

GAHC010209012022



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

Case No. : I.A.(CrI.)/615/2022

AKHIRUL ISLAM
S/O MD. LEHAZUR RAHMAN @ NEHAJUR RAHMAN
VILL.- SANTOSH PUR
P.S- CHAPAR
DIST.- DHUBRI
ASSAM
PIN- 783348.

VERSUS

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

2:SAJEDA KHATUN
D/O SAHAR ALI

VILL.- SANTOSH PUR
P.S.- CHAPAR
DIST.- DHUBRI
ASSAM
PIN- 783348.

Advocate for : MR H R A CHOUDHURY
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM AND ANR.

**BEFORE
HONOURABLE MRS. JUSTICE MITALI THAKURIA
ORDER**

19.07.2023

Heard Mr. A. Ahmed, learned counsel for the applicant. Also heard Mr. P. S. Lahkar, learned Additional Public Prosecutor representing the State respondent No.1 and Mr. I. H. Laskar, learned counsel for the respondent No.2.

2. This is an application filed under Section 389 of the Code of Criminal Procedure, 1973, praying for suspension of sentence and to release the accused on bail, during the pendency of Crl.A.No.253/2022.

3. It is stated that the present applicant/appellant has preferred the connected Criminal Appeal, registered under Section 374(2) of the Code of Criminal Procedure, challenging the Impugned Judgment and Order dated 30.08.2022, passed by the learned Special Judge, Bilasipara, Dhubri District, in Special (POCSO) Case No. 06/2020 by convicting the accused/appellant under Section 4 of POCSO Act, and sentencing him to undergo rigorous imprisonment for 10 (ten) years and in default for another 3 (three) months, and also to S.I. for 6 (six) months for offence under Section 448 of IPC.

4. The learned counsel for the applicant has submitted that the impugned conviction and sentenced passed by the learned Trial Court is not sustainable in law, as the said Court grossly neglected the evidence in its true perspective and passed the Impugned Judgment and Order dated 30.08.2022 only on the basis of presumptions, inferences and assumptions. Hence, interference of this Court is necessary. The learned Trial Court failed to consider the evidence of the witnesses and even though there was no incriminating evidence available to

justify the conviction of applicant under Section 4 of POCSO Act. The said Court, while, appreciating evidence primarily discussed about the contradictions but overlooked that in a case of this nature primary consideration is whether the evidence of victim is trustworthy or not. A contradiction may not be a material contradiction here but the Court has to see as to whether such contradiction makes her evidence untrustworthy or not. The sole testimony of the prosecutrix can be based on the conviction, if it inspires confidence of Court.

5. He further submitted that the learned Trial Court has failed to appreciate the fact that the victim herself stated before the doctor that she had a love affairs with the accused applicant for last 2 years and they were in sexual relationship. Thus, it is seen that their relation was on mutual consent.

6. More so, the learned Trial Court also failed to appreciate the fact that the prosecutrix could not prove that the victim was below 18 years of age on the date of occurrence. In the present case, the prosecutrix also failed to adduce any documentary evidence in respect of the age of the victim girl. Further, the Medical Officer suggested for X-ray to ascertain the age of the victim, but the prosecutrix did not made any afford for determination of victim's age. The learned trial Court erroneously applied Sections 29 and 30 of the POCSO Act, by misleading the judgment of this Court passed in ***Bhupen Kalita Vs. State of Assam reported in 2020 (3) GLT 403.*** The learned Trial Court without discussing anything properly held that the prosecution side has been successful in establishing the foundational facts.

7. The learned counsel for the applicant also submitted that the accused applicant was on bail during the entire trial, and had never misused the privilege of bail. Therefore, on this ground he prays for, to grant the privilege of bail to

the accused/applicant and also submits that, since the accused/applicant is a local person, so, there is no chance of absconding, and also undertakes that he will not misuse the privilege of bail, if the same is granted.

8. The learned counsel for the applicant further submitted that one copy of the Birth Certificate was collected by the police during the investigation. However, from the evidence of IO it reveals that the original Certificate was returned back to the prosecutrix, and kept photostat copy of the said birth certificate of the victim. Apart from the Photostat copy of the Birth Certificate no other document relied upon by the prosecutrix to prove that the victim was below the age of 18 years at the time of the incident.

