

GAHC010123992023



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

Case No. : I.A.(CrI.)/478/2023

BUBUL TAMULI
S/O SRI PRADIP TAMULI,
RESIDENT OF JOKAI KOIBORTA, 27 GHORIA GAON, PO KHAMTIGHAT, PS
BARBARUAH, DIST DIBRUGARH, ASSAM

VERSUS

THE STATE OF ASSAM AND ANR.
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

2:RAM MOHAN DAS
S/O LATE TIKHARAM DAS
RESIDENT OF JOKAI KOIBORTA 27 GHORIA GAON
PO KHAMTIGHAT
PS BARBARUAH
DIST DIBRUGARH
ASSA

Advocate for the Petitioner : MR S BORTHAKUR

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE ARUN DEV CHOUDHURY

ORDER

Date : 25-08-2023

1. Heard Mr. S Borthakur, learned counsel for the petitioner. Also heard Mr. P Borthakur, learned Addl. PP, Assam.

2. The present application is filed under section 389 Cr.P.C, 1973 praying for suspension/stay of the operation of the judgment dated 30.11.2022 passed by the Additional Sessions Judge, Dibrugarh in Sessions Case No.129/2017 convicting and sentencing the applicant under section 376 IPC to undergo RI for 7 (seven) years and also to pay a fine of Rs.10,000/- and in default to undergo SI for 6 (six) months. The further prayer made in this application is to release the applicant on bail.

3. The connected appeal was admitted by this court on 22.03.2023 and the records were called for. The records called for are accordingly received.

4. Mr. Borthakur, learned counsel for the petitioner while arguing for the bail of the petitioner submits that the alleged offence of rape was committed in the month of October 2016 however, the FIR was lodged on 02.01.2017 i.e. after 3 (three) months. He further contends that the accused person's specific stand is that he did not commit the rape and refuted the allegation of the victim that out of the alleged incident a girl child was born and accordingly to prove his innocence the accused even filed an application to have a DNA test of the child so as to bring out the truth. Such application was also allowed however, the Magistrate and the Investigating Officer did not initiate any procedure for collection and conclusion of such DNA procedure and during trial convicted the accused only on the basis of the testimony of the victim girl and that too without considering the statement of the accused recorded under section 313 Cr.P.C.

Accordingly, Mr. Borthakur submits that such course of action has violated the right of the accused of fair trial and thus vitiated the entire proceeding.

5. Mr. Borthakur further contends that there are vital contradictions and improvements in the statement of the victim girl inasmuch as, the victim girl has herself testified before the court that she had a love affair with the accused, however, the accused refused to marry her and therefore, she was angry with the accused. Referring to the testimony of the accused, Mr. Borthakur further contends that the victim herself testified that she surrendered before the accused at the time of the incident as the accused promised to marry her. Thus, even if it is assumed that there is commission of sexual intercourse, it was clearly a consenting act and therefore, the same cannot be treated as an offence under section 376 IPC.

6. Mr. Borthakur, further contends that the accused is still ready to go for a DNA test along with the child born out of the alleged rape and if such a procedure is done the truth will come out inasmuch as the accused specifically took a stand in his statement recorded under section 313 Cr.P.C that he did not commit the offence and has not fathered the child born to the victim, however, the learned court has ignored that even after allowing DNA test the same was not done, however, the learned trial court ignored its own direction of DNA test blaming it on the accused that accused has not done anything to get the DNA test as directed. Therefore, Mr. Borthakur submits that the petitioner has been able to make out a case for grant of bail.

7. On the other hand the learned Addl. PP, Mr. P Borthakur has vehemently opposed the prayer of the accused primarily on the ground that the statement of the victim has been consistent that the petitioner had committed rape upon her inasmuch as when the evidence of the prosecutrix in the commission of sexual offence is trustworthy no further corroboration is required to convict a rape accused. He further submits that even if the petitioner is ready for a DNA test, the same can be done in exercise of power under section 311 Cr.P.C at the time of hearing of the appeal after consideration of the other available evidence on record. The applicant has not also filed any application under section 311 Cr.P.C in this regard therefore, at this stage such prayer may not be allowed inasmuch as DNA test involves the privacy of another person.

8. Considered the materials available on record, including the statement of the victim recorded under section 164 Cr.P.C before the magistrate as well as her testimony before the court.

9. From the materials available on record, one fact is seen by this court that both the accused and the victim admittedly had an affair and from the testimony of PW-1 it is seen that according to her the relation was broken down by the accused that's why she had anger against the accused. On the other hand the accused in his 313 statement took a defence that he did not marry the girl though there was an affair for the reason of her tender age, as at that point of time, she was around 17 years and thereafter he got married to another lady and fathered one boy who was aged about 5 years.

10. From the deposition of the victim, it is also seen that she depicted the incident initially to be forceful, however, she further deposed that when the accused promised her to marry, she consented inasmuch as at that point of time the accused was already a married man.

11. The record also reveals that during the investigation an petition was filed being Pet No.134/2017 before the Magistrate praying for DNA test and such application was allowed by an order dated 28.02.2017 with a condition that the petitioner is to bear the cost, however, the matter did not proceed further.

12. This court has also considered that even after detection of the pregnancy, the FIR was not lodged rather from the evidence of the mother and the victim it is seen that a attempt was made for the abortion and when the same failed, a village meeting was called and when in the village meeting the accused disown fathering the child, the FIR was lodged.

13. This court also considered that the learned trial court has not dealt with in any manner the defence taken by the accused while recording his statement under section 313 Cr.P.C.

14. Considering the matter in its entirety as discussed herein above, this court is of the considered opinion that the petitioner has been able to make out a case for grant of bail during the pendency of the appeal.

15. Accordingly, the applicant shall be allowed to be enlarged on

bail on furnishing bail bond of Rs.50,000/- with a solvent surety of the like amount to the satisfaction of the learned Additional Sessions Judge, Dibrugarh.

16. While parting with the records, it is made clear that the findings recorded in this order is only for the purpose of consideration of the present application and such findings shall not influence the determination of the appeal. It is also made clear that this court in the present application has not dealt with the verbal submission of Mr. Borthakur that a DNA test be directed however, the applicant shall be at liberty to file separate application under section 311 Cr.P.C and in the event of such application is filed, same shall be considered on its own merit.

JUDGE

Comparing Assistant