

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

Reserved on 16.04.2025
Pronounced on 24.04.2025

Bail App No. 15/2025
c/w
CRM(M) No. 39/2025

Tsewang ThinlesAppellant(s)/Petitioner(s)

Through: Mr. Rohit Kohli, Adv.

vs

U. T. of Ladakh and another Respondent(s)

Through: Mr. Vishal Sharma, DSGI for No. 1
Mr. Nisar H. Ladakhi, Adv for No. 2
(th. virtual mode)

Coram: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1. By this common judgment, two petitions, one seeking quashment of order dated 12.12.2024 passed by the learned Principal Session Judge, Leh(hereinafter to be referred as the trial Court) and another for grant of bail to the petitioner are proposed to be disposed of.
2. It appears that on 01.07.2019, the prosecutrix lodged a written report with Women Police Station, Leh alleging therein that the petitioner has committed a sexual assault upon her. It was alleged that the mother of the prosecutrix, who is a divorcee, is suffering from an ailment and that she belongs to a poor family, as such, she is unable to take her mother outside Ladakh for her treatment. She further alleged that she approached the petitioner, who happens to be the President of Ladakh Buddhists Association(LBA) and narrated to him all her miseries. The petitioner is

stated to have promised her with all help, but at the same time, he started to take undue advantage of the miseries of the prosecutrix and launched sexual assaults upon her at different places. It was further alleged that in the first instance, the petitioner touched her in an inappropriate manner, in his office and the same was to her discomfort. Thereafter, he came to her house and in the absence of her mother, he touched her private body parts. Thereafter, in his office, the petitioner laid her down on a sofa and jumped upon her, whereafter, he sexually assaulted her. These incidents are stated to have taken place in the month of March, 2019. The prosecutrix went on to allege that because the petitioner is holding a high position, as such she felt scared to make any complaint against him and she could not muster courage to narrate these incidents to anyone.

3. On the basis of the aforesaid report, FIR No. 05/2019 for offences under sections 354, 354-A RPC and 9(1)/10 Protection of Children from Sexual Offences Act (for short the POCSO Act) came to be registered with Women Police Station, Leh and investigation of the case was started. During the investigation of the case, the statement of the prosecutrix under section 164-A Cr.P.C. was recorded by the learned Magistrate. In the said statement also, the prosecutrix gave vivid details about the incidents of sexual assault alleged to have been committed by the petitioner upon her. She stated that when she approached the petitioner, who happens to be the President of LBA, he become emotional, when she started crying, whereafter he hugged her and started playing with her hair. She further narrated that the petitioner pressed her hand, which was

resisted by her. She further went on to state that the petitioner came to her house where he touched her back, pressed her bosoms and asked her as to why she was not wearing a bra. She further stated that the petitioner touched her vaginal part and asked her to have sexual intercourse with him. On the next day, when she had gone to his office, he laid her down on a sofa and committed illegal act with against her will. She could not resist it because she was helpless and the petitioner took undue advantage of her helplessness.

4. The Police after investigating the case found that the offences under Sections 354, 354-A RPC and 9(1)/10 POCSO Act are proved against the petitioner. It seems that the petitioner absconded during investigation of the case, as such, the Investigating Agency presented the challan before the trial court in the absence of the petitioner/accused. It also appears that the petitioner approached this Court for grant of bail in anticipation of his arrest on 27.03.2024. This Court provided interim protection to the petitioner and directed him to approach the trial court for seeking recall of general warrants of arrest issued by the trial court against him. Accordingly, the petitioner moved an application before the trial court for recalling of general warrants of arrest issued by the said court against him and vide order dated 26.04.2022 passed by the learned trial court, the general warrants of arrest issued against the petitioner were recalled. The petitioner also moved an application for grant of bail before the learned trial court and he was admitted to interim bail by the said court which came to be extended till 12.12.2024.

