

GAHC010052382021



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

Case No. : I.A.(Crl.)/97/2023

NAKUL KALITA
S/O LATE SAYA RAM KALITA
R/O VILL- TOKRADIA (BAHARSUPA)
P.S.-HAJO
DIST- KAMRUP
ASSAM-781102

VERSUS

THE STATE OF ASSAM AND ANR.
REPRESENTED BY THE PUBLIC PROSECUTOR
ASSAM

2:PRABHAT KALITA
S/OI RAMESH KALITA
R/O VILL-TOKRADIA (BAHARSUPA)
P.S.-HAJO
DIST-KAMRUP
ASSAM

Advocate for : MR D J DEKA
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM AND ANR.

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA
HONOURABLE MR. JUSTICE KARDAK ETE

ORDER

Date : 07.08.2023

(K.R. Surana, J)

The connected appeal is directed against the judgment and sentence dated 16.12.2020, passed by the learned Special Judge, Kamrup, Amingaon, by which the applicant-appellant was sentenced to undergo rigorous imprisonment of 12 (twelve) years for committing offence punishable under Section 6 of the POCSO Act with fine with default stipulation.

2. This interlocutory application has been filed by the applicant under Section 389(1) of the Cr.P.C., praying for suspension of sentence, pending disposal of the connected appeal.

3. Heard Mr. Y.S. Mannan, learned counsel for the applicant and Mr. D. Das, learned Addl. P.P. appearing for the State.

4. The learned counsel for the appellant has submitted that broadly, the points on which the applicant is pressing for suspension of sentence, which are as follows:-

- a. That there has been an unexplained delay of about 7 (seven) month in lodging the FIR from the estimated date of the alleged incident and about 5 (five) months delay after the alleged incident came to the knowledge of the informant, i.e. the father of the alleged victim. Therefore, the chance of the alleged victim being tutored cannot be ruled out.
- b. The minor victim, in her cross-examination, had admitted existence of boundary dispute between the family of the parents of the informant and the applicant.
- c. The Court failed to appreciate the evidence to the effect that the

applicant, the alleged minor victim and the wife of the applicant, who is the paternal aunt of the alleged victim had been sleeping in the same bed and therefore, even if it is accepted that the victim was drugged as alleged, it is most unlikely that the applicant would rape the minor victim in the presence of his wife i.e. paternal aunt of the victim.

- d. The alleged victim did not see the applicant raping her, but instead she only felt someone pressing her body while she was asleep and she allegedly felt burning sensation while urinating in the morning. Accordingly, it was submitted that the applicant has been convicted merely because of surmises and conjectures, without any iota of evidence against him.
- e. The learned trial Court failed to appreciate that the witnesses examined by the prosecution could not prove that the applicant had made extra judicial confession of raping the minor victim and in this regard, the evidence of PW-5, who was a lady lecturer and President of the Gaon Panchayat was referred to, who had denied that the applicant had admitted raping the minor.
- f. It is also submitted that the time when the alleged incident had happened is not properly described and it was vaguely alleged that the applicant had raped the minor victim in the Assamese month of *Bohag*, which would be between the third week of April, 2017 to second week of May, 2017. It was submitted that the approximate date of offence was very material in this case because if the alleged rape was committed in the month of April, 2017 then the alleged pregnancy on 10.11.2017, when FIR was lodged would be 8 (eight)

months and would not match the allegation that 15 days prior to lodging of FIR, the victim was 7 (seven) months pregnant.

- g. It was further submitted that the learned trial Court failed to take notice of the fact that the appellant was married since last 12 years and was childless.

5. The Court has considered the submissions made by the learned counsel for the applicant and have also carefully perused the paper-book.

6. It is seen that the applicant has been convicted for committing offence punishable under Section 6 of the POCSO Act and sentenced to undergo rigorous imprisonment for 12 (twelve) years.

7. Although the submissions made by the learned counsel for the applicant cannot be brushed aside, but it is noted that the allegation by the victim is that she was staying with her maternal uncle's place and she was asked by the applicant to stay with her paternal aunt. The victim was having a headache and the applicant gave her medicine after which she fell sleepy and in her sleep, she felt her body being pressed and in the morning she had burning sensation in her private parts while urinating. After about 5 (five) months from the date of incident, the victim was suffering from jaundice and it was then that the doctor found that the minor victim was pregnant and the matter came to light. The prosecution has made out a case that a village *mel* was called and when the matter was not settled, the FIR was lodged.

8. From the evidence of the defence witnesses no. 1 and 2 had stated in their evidence that the victim had an affair with another boy and eloped with him. However, their evidence is found insufficient to *prima facie*

hold that the victim was impregnated by another person.

9. According to the learned counsel for the applicant, there was discrepancy in the date when the alleged incident had happened. However, the fact that is not in dispute that the victim girl, who was a minor, was pregnant. The victim had no animosity with the applicant. The fact that the victim had slept in the house of the applicant in the Assamese month of *Bohag* is not disputed.

10. Under such circumstances, for the purpose of examining this application for suspension of sentence and/or bail, the Court is unable to hold that the applicant was convicted only on the basis of surmises and conjectures alone. Hence, the Court does not find this to be a fit case to release the applicant on bail at this stage. Accordingly, the prayer for suspension of sentence is declined at this stage.

JUDGE

JUDGE

Comparing Assistant