

GAHC010018262023



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

Case No. : I.A.(Crl.)/64/2023

MOHAMMADULLAH LASKAR
S/O LATE HAREIN RASHID LASKAR, VILL.- TOKLAI, RAJABARI, P.S.-
JORHAT, DIST.- JORHAT, ASSAM.

VERSUS

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

2.:JADAB DUTTA
S/O LATE PHANIDHAR DUTTA

VILL.- SARATI

P.S.- DAKHIN MAJULI

C/O CHILDLINE JORHAT-MAJULI SUB CENTRE

P.O.- MADHUPUR

PIN- 785104
DIST.- MAJULI
ASSAM

Advocate for the Petitioner : MR. P K MUNIR

Advocate for the Respondent : PP, ASSAM

BEFORE
HON'BLE MRS. JUSTICE MALASRI NANDI
ORDER

17.05.2023

Heard Mr P K Munir, learned counsel for the applicants/appellants and Ms S H Bora, learned Additional Public Prosecutor for the State of Assam.

2. This interlocutory application under Section 389 of the Code of Criminal Procedure, 1973, is filed for suspension of sentence and grant of bail to the applicant/appellant, namely, Mohammadullah Laskar who has been convicted by the learned Special Judge, Majuli, in Special Case No. 12/2020, vide Judgment and Orders dated 23.12.2022, and 07.01.2023, under Section 10 of POCSO Act, 2012 and sentenced to undergo Rigorous Imprisonment for a period of 5 years and to pay a fine of Rs. 20,000/-, in default of payment of fine, further Simple Imprisonment for another two months.

3. It is submitted by the learned counsel for the applicant/appellant that during trial, the prosecution has failed to prove the age of the victim by producing any document. As per the medical report, the victim was 17 years of age at the time of incident. By referring to the Judgment of *Jarnail Singh vs. State of Haryana*; reported in (2013) 7 SCC 263, learned counsel for the applicant/appellant submitted that as no certificate of age has been exhibited during trial by any of the prosecution witnesses, the doctor's opinion is the only evidence available in the present case. In such a case, margin of error has also to be reckoned with. It is also a settled principle of law that in case of determination of age on the basis of the opinion of the radiologist, the benefit of the margin of error should also go to the accused. In the case in hand, the doctor has opined that the age of the victim was 17 years and if we add 2 years of margin of error, it will come to 19 years, in which case the victim may not be regarded as minor under Section 2 (1) (d) of the POCSO Act, 2012.

4. It is also submitted that the evidence of the victim and the evidence of the other witnesses had contradicted each other, as a result of which, the conviction cannot be sustainable in law. There is every possibility of acquittal of the applicant/appellant in the case.

5. On the other hand, learned Additional Public Prosecutor has submitted that the appellate Court should not re-appreciate the evidence at the stage of considering the application under Section 389 CrPC. It is only in exceptional case, the benefit of suspension of sentence can be granted and considering the gravity of the offence, learned Additional Public Prosecutor has submitted not to release the applicant/appellant on bail by suspending the sentence, during pendency of the appeal.

6. In support of the above submission, the learned Additional Public Prosecutor has relied upon the case of ***Omprakash Sahni vs- Jai Shankar Chaudhury & Another***; reported in 2023 Livelaw (SC) 389,

7. I have considered the submissions made by the learned counsel for both the parties.

8. I have also gone through the record which reveals that the allegation against the applicant/appellant is that the victim was brought to Kamalabari Hospital for ossification test, on the date of incident i.e., 13.11.2019, escorted by one Homeguard, Junu Das. During the course of examination, the accused who is a radiologist, asked her to remove the *salwar* and pulled down her panty halfway down and inserted his finger inside her vagina. After completing the examination, the accused also asked her to kiss him. The victim immediately informed the matter to the Homeguard, who was standing outside the room and Junu Das informed the lady doctor of Kamalabari CHC. When the lady doctor asked the applicant/appellant about the matter, he fled away from the scene. But Junu Das stated before the Court that on the relevant day, she was present in the hospital by escorting the victim to the hospital in another case. At that time, the victim girl of this case was also taken for ossification test. At that time, the victim girl told her that the applicant/ appellant told some bad words to her.

9. On examination of the victim, the doctor did not find any injury on her private parts. According to the Medical Officer, the victim had complained that during X-Ray, the radiologist touched other parts of her body instead of the parts of the body under X-Ray advice.

10. In *Bhagwan Rama Sindhe Gosai & Ors. Vs. State of Gujarat*; (1999) 4 SCC 421, the Hon'ble Supreme Court held that when a convicted person is sentenced to a fixed period of sentence and when he files an appeal under any statutory right, suspension of sentence can be considered by the appellate court liberally unless there are exceptional circumstances.

11. In *Union of India vs. Ram Samujh & Anr.*; (1999) 9 SCC 429, the Hon'ble Supreme Court held that the jurisdiction of the Court to grant bail is circumscribed by the Act. The bail can be granted and sentence suspended in a case where there are reasonable grounds for believing that the accused is not guilty of the offence for which he has been convicted and he is not likely to commit any offence while on bail and during the period of suspension of sentence.

12. There is no straitjacket formula which could be applied in exercising discretion and the facts and circumstances of each case would govern the exercise of judicious discretion while considering an application filed by a convict under Section 389 CrPC.

13. In the case at hand, nothing has been produced by the prosecution to show that the applicant/appellant had absconded during trial and will abscond during the bail period.

14. It is true that the evidence of the witnesses cannot be appreciated to consider the bail prayer of the applicant/appellant, suspending the sentence, during pendency of the appeal, however, looking to the facts and circumstances of the case, and the sentence awarded by the learned trial Court, this Court deems it just and proper to suspend the sentence awarded to the petitioner. Hence, the prayer made by the applicant/appellant is allowed. Accordingly, the applicant/appellant, Mohammadullah Laskar shall be released

on bail in connection with Special Case No. 12/2020, on furnishing bail bond of Rs. 30,000/- (Rupees Thirty Thousand Only) with two suitable sureties of the like amount, to the satisfaction of the learned Special Judge, Majuli, with the following conditions:-

- a) That the petitioner will appear before the trial Court in the month of June and January of every year till the appeal is decided.
- b) That if the petitioner changes the place of residence, he will give in writing his changed address to the trial Court as well as to the counsel in the High Court.
- c) Similarly, if the sureties change their place of residence, they will give in writing their changed address to the trial Court.

15. The trial Court shall keep the record of attendance of the accused-petitioner in a separate file. Such file be registered as Criminal Misc.Case related to original case in which the accused/petitioner was tried and convicted. A copy of this order shall also be placed in that file for ready reference. Criminal Misc. Case file shall not be taken into account for statistical purpose relating to pendency and disposal of cases in the trial Court. In case, the accused/petitioner does not appear before the trial Court, the learned Special Judge shall report the matter to the High Court for cancellation of bail.

16. The impugned judgment and order(s) 23.12.2022, and 07.01.2023, shall remain suspended, till disposal of the connected appeal.

17. With the aforesaid observation and directions, this interlocutory application stands disposed of accordingly.

JUDGE

Comparing Assistant