5. It seems that while the petitioner was on interim bail, he moved an application before the learned trial court claiming that the victim was more than 18 years of age at the time of the alleged incident, as such, offences under the POCSO Act are not made out against the petitioner. The learned trial court after holding enquiry with regard to age of the victim passed impugned order dated 12.12.2024, whereby the application of the petitioner was disposed of by holding that that the victim, at the relevant time, was less than 18 years of age. While passing the said order, the learned trial court passed another order on the same date, whereby the interim bail granted to the petitioner was cancelled and he was sent to custody. This was done by the trial court by observing that because the interim bail granted to the petitioner was subject to the outcome of the inquiry under section 94 of the Juvenile Justice Care and Protection Act, 2015(for short the JJ Act) and once the age of the victim was found to be less than 18 years, as such, the interim bail granted to him is required to be withdrawn.
6. The petitioner has challenged impugned order dated 12.12.2024, whereby the victim has been declared to be aged less than 18 years on the ground that the learned trial court has failed to follow the mandate of law governing the holding of inquiry as contemplated under the JJ Act. It has been further contended that the learned trial court has ignored the age of the victim as has been reflected in her Vaccination Card which was produced in the earlier charge sheet, filed against another accused at the behest of the same victim. It has been contended that the learned trial

court has been swayed by the certificate issued by the School Authorities depicting the date of birth of the victim as 05.02.2002. It has been claimed that proper inquiry was not conducted by the learned trial court for ascertaining the veracity of the school certificate, which has been relied upon by it.

7. On the question of grant of bail, it has been contended that the petitioner had remained on bail for almost eight months and he had never violated any condition of bail imposed on him by the court, as such, it was not open to the learned trial court to withdraw the concession of bail granted in his favour. It has also been contended by the petitioner that the petitioner belongs to a respectable family with political background and has deep roots in the society, therefore, there is no chance of his jumping over the bail and disobeying the orders of the court. It has been further contended that the interim bail that was granted in favour of the petitioner was not subject to outcome of the application seeking inquiry into the date of birth of the victim.
8. I have heard learned counsel for the parties and perused the record of the case.
9. The issue that needs to be determined is as to whether provisions of the POCSO Act provide for age determination of a victim and if that is so at what stage of the proceedings such as exercise has to be undertaken by the Special Court. In this regard provisions of Section 34 of the POCSO Act are required to be noticed. The same reads as under:

“34. Procedure in case of commission of offence by child and determination of age by Special Court.—

(1) Where any offence under this Act is committed by a child, such child shall be dealt with under the provisions of 1[the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016)].

(2) If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination.

(3) No order made by the Special Court shall be deemed to be invalid merely by any subsequent proof that the age of a person as determined by it under sub-section (2) was not the correct age of that person.”

10. From a perusal of sub section (1) quoted above, it appears that the question of determination of the age under the POCSO Act is restricted to a child in conflict with law and it does not mention anything about the victim. However in sub section (2), no such restriction is laid down and it make mention about determination of the age of a child without specifying whether such child is a victim or the offender, meaning thereby that section 34 of the POCSO Act vests jurisdiction with the Special Court to determine the question with regard to the age of a child whether such child is an offender or a victim, whenever such question arises in a proceeding before the Special Court. It is also clear from sub section (2) that the procedure for determining the age of a child whether victim or the offender is to be governed by the Juvenile Justice (Care and Protection of Children) Act, 2015 and it further appears that such question can be determined by the Special Court whenever it arises in any proceeding before the said Court. The provision does not put any restriction on the Special Court about the stage at which such an inquiry has to be undertaken by the said Court. Sub section (2) makes it clear that the

question relating to any person to ascertain whether such person is child or not has to be determined by the Special Court whenever such question arises in any proceeding. The proceeding may be a bail application or it may be at the time of holding inquiry or at the time of holding the trial. So the Special Court has to determine whether a person is child or not as and when such question arises in any proceeding at any stage before the said court.

11. The question whether Section 34 of the POCSO Act vests jurisdiction with the Special Court to determine the age of not only the person, who is the offender, but also of the person, who is the victim, came up for consideration before the Supreme Court in the case of. **P. Yuvaprakash v State rep. by Inspector of Police, AIR 2023 SC 3525**. The Supreme Court after noticing the provisions contained in Section 34 of the POCSO Act and Section 94 of the JJ Act, observed that whenever the dispute with respect to the age of a person arises in the context of her or him being a victim under the POCSO Act, the courts have to take recourse to the steps indicated in Section 94 of the JJ Act.
12. A Single Bench of the Manipur High Court in the case of **Shri Longjam Pinky Singh vs State of Manipur, 2018 CriLJ 1673** has, while specifically considering the aforesaid issue observed as under:

