

GAHC010149152023



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

Case No. : I.A.(Crl.)/645/2023

NIRANJAN MANDAL
S/O LATE MANGAL MANDAL
VILL.- 2 NO. DUAMAKHA P.S.- TAMULPUR
DIST.- BAKSA, ASSAM.

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

2:ASHMITA BISHWAS
D/O RANJIT BISHWAS
VILL.- 2 NO. DONGARGAON
P.S.- TAMULPUR
DIST.- BAKSA
ASSAM
PIN- 781368.

Advocate for : MR S C DAS

Advocate for : PP

ASSAM appearing for THE STATE OF ASSAM AND ANR.

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HONOURABLE MRS. JUSTICE MITALI THAKURIA

ORDER

06.10.2023

(M. Zothankhuma, J)

1. Heard Mr. S.C. Das, learned counsel for the applicant. Also heard Ms. S. Jahan, learned Additional Public Prosecutor for the State.

2. This application has been made under Section 389 Cr.P.C. for setting aside the sentence imposed upon the applicant, on being convicted under Section 6 of the POCSO Act by the Court of the Special Judge (POCSO), Baksa, in Special (POCSO) Case No.19/2023, arising out of Tamulpur P.S. Case No.14/2023.

3. The applicant's counsel submits that the age of the victim girl was above 18 years at the time of the alleged incident and as it was not proved by the prosecution before the learned Trial Court that the girl was below 18 years of age at the time of the incident, the applicant could not have been convicted under Section 6 of the POCSO Act. He also submits that the applicant did not rape the victim girl and the allegation of the applicant having committed aggravated penetrative sexual assault is false. The learned counsel for the applicant further submits that the child that has been born to the victim girl cannot be the child of the applicant, as the applicant did not have any sexual intercourse with the victim girl. He submits that the applicant is willing to undergo a DNA test to prove that the child born to the victim girl has not been fathered by the applicant.

4. Ms. S. Jahan, learned Additional Public Prosecutor, on the other hand submits that the applicant had not taken any stand before the learned Trial Court that the victim girl was 18 years and above at the time of the incident and as such, the age of the victim was not a disputed issue to be taken up by the learned Trial Court. She submits that the question of whether DNA testing/profiling should be normally allowed, is still a debatable issue and as per the various judgments of the Supreme Court, the same should not be done at the drop of a hat.

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

6. The prayer in the present application is for suspending the sentence and allowing the applicant to go on bail. The evidence of the victim girl and the FIR submitted by her is to the effect that she was below 18 years, at the time when the rape had been committed. Thereafter, the victim girl has also apparently given birth to a child. The learned Trial Court in paragraph-19 of the impugned judgment dated 04.05.2023 has held that no suggestion was given to the prosecution witnesses denying the age of the victim as 17 years, at the time of occurrence of the crime. The learned Trial Court also states that even during arguments, the learned Legal Aid Counsel did not challenge the evidence pertaining to the age of the victim girl. As such, it was clearly established from the oral evidence on record that the age of the victim girl was 17 years, at the time of the alleged incident and thus was a child within the meaning of POCSO Act, 2012.

7. On considering the above facts, we are of the view that no case for suspension of the sentence has been made out by the applicant. The application is accordingly dismissed. The above being said, the observations and decision made in this order shall not be construed to be the final observation/decision of this Court at the time of hearing the appeal.

JUDGE

JUDGE

Comparing Assistant