

GAHC010085452023



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

Case No. :

I.A.(CrI.)/348/2023

HASANUR RAHMAN
S/O LATE MUZAMMEL HOQUE
VILL.- DAMPUR
P.S.- KAZIGAON
DIST.- KOKRAJAHR
ASSAM.

VERSUS

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

2:NAOSAD ALI
S/O BADSHA ALI

R/O ANTHAIBARI

P.S.- GOSSAIGAON

DIST.- KOKRAJAHR
ASSAM
PIN- 783360.

Advocate for : MR. A AHMED
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM AND ANR.

In CrI.Apl No. 149/23

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

26/09/2023

(Mridul Kumar Kalita, J)

1. Heard Mr. A. Ahmed, learned counsel for the applicant. Also heard Ms. B. Bhuyan, learned Additional Public Prosecutor for the State.

2. This application under Section 389 of the Code of Criminal Procedure, 1973 has been filed by the applicant, namely, Hasanur Rahman praying for suspension of sentence and his release, on bail, during pendency of the connected appeal which has been registered as Criminal Appeal No. 149/2023. By preferring the said appeal, the present applicant has impugned the judgement dated 20/02/2023 and the sentence imposed on him, by order dated 21/02/2023, by the Court of learned Sessions Judge, Kokrajhar, in Sessions Case No. (T1) 19 /2019. By the judgement the present applicant was convicted under section 498A/302 of the Indian Penal Code and was sentenced to undergo rigorous imprisonment for life and to pay a fine of ₹ 5000/-and in default of payment of fine to further undergo simple imprisonment for six months under Section 302 of the Indian Penal Code. The applicant was also sentenced to undergo rigorous imprisonment for one year and to pay a fine of ₹ 1000/- and default of payment of fine to undergo simple imprisonment for one month under Section 498 A of the Indian Penal Code.

3. The facts relevant for consideration of the instant interlocutory application, in brief, are as follows: -

(i) On 16/03/2018, one Jakir Hussain, the secretary of Village Defence Party (VDP) of Dampur Part II village, informed the police of Kazigaon Police Station that one Noisa Bibi had committed suicide. Accordingly, a GD entry namely, Kazigaon Police Station GD Entry No. 229 dated 16/03/2018 was made and police proceeded to the place of occurrence and on reaching there, it was found that the dead body of Noisa Bibi was lying in the Veranda on the house of the present applicant. The police, after conducting preliminary investigation, sent the dead body for post-mortem examination.

(ii) Later on, on 17/03/2018, at about 12:30 PM, the father of the deceased, namely Naushad Ali lodged a written ejahar, *inter alia*, alleging that the present applicant had subjected his daughter Noisa Bibi to cruelty for demand of dowry and suspected that the present applicant had murdered his daughter.

(iii) On receipt of the said FIR, Kazigaon PS case No. 16/18 was registered under section 498A/302/34 of the Indian Penal Code and the investigation was initiated and ultimately on completion of the investigation, chargesheet was laid under section 498A/302 of the Indian Penal Code against the present applicant. When the charges under section 498A/302 of the Indian Penal Code were framed and were read over and explained to the present applicant, he pleaded not guilty and claimed to be tried.

(iv) During trial, the prosecution side examined six witnesses. The Trial Court also examined Dr Gunajit Das, Professor of Forensic Medicine, Dhubri Medical College as court witness. During his examination under Section 313 of the Code of Criminal Procedure, 1973, the present applicant pleaded his innocence and denied the incriminating testimony of prosecution witnesses against him, however, he did not adduce any evidence in his defence.

Ultimately, by the judgment, which has been impugned by the present applicant in the connected appeal, the present applicant has been convicted and sentenced in the manner as already described herein before.

4. Mr. A. Ahmed, learned counsel for the appellant has submitted that out of the six prosecution witnesses examined by the prosecution side, no one is the eyewitness and the prosecution case is based only on circumstantial evidence. It is submitted that apart from the fact that the applicant happens to be the husband of the deceased and the incident occurred in the house of the applicant, no other implicating circumstance is proved against the present applicant to show that the alleged offence has been committed by him. Learned counsel for the applicant has submitted that the learned Trial Court only assumed existence of incriminating circumstances against the present applicant without any evidence regarding the same available on record. It is also submitted by learned counsel for the applicant that there is no evidence on record to show the presence of the present applicant at the place of occurrence, i.e., in his house, when the alleged offence was committed. It is submitted that without first establishing the presence of the applicant in his house at the time of commission of offence, the question of applicability of provisions of Section 106 of the Indian Evidence Act does not arise in this case. In support of his contention, learned counsel for the applicant has cited ruling of Hon'ble Supreme Court of India in the case of "**Nagendra Sah -Vs- The State of Bihar**" reported in "**2021 10 SCC 725**" where in Hon'ble Apex Court has observed that "*Section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused*". However, it is submitted that, in

the instant case the prosecution side has failed to prove the foundational fact of presence of the present applicant at the place of occurrence of alleged offence when it occurred, hence section 106 of the Indian Evidence Act is not applicable to the present case.