“14. As already mentioned above, section 34(1) of the Protection of Children from Sexual Offences (POCSO) Act, 2012 provides for determination of the age of the child when he commits any offence under the Act. However, reading of section 34(2) would indicate that the scope of examination of the child is not restricted to only the child in conflict with law. Section 34(2) speaks in general term that if any question arises in any proceeding before the Special Court whether a

person is a child or not, such question shall be determined by the Special Court. This Court is of the view that it may not be appropriate to restrict the scope of section 34(2) only for determining the age of child who is in conflict with law but can be extended to even a child who is a victim of the crime. It may be noted that a statute, particularly a statute which fastens criminal liability may be interpreted in such a manner that when two interpretations are possible, such interpretation which supports the right of the accused may be preferred unless the context otherwise requires.

15. Thus, though the provision of section 34 appears to be applicable for the purpose of determining age of the child who is in conflict with law, when sub-section (2) is referred to, it is not specifically confined to determining the age of the accused only. As already mentioned above, the Protection of Children from Sexual Offences (POCSO) Act, 2012 will be attracted only when the victim of the crime is a minor. Since there is no other specific provision under the Cr. P.C. nor the POCSO Act to deal with the issue raised by the petitioner and since this issue has to be decided before proceeding with the trial by invoking the Protection of Children from Sexual Offences (POCSO) Act, 2012, this Court has no any hesitation to hold that the Court can invoke the provision under section 34(2) of the Act to determine the age of the victim child also.

16. This Court agrees with the submission of Mr. Kh. Samarjit, learned Counsel for the petitioner that even though section 34 of the Act does not specifically mention for determination of age of the victim, it can be made applicable for determining the age of the victim also, by following the similar reasoning adopted by the Hon'ble Supreme Court in the aforesaid case of Jamail Singh (supra) where Hon'ble Supreme Court while dealing with Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 which provides the procedure to be followed for determining the age of a child or juvenile in conflict law held that, has been held applicable for determining the age of the child who is the victim.

13. In the same judgment, the learned Single Judge of the Manipur High Court had also an occasion to answer the question as to at what stage, the question regarding the age determination of the victim can be considered by the Special Court. While answering the said question, the High Court of Manipur after noticing the ratio laid down by the Supreme Court in **Abuzar Hussain v. State of West Bengal, (2012) 10 SCC 489** observed as under:

19. Thus, the Hon'ble Supreme Court in *Abuzar Hossain v. State of West Bengal* (supra) has held that the issue relating to the juvenility can be raised at any stage before any Court. From the above, one may adduce that the stage at which the claim of juvenility can be raised, cannot be confined only when the trial is going on or concluded, can be raised even before the trial starts. Thus, it may be stated that the claim of juvenility may be raised even before framing of charge also in the same way it can be raised at a belated stage. The rationale for such a conclusion is that if the victim is a juvenile, the ordinary Court under the Cr. P.C. would have no jurisdiction to deal with any such juvenile in conflict with law. For the same reason, if the victim is a minor, only the Special Court established under the POCSO Act will have jurisdiction. In that event, whenever the issue is raised about the age of the victim before any Court, the issue of minority or majority has to be decided, whether it is pretrial or post trial stage, even before framing of charge. If it is found that the victim is a minor, the Special Court would have jurisdiction to proceed with the matter including framing of charge and if not, the Special Court would have no jurisdiction. Therefore, this Court would hold that if the issue of age of the victim is raised whether the victim was/is a minor or a major, the same has to be decided first and if the victim was/is a minor, the Special Court will have the jurisdiction to proceed with the matter and if the victim is not a minor, the Special Court would have to refer the matter to the normal Court and the Special Court under the POCSO Act will have no jurisdiction. In the present case as the petitioner has raised the issue of age of the victim before framing of charge contending that the victim was not a minor when the alleged crime took place, the Special Court (POCSO) must consider the issue first, even before proceeding with framing of charge.