9. In addition to his argument, he relies on the judgment passed by this Court in ***Criminal Appeal No.64/2020*** in the case of ***Manirul Islam Vs. State of Assam*** decided on 09.04.2021, wherein, it has been held that;

“Testimony of the prosecutrix full of contradictions and hence, unreliable- No cogent evidence brought on record to prima facie establish the foundational facts- Conviction cannot be based solely on presumption of guilt, premised on the precincts of the doctrine of reverse burden- Impugned judgment unsustainable in law and thus set aside”.

10. He also relied on the decision of ***Hon’ble Supreme Court passed in Criminal Appeal No. 221 of 2009 decided on 06.02.2009***, in the case of ***Angana & Ors. vs. State of Rajasthan***, wherein, in paragraph-13 of the said judgment read as under;

“Paragraph-13. Reference can made to the decision of this court in the case

of [Kashmira Singh vs. State of Punjab](#), (1997) 4 SCC 291, where this Court has observed that:

"Now, the practice in this Court as also in many of the High Court has been not to release on bail a person who has been sentenced to life imprisonment for an offence under [Section 302](#) of the Indian Penal Code. The question is whether this practice should be departed from and if so, in what circumstances. It is obvious that no practice howsoever sanctified by usage and hallowed by time can be allowed to prevail if it operates to cause injustice. Every practice of the Court must find its ultimate justification in the interest of justice. The practice not to release on bail a person who has been sentenced to life imprisonment was evolved in the High Courts and in this Court on the basis that once a person has been found guilty and sentenced to life imprisonment, he should not be let loose, so long as his conviction and sentence are not set aside, but the underlying postulate of this practice was that the appeal of such person would be disposed of within a measurable distance of time, so that if he is ultimately found to be innocent, he would not have to remain in jail for an unduly long period. The rationale of this practice can have no application where the Court is not in a position to dispose of the appeal for five or six years. It would indeed be a travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. Can the Court ever compensate him for his incarceration which is found to be unjustified? Would it be just at all for the Court to tell a person: 'We have admitted your appeal because we think you have a prima facie case, but unfortunately we have no time to hear your appeal for quite a few years and, therefore, until we hear your appeal, you must remain in jail, even though you may be innocent?' What confidence would such administration of justice inspire in the mind of the public? It may quite conceivably happen, and it has in fact happened in a few cases in this Court, that a person may serve out his full term of imprisonment before his appeal is taken up for hearing. Would a judge not be overwhelmed with a feeling of contrition while acquitting such a person after hearing the appeal? Would it not be an affront to his sense of justice? Of what avail would the acquittal be to such a person who has already served out his term of imprisonment or at any rate a major part of it? It is therefore, absolutely essential that the practice which this Court has been following in the past must be reconsidered and so long as this Court is not in a position to hear the appeal of an accused within a reasonable period of time, the Court should ordinarily, unless there are cogent grounds for acting otherwise, release the accused on bail in cases where special leave has been granted to the accused to appeal against his conviction and sentence."

- 11.** It is submitted that the prosecutrix failed to prove that the victim was below the age of 18 years at the time of the incident and without supporting

any documents or evidence, the learned Trial Court passed the order, considering the victim as a minor on the basis of the photocopy of the birth certificate, which was collected by the IO during the investigation. Therefore, he submits that it is fit case where the accused applicant can be released on bail by suspending the sentence imposed upon him.

12. In this regard, Mr. P. S. Lahkar, learned Additional Public prosecutor has submitted that the entire evidence of the prosecutrix and the statement of the victim is recorded under Sections 161 and 164 of the Cr.P.C. There is no material contradiction to disbelieve the evidence of the prosecutrix. He also submitted that the defence side has not raised any issue regarding the plea of minority. The other witnesses also corroborated the prosecutrix, and there is nothing to disbelieve the other corroborated evidence. Thus, the learned Special Judge had rightly convicted the accused/applicant. He further submitted that the sole testimony of the prosecution could be the basis of conviction, if it inspires the confidence of the Court.