5. Learned Counsel for the applicant has also submitted that as this case is based entirely on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn should be fully established and the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty, however, same is not the case in the instant case as the circumstances on which learned trial court based its finding of guilt of the present applicant does not lead only to the conclusion of guilt of the present applicant, hence, it is submitted that there is a fair chance of the applicant getting a verdict of acquittal in the appeal.

6. On the other hand, Ms. B. Bhuyan, learned Additional Public Prosecutor submitted that the testimony of PW-1, who deposed that the applicant used to torture his daughter for dowry and the testimony of PW-3, who saw the dead body of the deceased in the house of the applicant and that of PW-5 corroborate each other. She has further submitted that the evidence of PW-5 and the court witness (CW-1) were to the effect that the death of the wife of the applicant is homicidal in nature and the evidence on record has proved that same has occurred in the house of the applicant where the deceased used to live along with the applicant and her daughter and therefore, it was incumbent on the applicant to explain as to how the death of his wife occurred, however he offered a false explanation of suicide by his wife, which is against the evidence of the forensic experts i.e., PW-5 and CW-1. Thus, it is submitted

that the applicant failed to relieve his burden under section 106 of the Indian Evidence Act, which only leads to the conclusion that it is the applicant who had killed his wife. In support of her submissions, learned Additional Public Prosecutor has relied on the ruling of Hon'ble Supreme Court of India in "***Trimukh Maroti Kirkan -vs- State of Maharashtra***" reported in "**(2000) 10 SCC 681**" where it was observed that where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence that shortly before the commission of the crime they were seen together or the offence takes place in dwelling home where the husband also normally resided, it has been consistently held that where the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. Accordingly, learned Additional Public Prosecutor has opposed the suspension of sentence which has been imposed on the present applicant by the impugned judgement.

7. We have considered the rival submissions made by the learned counsel for the applicant as well as learned Additional Public Prosecutor. We have also carefully perused the materials available on record.

8. Hon'ble Supreme Court of India, in several of its judgments [***Ramji Pradsad vs Ratan Kumar Jaiswal and & Another*** reported in **(2002) 9 SCC 366; *Omprakash Sahni vs Jai Shankar Choudhury & Others*** reported in **(2023)6 SCC 123]** has observed that in cases involving offences under section 302 of the Indian Penal Code, it is only in exceptional circumstances that the benefit of suspension of sentence may be granted. It is only when something which is very apparent or gross on the face of record, which may lead to prima-facie satisfaction that the conviction may not be

sustained, the sentence may be suspended in case involving offence of murder. It has also been observed by the Hon'ble Apex Court at the stage of considering an application under section 389 of the Code of Criminal Procedure, 1973, the appellate court should not re-appreciate the evidence and try to pick up lacunae here and there in the case of the prosecution. Hon'ble Apex Court has also observed that principle of "*presumption of innocence*" and "*bail the rule and jail is the exception*" may not be applicable to the appellant who has suffered a conviction after a full trial.

9. We have seen hereinbefore that in the instant case, the main contention of the learned counsel for the applicant is that the learned Trial Court has erred in arriving at a finding of guilt of the present applicant on the basis of available evidence on record and due to the deficient evidence, it could not have arrived at such a conclusion. Whereas, the contention of learned Additional Public Prosecutor is that there are incriminating evidence against the present applicant and the learned Trial Court has not erred coming to the finding of guilt of the present applicant by taking aid of section 106 of the Indian Evidence Act. The nature of the contentions raised by the learned counsel for both the sides, itself shows that it requires in-depth scrutiny of evidence available on record and detail consideration of rival submissions made by learned counsel of both the sides which may only be done at the time of final consideration of the connected appeal and not at the stage of considering an application under section 389 of the Code of Criminal Procedure, 1973. This case, in our considered opinion, does not fall within the category where there is something very gross or apparent on the face of the record which makes it into a category of exceptional case justifying the suspension of sentence imposed on the applicant and this stage.

10. For the reasons discussed above, this interlocutory application, for suspension of sentence of the applicant, fails and same is accordingly dismissed. However, considering the ground taken in the connected appeal by the applicant, he shall be at liberty to make separate prayer for out of turn listing and expeditious hearing of the said appeal. With above observation this is interlocutory application is hereby disposed of.

JUDGE

JUDGE

Comparing Assistant