20. Accordingly, for the reasons discussed above, the petition is allowed by directing the Special Judge (POCSO) to first determine the age of the victim before proceeding with the framing of charge for which the petitioner would be entitled to adduce evidences to prove that the victim girl was indeed a major not a minor when the alleged crime took place for which the petitioner is sought to be charged for committing offences under the POCSO Act. If the Special Judge (POCSO) concludes on the basis of the materials/evidences adduced by the petitioner as well as by the prosecution that the victim was a minor, the Special Judge (POCSO) can proceed with the framing of charges and trial for committing offences under the POCSO Act. On the other hand, if on the inquiry conducted, the Special Judge (POCSO) finds that the victim was not a minor at the relevant time when the alleged crime occurred, provisions of the Protection of Children from Sexual Offences (POCSO) Act, 2012 will not be applicable and in that situation, the petitioner is to be tried in accordance with the normal law and not under the POCSO Act.”

14. From the aforesaid analysis of the law, it is clear that Section 34 of the POCSO Act vests jurisdiction with the Special Court not only to determine the age of the offender but it also vests jurisdiction with it to determine the age of the victim. It is also clear that said question can be determined by the Special Court at any stage whenever such question arises in any proceeding. Thus, the question relating to age determination of a victim can be gone into by a Special Court even before the framing of charges during the inquiry proceedings, so as to determine whether or not the case is eligible to be dealt with in accordance with the provisions of the POCSO Act.
15. The next question that falls for determination is as to what procedure has to be adopted by the Special Court while undertaking age determination of the victim. There is no confusion so far as this aspect of the matter is concerned because Section 34(1) of the POCSO Act clearly provides that the Juvenile Justice (Care and Protection of Children) Act 2015 shall be applicable to such cases.
16. Section 94 of the JJ Act deals with the presumption and determination of the age. The said provision prescribes the procedure for determination of the age of a person brought before a Juvenile Justice Board or the Juvenile Justice Committee. It reads as under:

“94. (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.”

17. From a perusal of sub section (2) quoted above, it is clear that when there is a reasonable ground for doubt regarding whether a person is or is not a child, the age determination has to be undertaken by obtaining firstly the date of birth certificate from the school or the Matriculation or equivalent certificate from the concerned examination Board and in absence of these certificates, the birth certificate given by a corporation or Municipal Authority or a Panchyat. It further provides that in the absence of the documents of aforesaid nature, the age has to be determined by ossification test or any other latest medical age determination test. So the first preference has to be given to birth certificate of the school or the Matriculation Certificate. It is only in absence of such certificates that birth certificate of the corporation or the Municipal Authority has to be taken into consideration and in absence of such a certificate, the ossification test has to be resorted to.

18. With the aforesaid legal position in mind, let us now advert to the facts of the present case. In the present case, the petitioner claims that the age of the prosecutrix was more than 18 years at the time of the incident. The claim of the petitioner is based upon his assertion that if age of the victim as projected by the prosecution in the earlier criminal challan arising out of FIR No. 66/2005 of Police Station Leh offences under section 376, 511 and 457 RPC which ended in conviction of the accused therein, is taken as the basis, then the victim had crossed the age of 18 years at the time of the alleged occurrence. It is being claimed that in the said challan, the age of the prosecutrix was shown as 5 years as in the year 2005 with her date of birth as 05.02.2000 therefore, on the date of the incident, which is subject matter of the present case, she was more than 18 years of age. It has been contended that in the said challan, the date of birth of the victim was shown as 05.02.2000 as such, she had attained the age of majority on the date of the incident, which is subject matter of present case.
19. The prosecution on the other hand has relied upon the certificate dated 03.07.2019 issued by the Jawahar Navodaya Vidyalaya, Leh, according to which, the date of birth of the victim is 05.02.2002, meaning thereby that she had not attained the age of 18 years as on the date of the incident, which is subject matter of the present case.
20. The learned Special Court, while holding inquiry into the age of the victim, has discarded the age of the victim which has been projected in the challan arising out of FIR No. 66/2005 on the ground that because there was no POCSO law in-vogue at the relevant time, therefore, the age of the

victim mentioned in the said challan cannot be taken as authentic. Although the conclusion of the learned Special Court in this regard is correct but the reasoning assigned by the said court may not be correct.