13. In addition to, he relied on the decision of the Hon'ble Apex Court in the case of ***Phool Singh Vs. State of Madhya Pradesh reported in 2022 (2) SCC 74***, wherein, he stressed on paragraphs-5.2, 5.3, 5.6, 7, 8, 9 & 11 and, whereas, para-11 of the said judgment read as under;

“11. [In State of Punjab v. Gurmit Singh \[State of Punjab v. Gurmit Singh, \(1996\) 2 SCC 384\]](#), this Court held that in cases involving sexual harassment, molestation, etc. the court is duty-bound to deal with such cases with utmost sensitivity. Minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. Evidence of the victim of sexual assault is enough for conviction and it does not require any corroboration unless there are compelling reasons for seeking corroboration. The court may look for some assurances of her statement to satisfy judicial conscience. The statement of the prosecutrix is more reliable than that of an injured witness as she is

not an accomplice."

14. Mr. I. H. Laskar, learned counsel for the respondent No.2 also submitted that there is nothing to disbelieve prosecution story. He also submitted that the consent of the minor is considered to be immaterial.

15. He further rely on the decision of ***Hon'ble Apex Court in the case of Satish Kumar Jayanti Lal Dabgar reported 2015 (7) SCC 359***, wherein, he stressed on paragraphs- 14, 15 and 16 and para-16 of the said judgment read as under:-

"14) First thing which is to be borne in mind is that the prosecutrix was less than 16 years of age. On this fact, clause sixthly of [Section 375](#) of the IPC would get attracted making her consent for sexual intercourse as immaterial and inconsequential. It reads as follows:

"375. Rape-A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

Sixthly - With or without her consent, when she is under sixteen years of age.

Explanation.-Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape."

15) The Legislature has introduced the aforesaid provision with sound rationale and there is an important objective behind such a provision. It is considered that a minor is incapable of thinking rationally and giving any consent. For this reason, whether it is civil law or criminal law, the consent of a minor is not treated as valid consent. Here the provision is concerning a girl child who is not only minor but less than 16 years of age. A minor girl can be easily lured into giving consent for such an act without understanding the implications thereof. Such a consent, therefore, is treated as not an informed consent given after understanding the pros and cons as well as consequences of the intended action. Therefore, as a necessary corollary, duty is cast on the other person in not taking advantage of the so-called consent given by a girl who is less than 16 years of age. Even when there is a consent of a girl below 16 years, the other partner in the sexual act is treated as criminal who has committed the offence of rape. The law leaves no choice to him and he cannot plead that the act was consensual. A fortiori, the so-called consent of the prosecutrix below 16 years of age cannot be treated as mitigating circumstance.

16) Once we put the things in right perspective in the manner stated above, we have to treat it a case where the appellant has committed rape of a minor girl which is regarded as heinous crime. Such an act of sexual assault has to be abhorred. If the consent of minor is treated as mitigating circumstance, it may lead to disastrous consequences. This view of ours gets strengthened when we keep in mind the letter and spirit behind Protection of Children from Sexual Offences Act.

16. Further, he also relies on the decision of ***Hon'ble Apex Court in the case of Iqbal vs. State of Kerala reported in 2007 (12) SCC 724***, wherein, the said court expressed the view that the sexual intercourse with woman with consent or without consent amounts to rape, when she is under 16 years of age.

17. With support of above cited judgments, the learned counsel for the respondent No.2 has submitted that it is not at all a fit case to release the accused applicant on bail by suspending his sentence imposed upon him.

18. After hearing the submissions made by the learned Advocates of both sides, it is seen that, during the trial, the defence has not raised the issue of age of the victim. Considering the evidence on record the learned Special Judge has held that the victim was minor at the relevant time of the incident. Though, the victim admitted the fact that she was in love affair with the accused applicant and had a sexual intercourse with him, but, the first thing which is to be borne in mind is that the prosecutrix was less than 16 years of age and [Section 375](#) of the IPC would get attracted making her consent for sexual intercourse as immaterial and inconsequential.

19. Considering the above aspect of the case and also considering the fact there is an allegation of aggravated penetrative sexual assault on the victim, I do not find it a fit case to allow the applicant to go on bail by suspending the sentence imposed upon him, vide judgment and order dated 30.08.2022, by the

learned Special Judge (POCSO), Bilasipara, Dhubri District in Special (POCSO) Case No. 06/2020, and accordingly, the same stands dismissed. However, both the parties are hereby directed to proceed with the hearing on the next date fixed in the connected Criminal Appeal No.253/2022.

20. The interlocutory application stands disposed of in terms above.

JUDGE

Comparing Assistant