013.

The learned trial Judge is directed to dispose of the case within three months from the date of receipt of the copy of the order. The learned advocate for the appellant is at liberty to act upon the server copy of the order and communicate the same to the learned Court below.

During trial of the case the appellant /petitioner is enlarged on bail of Rs.10,000/- with one surety of like amount to the satisfaction of the learned Special Judge, POCSO Court, Bashirhat, North 24

Parganas with further condition that he shall attend the learned Court below on all dates of trial.

The instant appeal and the application are, thus, disposed of.

(Bibek Chaudhuri, J.)