21. If we have a look at the copy of the judgment delivered by the Principal Session Judge, Leh in the challan arising out of FIR No. 66/2005 of Police Station, Leh, it is revealed that the court has not addressed the issue of exact age of the victim in its judgment. So the issue as to whether the victim was aged exactly five years at the time of the incident which was subject matter of the said challan has neither been deliberated upon nor decided by the trial court because the same did not fall for determination before the court.
22. It appears from a perusal of the judgment dated 12.12.2024 passed by the Principal Sessions Judge, Leh in the said case that the defence had not disputed the fact that the victim was minor at the relevant time so there was no occasion for the court to determine her exact age in the said case. Thus, the petitioner cannot rely upon what was projected by the prosecution in its challan as regards the age of the victim in the earlier case.
23. However, there is yet another aspect of the matter, which is required to be noticed. The learned trial court, while relying upon the date of birth certificate of the victim issued by the Jawahar Navodaya Vidyalaya, Leh, has not examined the Record Keeper of the School nor has the trial Court perused the record on the basis of which, the particulars of the victim have been recorded in the said certificate. It was incumbent upon the learned

trial Court to summon the record relating to the said certificate from the concerned school and to examine the Record Keeper so as to determine the veracity of the certificate in question. It was also incumbent upon the learned trial Court to ascertain as to on what basis the date of birth of the victim has been recorded in the said certificate, particularly when the petitioner had disputed the particulars of the date of birth of the victim mentioned in the said certificate.

24. The Supreme Court in the case of **P. Yuvaprakash v State rep. by Inspector of Police, AIR 2023 SC 3525**, has held that a document purporting to be date of birth certificate issued by a School has to answer the description of the date of birth certificate from the school as mentioned in section 94(2) of the JJ Act and for that purpose, the relevant record of the school has to be perused. In the present case, no such exercise has been undertaken by the learned trial Court while placing reliance upon the certificate issued by the Jawahar Navodaya Vidyalaya, Leh depicting the date of birth of the victim as 05.02.2002.
25. In view of the above, the case is required to be remanded to the trial Court for conducting the inquiry afresh with regard to the age determination of the victim by summoning the relevant record from the school and allowing the petitioner to cross examine the Record Keeper or the concerned official of the school with regard to the entries made in the said certificate.
26. That takes us to application for grant of bail to the petitioner. It has to be noted that in her statement recorded under section 164-A Cr.P.C, the

prosecutrix has leveled serious allegations against the petitioner, by stating, *inter alia*, that he laid her down on a sofa in his office and committed wrong act with her. The petitioner is stated to be President of a very influential organization in Ladakh. Even if, the case of the petitioner that the age of the victim was around 18 years at the relevant time is accepted still then having regard to the gravity of the allegations made by the victim and the high position which the petitioner enjoys, the offence alleged to have been committed by him becomes all the more serious in nature. As per the prosecutrix, the petitioner took undue advantage of her helpless situation and he sexually exploited her not once but on several occasions. If the victim at the relevant time turns out to be less than 18 years of age, then the situation for the petitioner would become more grim.

27. The offence alleged to have been committed by the petitioner against the victim becomes all the more serious having regard to the age gap between the two. The petitioner is aged about 50 years whereas the victim, even as per case of the petitioner was aged only 18 years at the relevant time. It is not a case of relationship between teenagers which has gone wrong but it appears to be a case of exploitation of a helpless girl by a person holding a high position in the society. In these circumstances, the grant of bail to the petitioner at this stage is likely to thwart the course of justice.
28. We have also to take into account the fact that the petitioner had during the investigation of the case absconded, as a result whereof, general warrants of arrest came to be issued against him by the learned trial Court.

This conduct of the petitioner gives rise to an apprehension that if he is enlarged on bail, he may again abscond. Having regard to the influence which the petitioner may be wielding keeping in view his position in the society, it is quite possible that he may try to pressurize or influence the victim, so as to dissuade her from deposing against him during the trial. Therefore, at this stage, the petitioner does not deserve the concession of bail.

29. For the foregoing reasons, the petition challenging order dated 12.12.2024 (CRM(M) No. 39/2025 whereby the age determination of the victim has been conducted is allowed and the impugned order is set aside. The matter is remanded to the learned trial Court with a direction to conduct an inquiry afresh in light of the observations made hereinbefore. The trial Court shall be at liberty to record any further evidence for arriving at a proper conclusion with regard to age of the victim.
30. So far as the bail application(Bail App No. 15/2025) of the petitioner is concerned, the same is **dismissed** with liberty to him to approach the trial court after the statement of the victim is recorded by the said court.

(SANJAY DHAR)
JUDGE

Jammu:
24.04.2025
Rakesh PS

Whether the order is speaking: Yes/No
Whether the order is reportable: Yes/No