

GAHC010058932023



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

Case No. : I.A.(Crl.)/345/2023

MIZAZUL HOQUE
S/O MD. HAFIJUL HOQUE, VILL.- KALITAPARA (BORKOLA), P.S.-
KALAIGAON, DIST.- UDALGURI, ASSAM.

VERSUS

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

2:RUMI BALA NATH
W/O KRISHNA KANTA NATH

VILL.- BORKOLA PUB KALITAPARA

P.S.- KALAIGAON
DIST.- UDALGURI
ASSAM

Advocate for the Petitioner : MR. A BHATTACHARYA

Advocate for the Respondent : MS. B. BHUYAN(ADDL.PP, ASSAM)

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

ORDER

15.12.2023

(M. Zothankhuma, J)

1. Heard Mr. A. Bhattacharya, learned counsel appearing for the applicant.

Also heard Ms. B. Bhuyan, learned Senior Counsel and Addl. P.P., Assam for the State and Mr. J. Kalita, learned legal aid counsel appearing for the victim.

2. This application under Section 389 Cr.P.C. has been filed for suspending the impugned sentence and releasing the applicant on bail, in connection with Special (POCSO) Case No.43/2021 which was disposed of vide the judgment dated 20.01.2023, passed by the learned Special Judge, Udalguri, Assam, convicting the applicant under Section 4(2) of the POCSO Act, 2012.

3. The learned counsel for the applicant submits that a reading of the evidence of the victim/P.W.2 shows that the applicant was released by the respondent accused and that the family members of the accused had assaulted her and took her to the residence of another person. He submits that the evidence of P.W. 4, who is the grandmother of the victim, is to the effect that when the victim was brought home to her house after being rescued from the house of the applicant, the victim had again left the house of the grandmother and gone to some other house. He submits that the actions of the victim does not prove that there was any kidnapping of the victim girl or that any rape had been committed upon her by the applicant. He submits that the evidence of P.W. 2 having clearly shown that the age of the victim girl was considered to be 15 years at the time of the incident in terms of her horoscope, the learned trial Court erred in accepting the age of the victim girl as 15 years in the absence of any birth certificate or school certificate. He submits that unless the age of the victim girl was established in terms of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015, the learned trial Court could not have convicted the applicant under Section 4(2) of the POCSO Act, 2012. He also submits that the evidence of the Doctor (P.W. 5) shows that there was no vaginal injury and no sign of sexual violence was present at the time of

examination of the victim girl and as such, there was nothing to corroborate the evidence of P.W.2, to prove that the applicant had raped the victim. He further submits that the FIR was lodged on 06.11.2021, i.e., after the recovery of the victim girl by the police. However, the FIR speaks only of kidnapping of the victim and does not speak of any sexual assault being made on her. He accordingly, submits that the sentence should be suspended and the applicant should be allowed to go on bail.

4. Ms. B. Bhuyan, learned Addl. P.P., on the other hand, submits that the evidence of P.W. 2, P.W. 4 and P.W. 5 corroborate each other, to prove the fact that the applicant had raped the victim girl. She submits that there was no cross examination of the prosecution witnesses with regard to the age of the victim girl and as such, there was no infirmity with the learned trial Court accepting the age of the victim girl as 15 years as on the date of the occurrence of the incident. She submits that as the evidence of the victim girl categorically states that the applicant had raped her, there is no reason to doubt the evidence given by the victim. She also submits that in view of Section 29 of the POCSO Act, 2012, there is a presumption of guilt on the part of the applicant in having committed the crime. Though the foundational facts of the case have been proved by the prosecution, the rebuttable presumption has not been acted upon by the applicant. She, accordingly, submits that the application should be dismissed. In support of her submission, she has relied upon the judgment of the Hon'ble Supreme Court in *Attorney General for India Vs. Satish and Ors., reported in (2022) 5 SCC 545*.

5. Mr. J. Kalita, learned counsel appearing for the victim submits that the evidence of the mother of the victim girl shows that the victim and the applicant

were not known to each other earlier and that the victim had been introduced to the applicant by the mother (P.W.1) about 4(four) months prior to the incident. He also submits that the victim girl was taken to the medical Doctor on 08.11.2021, by which time any injury sustained by the victim girl might have healed to a certain extent. He also submits that the age of the victim girl being 15 years having been proved by the learned trial Court and as the victim girl had stated that she had been raped by the applicant, the application should be rejected.

6. We have heard the learned counsel for the parties.

7. The FIR filed by P.W. 1, i.e., the mother of the victim was registered by the police on 06.11.221 at 1 p.m. There is no doubt that the victim girl was recovered the next day. A glance at the documents annexed in the appeal filed by the applicant/appellant does not indicate the exact time when the victim girl was brought back into the house of the grandmother, i.e., P.W. 4 and as such, though the FIR does not make a mention of the victim girl being raped, the same does not mean that the evidence of the victim girl, who stated that she was raped is not true, keeping in view that the learned trial Court has already convicted the applicant under Section 4(2) of the POCSO Act, 2012. Besides the above, there is nothing to show that there is any enmity between the families of the applicant and the victim, so that the victim would have a reason to make a false allegation against the applicant. As the offence is a serious one, besides keeping in view the fact that the minor girl was taken to the house of the applicant and apparently raped, we are not inclined to allow this petition at this stage.

8. However, the observations and findings made in this order shall not be construed to be the final observations and findings of this Court at the time of final hearing of the appeal.

The I.A. accordingly stands dismissed.

JUDGE

JUDGE

Comparing Assistant