

GAHC010196452023



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

Case No. : I.A.(CrI.)/816/2023

RATUL BHARALI AND ANR.
S/O RAMLAL BHARALI, R/O JORBIL GAON, P.S.- GARMUR, DIST.- MAJULI,
ASSAM.

2: MANASH BHARALI @ KON BHARALI
S/O KANBAP BHARALI
R/O JORBIL GAON
P.S.- GARMUR
DIST.- MAJULI
ASSAM

VERSUS

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

2:BITUL BANIA
S/O KUKHESWAR BANIA
VILL.- SONAPUR CHAPORI
JORBEEL
P.S.- GARMUR
DIST.- MAJULI
ASSAM

Advocate for the Petitioner : MS. T SOM

Advocate for the Respondent : MS. S H BORA(ADDL.PP, ASSAM)

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

ORDER

15.12.2023

(Malasri Nandi, J)

Heard Ms. T. Som, learned counsel for the applicants. Also heard Ms. S. H. Bora, learned Additional Public Prosecutor appearing for the State/respondent.

2. This is an application filed under Section 389 Cr.P.C. praying for suspension of sentence and to release the applicants on bail during pendency of the appeal.

3. The applicants have filed a criminal appeal under Section 374(2) Cr.P.C. challenging the impugned judgment and order dated 28.07.2023 passed by the learned Special Judge, Majuli in Special Case No. 47/2023, convicting the accused/applicant under Section 6 of POCSO Act and sentencing them to undergo rigorous imprisonment for life and also to pay a fine of Rs.20,000/- each, in default of payment of fine, to suffer simple imprisonment for two months each.

4. The allegations against the applicants as per FIR is that on the date of incident when the victim girl went to the grazing ground to tether her goats, at that time, the applicants, who also came there to take their cows in the same grazing field. After some time, both the applicants came nearby the victim girl, gagged her mouth and dragged her to the nearby jungle and committed rape on her. At that time, one Karuna Bonia came to the spot and having seen the incident, raised alarm and then the applicants fled away.

5. Learned counsel for the petitioner has submitted that the evidence on record does not warrant conviction and sentence of the applicants under Section

6 of POCSO Act. From the evidence, it is apparent that the alleged incident occurred in the grazing field which is an open area and occurred in the morning hour. The trial court has failed to appreciate the fact that the commission of such heinous offence is not possible in broad day light in an open space like grazing field.

7. It is also the submission of the learned counsel for the applicants that the trial court has failed to appreciate the fact that the medical report of the victim girl is silent regarding commission of any sexual assault to the victim.

8. According to the learned counsel for the applicants, the trial court has completely overlooked the evidence of the defence witnesses specially the DW-3, who clearly stated that on the date of incident, he went to the grazing ground and saw PW-6, the victim girl and the applicants there and both the applicants returned with him. The evidence of defence witnesses were ignored by the trial court without any valid reason and convicted the applicants mechanically.

9. It is further submitted by learned counsel for the applicants that there is every likelihood that the applicant will succeed in proving themselves not guilty in the criminal appeal preferred by them.

10. Against the prayer of the petitioner, learned Additional PP has filed an objection for releasing the applicants on bail during pendency of appeal. According to learned Additional Public Prosecutor, the most clinching evidence in the instant case is the testimony of the victim, who clearly stated before the trial court that on the date of incident, in the grazing field, both the applicants gagged her mouth, dragged her to some extent and committed rape on her one after another by disrobing her. Though, the victim was cross examined at length

but at no point of time her cross-examination was demolished or shaken to any extent. It is also submitted that the victim was consistent from the beginning of the case when her statement was recorded by the IO, subsequently by the Magistrate under Section 164 Cr.P.C. and before the trial court.

11. Learned Additional Public Prosecutor also mentioned that PW-6 was the eye witness to the incident who came to the spot on the relevant time and had seen the incident of committing rape upon the victim by the applicants. According to learned Additional Public Prosecutor, the Medical Officer, who examined the victim also found some redness in the vulva and also on her vagina which proves sexual assault on the victim. Under such backdrop, the benefit of suspension of sentence during pendency of appeal cannot be granted to the applicants

12. We have considered the submissions of learned counsel for the parties and also perused the LCR

13. A plain reading of Section 389 Cr.P.C. makes it clear that recording of reasons while exercising discretion under Section 389 (1) of the Cr.P.C. is mandatory. The Hon'ble Supreme Court in case of *Mauji Ram Vs. State of Uttar Pradesh and Anr.* reported in *2019 (8) SCC 17* has laid emphasis on the requirement of assigning reasons for exercising jurisdiction under Section 389 Cr.P.C. The requirement of recording of reasons clearly indicates that there has to be careful consideration of the relevant facts and the order directing suspension of sentence and grant of bail cannot be passed as a matter of routine. The appellate Court has a duty to objectively assess the matter and to record reasons for the conclusion that the case warrants suspension of execution of sentence and grant of bail.

14. In the case in hand, as per statement of the victim, she was sexually abused by the applicants on the date of incident. Furthermore, the medical officer, who examined the victim, found redness on the vulva as well as on her vagina. Some other injuries were also noticed by the Medical Officer on the body of the victim i.e. bite marks on the left side of the face, contusions on the lower part of left thigh etc.

15. In considering an application for suspension of sentence, the appellate court is only to examine if there is such patent infirmity in the order of conviction that renders the order of conviction prima facie erroneous. Where there is evidence that has been considered by the trial court, it is not open to a court for considering application under [Section 389](#) to reassess or re-analyze the same evidence and take a different view, to suspend the execution of the sentence and release the convict on bail.

16. In view of the above, without discussing the evidence in detail and merits of the case, we do not find it appropriate to release the applicants on bail at this stage. Accordingly, the prayer of the applicant is rejected.

17. With the above observation, this Interlocutory Application stands disposed of.

JUDGE

JUDGE

Comparing Assistant