

GAHC010049052023



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

Case No. : I.A.(Crl.)/303/2023

JANTI DAS
S/O LATE BAPUKON DAS, R/O PANICHAKUA GAON, NOICHUK, P.S.-
PULIBOR, DIST.- JORHAT, ASSAM.

VERSUS

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

2:JUNMONI DAS
W/O RAJU DAS
R/O BORAHOM KATHANI
ANJU BAGAN
P.S.- PULIBOR
DIST.- JORHAT
ASSAM

Advocate for the Petitioner : MR. R CHETRI

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HONOURABLE MRS. JUSTICE MALASRI NANDI

ORDER

15.12.2023

(M. Zothankhuma, J)

1. Heard Mr. R. Chetri, learned counsel for the applicant. Also heard Ms. S.H. Bora, learned Additional Public Prosecutor for the State. No one appears for the

respondent nos.2 & 3.

2. This application has been made under Section 389 Cr.P.C for suspending the sentence awarded to the appellant, vide judgment and order dated 30.01.2023 passed by the Special Judge, Jorhat, Assam in Special Case No.58/2020, by which the appellant has been convicted under Section 4 of the POCSO Act, 2012 and sentenced to undergo rigorous imprisonment for a period of 20 years with a fine of Rs.10,000/-, in default undergo simple imprisonment for 1 year.

3. The prosecution story is that an FIR was lodged on 09.08.2020 before the Officer-in-Charge of the Pulibor Police Station alleging *inter alia*, that on 07.08.2020 at about 6 p.m., the applicant/appellant who is married, had taken the informant's 15 year old daughter from her home in a motorcycle to a nearby school and sexually exploited her the whole night. In pursuance to the FIR, Pulibor P.S. Case No.473/2020 under Section 376 IPC read with Section 4 of the POCSO Act was registered.

4. The learned Trial Court after examining 6 (six) prosecution witnesses came to a finding that the applicant was guilty of having committed penetrative sexual assault on the victim girl, who was 15 years at the relevant point of time and was convicted accordingly.

5. The applicant's counsel has taken us through the evidence of the prosecutrix (PW-2), which is to the effect that the applicant and the victim had gone together on foot to a school, wherein the applicant had physical relationship with the victim the whole night. He submits that though the victim had relied upon a birth certificate to prove that her age was 15 years at the time of the incident, no medical examination was conducted on the victim, as

she had refused to undertake the same. He submits that no physical relationship took place between the applicant and the victim. As such, the sentence should be suspended and the applicant should be released on bail.

6. Ms. S.H. Bora, learned Additional Public Prosecutor, on the other hand submits that the examination of the applicant under Section 313 Cr.P.C and the answers given therein implies that the applicant had sexual relationship with the victim. Further, as the victim was below 16 years at the time of the incident, the consent that the victim might have given to have sexual relationship with the applicant cannot be considered to be consent. She also submits that the applicant had not made a challenge to the age of the victim being 15 years during the time of cross-examination of the victim. She accordingly prays that the application should be dismissed.

7. We have heard the learned counsels for the parties.

8. LCR shows that the victim girl had refused to be medically examined. As such, the only evidence against the applicant having a sexual relationship with the victim is the evidence of the victim girl. The victim girl, who is PW-2, in her evidence has stated that she and the applicant had gone to the school on foot and that she had remained there the whole night, wherein they had established physical relationship. She was studying in Class-IX at that time and that she knew the applicant prior to the incident. She used to converse with him over the phone and developed a love relation. The victim also stated that she had called the applicant/accused to her home on the day of the incident and had left her home and accompanied him on foot, on her own free will. She also stated that the applicant had told her that he was unmarried and was also stated that he would marry her. She also stated that few days after the incident, she had gone to the house of the applicant with the intention of getting married with him and

staying with him. However, on coming to know that he was a married person, she filed a case against him. She also stated that though he was taken for medical examination, she had refused to be medically examined. She has also stated in her cross-examination that a few days after the incident she got married with Ramesh Tanti, Son of Jugalal Tanti, resident of Barahagaon, P.S. Pulibor. However, she had left Ramesh Tanti as he was an alcoholic.

9. As can be seen from the above, the victim had gone willingly with the applicant and as per the victim's evidence, she had sexual relationship with the applicant on the date of the incident.

10. On considering all the above facts and keeping in view the fact that the applicant has already been in custody for over 700 days, we are of the view that the sentence should be suspended. Accordingly the sentence to be undergone by the applicant in terms of the judgment and order dated 30.01.2023 passed by the Special Judge, Jorhat, Assam in Special Case No.58/2020 is hereby suspended. The applicant is accordingly allowed to go on bail, on furnishing a bail bond of Rs.50,000/- with two sureties of like amount, to the satisfaction of the learned Trial Court.

11. The I.A. is accordingly disposed of.

JUDGE

JUDGE

Comparing Assistant