

IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI

Criminal Appellate Jurisdiction
Appellate Side

CRA (DB) 16 of 2025
IA No. CRAN 2 of 2025

Zomangaih @ Zohmangaiha
-Vs.-
State of West Bengal

Before: The Hon'ble Justice Arijit Banerjee
&
The Hon'ble Justice Biswaroop Chowdhury

For the appellant : Ms. Ashima Mandia, Adv.
Ms. Mandakini Singh, Adv.
Mr. Debarshi Dhar, Adv.
Ms. Taniya Bhowmik, Adv.

For the State : Mr. Aditi Shankar Chakraborty, LD. APP,
Mr. Sourav Gangully, Adv.

CAV on : 11.04.2025

Judgment On : 25.04.2025

Arijit Banerjee, J.:-

1. This is an application for suspension of sentence in an appeal filed by the petitioner against the judgment and order dated November 29/30, 2024, passed by the Additional District and Sessions Judge, Kurseong in Special Case No. 01 of 2023, whereby the petitioner was convicted of offence

punishable under Section 10 of the POCSO Act 2012 and under Sections 448/376(2)(c)/511 of IPC and was sentenced to undergo rigorous imprisonment for 12 years and to pay fine of Rs. 50,000/-.

2. The petitioner says that he has been falsely implicated. The evidence on record does not support the charge of attempted rape. Even if the evidence of the victim girl, the *de-facto* complainant, the examining Doctor and other witnesses are taken at face value, the conviction cannot be sustained. He is in custody for about 2 years 4 months. There is no possibility of an early hearing of the appeal.

3. Learned Advocate for the petitioner further submitted that at the highest, without penetration, offence under Section 376 IPC cannot be made out. In this connection, learned Advocate relied on decisions of the Hon'ble Supreme Court in the cases of ***Tarkeshwar Sahu v. State of Bihar (North Jharkhand)*, reported at (2006) 8 SCC 560**, ***Aman Kumar v. State of Haryana*, reported at (2004) 4 SCC 379** and ***Bibhishan v. State of Maharashtra*, reported at (2007) 12 SCC 390**. Learned Advocate further referred to the decision in the case of ***State of M.P. v. Mahendra @ Golu* reported at (2022) 12 SCC 442** to argue that there is a difference between the stages of preparation and attempt in a rape case. The stage of preparation consists of deliberation, devising or arranging the means or measures which would be necessary for commission of an offence. Attempt starts from the next stage. In the present case, the evidence on record does not even support a charge of attempt to commit rape. At the highest, the prosecution may be able to make out a case of aggravated sexual assault under Section 10 of the POSCO Act for which the punishment prescribed is

imprisonment between 5 and 7 years. The petitioner has served out a substantial part of the prescribed period and should be enlarged on bail.

4. Arguments and counter arguments had been advanced by learned Counsel for the petitioner and the State on the point as to whether or not the learned Trial Judge could impose a sentence of 12 years imprisonment on the petitioner for commission of offence under Sections 376/511 IPC. According to learned Counsel for the petitioner, Sections 376 (rape) and 511 (attempt to commit an offence) read with Section 57 of the IPC would indubitably indicate that the maximum term imprisonment that could be imposed is 10 years. This is because Section 57 IPC provides that in calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for 20 years. Section 511 IPC provides that whoever attempts to commit an offence punishable with imprisonment for life or imprisonment and in such attempt does any act towards the commission of the offence, he shall, where no express provision is made by the Code for punishment of such attempt, be punished with imprisonment for a term which may extend to one-half of the imprisonment for life or as the case may be, one-half of the longest term of imprisonment provided for that offence. One-half of imprisonment for life would necessarily mean one-half of 20 years as otherwise no specific term can be computed since no one can predicate how long a convict is going to live.

5. Learned State Counsel, relying on the decision of the Hon'ble Supreme Court in ***Gopal Vinayak Godse v. State of Maharashtra, reported at AIR 1961 SC 600*** argued that life imprisonment means imprisonment for the convicts' entire natural life, unless commuted or remitted by the appropriate

authority. Section 57 IPC does not limit life imprisonment to 20 years. What is used solely for computing fractions of terms of punishment.

We need not dilate on this issue immediately which may assume greater relevance at the time of hearing of the appeal. Therefore, we do not express any opinion on this point.

6. Learned State Counsel also argued that there is a difference between grant of bail under Section 439 Cr.P.C. in case of pre-trial arrest and suspension of sentence under Section 389 Cr.P.C. and grant of bail, post-conviction. In the earlier case, there may be presumption of innocence, which is a fundamental postulate of criminal jurisprudence, and the Courts may be liberal, depending on facts and circumstances of the case, on the principle that bail is the rule and jail is an exception. However, in case of post-conviction bail by suspension of operation of the sentence, there is a finding of guilt and the question of presumption of innocence does not arise. Nor is the principle of bail being the rule and jail an exception attracted, once there is conviction upon trial. Rather, the Court considering an application for suspension of sentence and grant of bail, is to consider the prima facie merits of the appeal, coupled with other factors. There should be strong compelling reasons for grant of bail, notwithstanding an order of conviction, by suspension of sentence, and such strong and compelling reasons must be recorded in the order granting bail. In this connection learned Counsel referred to the decision in the case of ***Preet Pal Singh v. State of Uttar Pradesh & Anr., reported at (2020) 8 SCC 645.***

7. We have considered the rival contentions of the parties. We have carefully gone through the evidence recorded by the learned Trial Court. The

evidence of the victim girl and the medical examination report *prima facie* do not indicate that there was any penetration or rape committed by the petitioner on the victim girl nor that he attempted to penetrate. The victim girl has deposed that the petitioner was under the influence of alcohol and tried to grope her breasts. Such evidence may support a charge of aggravated sexual assault under Section 10 of the POCSO Act, 2012, but *prima facie* does not indicate commission of the offence of attempted rape,

8. This appeal is of the year 2024. Huge number of much older criminal appeals are pending. It is highly unlikely that the present appeal will be heard on the early date.

9. If at the final hearing of the appeal, the charge is scaled down to one under Section 10 of the POCSO Act and the conviction is sustained on that count only, the maximum period of imprisonment that the petitioner can be subjected to is 7 years and a minimum of 5 years. The petitioner has already been in incarceration for about 2 years 4 months.

10. On an overall assessment of the quality of the evidence on record and on an assimilation of the facts of the case, we are of the view that it cannot be said that the appeal is completely devoid of merits. Considering the period of incarceration of the petitioner and that there is very little possibility of an early hearing and disposal of the appeal we are inclined to suspend the sentence of the petitioner and grant him bail.

11. Accordingly, it is ORDERED that the applicant/appellant, namely, **Zomangaih @ Zohmangaiha**, shall be released on bail upon furnishing a bond of Rs. 10,000/- (Rupees Ten Thousand) with two sureties of like amount each, one of whom must be local, subject to the satisfaction of the

Learned Additional District & Sessions Judge, Kurseong and on further condition that the applicant/appellant shall be personally present or be represented before this Court when the appeal is taken up for hearing.

12. The operation of the order of conviction and sentence shall remain suspended till disposal of the appeal or until further orders, whichever is earlier. We also stay the operation of payment of fine till disposal of the appeal.

13. We make it clear that all observations made in this order are only for the purpose of disposing of the present application and shall have absolutely no bearing on the hearing of the appeal.

14. The application being IA No: CRAN/2/2025 is accordingly disposed of.

15. Urgent certified photocopy of this judgment and order, if applied for, be given to the parties upon compliance of necessary formalities.

I agree.

(Biswaroop Chowdhury, J.)

(Arijit Banerjee, J.)