

GAHC010117252023



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

Case No. : I.A.(CrI.)/516/2023

DILIP ROY
S/O LATE KISHORE ROY, VILL.- PATSALA NAWHALI, P.O.- THOMNA, P.S.-
BORBORI, DIST.- NALBARI, ASSAM, PIN- 781377

VERSUS

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

2:AMAR NEOG
S/O LATE SRI TULSI NEOG
VILL.- KALOOGAON GAYAN GAON
P.O.- KALOOGAON
P.S.- SIVASAGAR
DIST.- SIVASAGAR
ASSAM
PIN- 785666

Advocate for the Petitioner : MR. B BARMAN

Advocate for the Respondent : PP, ASSAM

Linked Case : CrI.A./220/2023

DILIP ROY
S/O LATE KISHORE ROY
VILL.- PATSALA NAWHALI
P.O.- THOMNA

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Advocate for : MR. B BARMAN
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM AND ANR.

BEFORE
THE HON'BLE MR. JUSTICE ARUN DEV CHOUDHURY
ORDER

16.10.2023

1. Heard Mr. B. Barman, learned counsel for the petitioner. Also heard Mr. R. J. Baruah, learned Additional Public Prosecutor for the State of Assam.
2. The present application is filed under Section 389 of the Code of Criminal Procedure, 1973 for grant of bail to the accused petitioner who has been convicted by the learned Additional Sessions Judge cum Special Judge (POCSO), Sivasagar vide Judgment and Order dated 28.02.2023 in Special

POCSO Case No. 36/2019 arising out of Sivsagar PS Case No. 837/2018 under Section 354 of IPC and was sentenced him to undergo Rigorous Imprisonment for 5 (five) years and also to pay a fine of Rs. 5,000/- (Rupees Five Thousand) only, in default of payment of fine to undergo further Rigorous Imprisonment for a period of three months.

3. The connected appeal being Crl.A.No.220/2023 has already been admitted and LCR has been called for. LCR has also been received.
4. Mr. Barman, learned counsel for the petitioner while arguing for bail submits that there are major contradictions regarding the time of occurrence of the alleged offence. The PW-2 deposed that the incident occurred around 04:00 to 05:00 PM, PW-1 deposed that the incident occurred before evening, PW-3 deposed that incident took place around 08:00 to 08:50 PM. There are also contradictions regarding the reporting of the incident by the victim girl. PW-2 deposed that the victim intimated at the time of dinner. PW-1 deposed that it was intimated to the parents. It is further contended that regarding the time of arrest also there are discrepancies. It was stated in the FIR that the incident took place on 21.08.2018. The PW-2 deposed that it happened on 02.08.2018 and PW-4 deposed that it was on 23.08.2018 and the I.O. deposed that the petitioner was arrested on 23.08.2018. Therefore, Mr. Barman, learned counsel contends that there are major discrepancies and a doubt has been created regarding the occurrence of the incident itself.
5. While arguing further and relying on the decision of the Hon'ble Apex Court in the case of **Angana and Another –Vs- State of Rajasthan** reported in **(2009)3 SCC 767**, Mr. Barman, learned counsel contends that

generally when an appeal is admitted, a person is entitled for bail. It is also contended that the petitioner has been sentenced for 5 (five) years of imprisonment and there is no immediate possibility of hearing the matter which shall prejudice the petitioner and he will remain inside the custody.

6. Per contra, Mr. R. J. Baruah, learned Additional Public Prosecutor for the State of Assam submits that the contradiction highlighted cannot be treated to be material contradiction inasmuch as the victims evidence is of sterling quality and her evidence is trustworthy and no motive can be attributed in falsely implicating the present petitioner.
7. Mr. Baruah, learned Additional Public Prosecutor for the State of Assam further contends that in fact the petitioner has committed the offence under Section 375 of IPC and the learned trial Court below has taken a lenient view and convicted him under Section 354 of the IPC.
8. This Court has given anxious consideration the arguments advanced by the learned counsel for the parties. Also perused the materials available on record.
9. It is true that there are certain discrepancies. Though there are certain discrepancies regarding time of occurrence by some PWs, including the informant brother of the victim, however, in the considered opinion of this Court, such discrepancies cannot be prima facie be treated as material discrepancies. Such discrepancies are normal and expected of a normal person inasmuch as, it is a settled law that in the deposition of witnesses, there are always some normal discrepancies, howsoever honest and truthful the witness may be.

10. It is also well settled that these normal discrepancies are discrepancies which arose due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition, such as shock and horror at the time of occurrence etc.
11. Taking note of the aforesaid settled propositions of law, this Court has perused the statement of the victim girl recorded under Section 164 of Cr.P.C., which was exhibited as well as her testimony before the learned trial Court below.
12. From her deposition, this Court does not prima facie find any material discrepancies inasmuch as she has vividly described how she has been molested by the accused in the guise of treating evils spirit from her body. Further the discrepancies as urged by Mr. Barman, learned counsel for the petitioner were also not confronted to the victim or any of the witnesses. Therefore, in the considered opinion of this Court, this is not a fit case where the petitioner can be granted bail at this stage.
13. Coming to the decision of **Angana and Another** (supra), relied on by Mr. Barman, learned counsel for the petitioner, the ratio laid down in the said judgment is that the suspension of sentence and releasing an appellant on bail during the pendency of appeal depends upon the facts of the each case and such consideration shall be made on the basis of nature of offence, the manner in which occurrence had taken place and whether in any manner bail granted earlier had been misused inasmuch as it was also laid down that no straight jacket formula can be applied in exercising the discretion.

14. As discussed hereinabove, in the case in hand, the nature of offence is very serious and the accused as per the version of the prosecution has taken advantage of the illness of the victim and sexually abused her.
15. Therefore, this Court has taken note of aforesaid consideration in coming into the conclusion hereinabove made. However, as Mr. Barman, learned counsel for the petitioner has expressed urgency, while dismissing the present IA (Crl), let the connected Criminal Appeal being Crl.A. No. 220/2023 be listed for hearing on 30.11.2023.

JUDGE

Comparing Assistant