

GAHC010216002022



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

I.A.(Crl.)/649/2022

LAKHI BARUAH
S/O LATE HITESWAR BARUAH

VILLAGE NIJ BEHALI
PO BEHALI
PS BEHALI
DIST BISWANATH
ASSAM

VERSUS

THE STATE OF ASSAM AND ANR.
REPRESENTED BY PP ASSAM

2:BIKASH BORAH
S/O LATE TANKA BARUAH
VILLAGE NIJ BEHALI
PO BEHALI
PS BEHALI
DIST BISWANATH
ASSAM

Advocate for : MR. K SARMA
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM AND ANR.

In Crl.A./268/2022

**BEFORE
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND**

ORDER

02.02.2023

1. Heard Mr. K. Sarma, learned counsel for the applicant. Also heard Mr. M.P. Goswami, learned Addl. P.P. appearing for the State respondent No. 1. The respondent No. 2 is represented by Ms. T. Begum.

2. The learned counsel for the applicant has raised serious objections stating that the respondent No. 2 need not be represented today.

3. This is an urgent bail application because the applicant's mother is suffering from high blood pressure and at any moment the applicant's mother may pass away. The applicant's mother Smti Baneswari Baruah is 89 years old and she is diagnosed with chronic hypertension and she has been undergoing treatment for the last 20 years.

4. Seen the medical certificate submitted on behalf of the applicant.
The medical certificate is issued by the Medical Officer of Biswanath.

5. The learned counsel for the applicant has relied on the decision of this Court in CrI.A. No. 332/2022, wherein a Co-ordinate Bench of this Court has held that:-

"7. The provision of Section 389, CrPC has provided for suspension of sentence pending an appeal and release of appellant on bail. Sub-section [1] of Section 389, CrPC has provided that pending any appeal by convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended, and also, if he is

confinement, that he be released on bail, or on his own bond. The proviso to sub-section [1] of Section 389, CrPC has laid down that the Appellate Court before releasing on bail or his own bond, a convicted person who is convicted of an offence punishable with death or imprisonment for life or imprisonment for a term not less than 10 years, shall give opportunity to the learned Public Prosecutor for showing cause in writing against such release. The second proviso thereto has provided that in cases where a convicted person is released on bail it shall be open to the learned Public Prosecutor to file an application for cancellation of the bail. The said provision of law has also been interpreted by the Hon'ble Supreme Court of India in Atul Tripathi vs. State of U.P. & Anr., reported in 2014 (9) SCC 177, by stating that it was only in case of conviction for a serious offence having punishment with death or life imprisonment or imprisonment of a term not less than ten years, it is mandatory for the Appellate Court to give an opportunity to the Public Prosecutor for showing cause in writing against such release on bail. The decision in Jagjeet Singh [supra] has acknowledged the participatory right of 'the victim,' defined under Section 2[wa], CrPC. It has been observed that where 'the victim' himself/herself has come forward to participate in a criminal proceeding, he/she must be accorded with an opportunity of a fair and effective hearing.

The participatory rights of the victim have been acknowledged by the said decision, especially in cases involving heinous crimes.

It is, however, not laid down as a proposition of law in Jagjeet Singh [supra] that it is obligatory in the part of Appellate Court to put

the victim on notice and thereafter, to hear the victim also at the time of consideration of the application under Section 389, Cr.P.C. From the said decision, it does not appear that a victim is invariably to be heard at the time of consideration of an application preferred by a convicted person under Section 389, CrPC. But in a case where the victim himself/herself approaches the Appellate Court and seeks participation in the proceedings in respect of the application under Section 389, CrPC, then it is obligatory on the part of the Appellate Court to give fair and proper of hearing opportunity to such a victim."

6. In the instant case vide order dated 30.01.2023, the Amicus Curiae has already been appointed by this Court, so, on the matter of bail both the respondents, who are represented are heard inconnection with the bail petition and suspension of sentence of the applicant/appellant.

This petition under Section 489 Cr.P.C. has been mainly pressed on the ground that the applicant's mother is seriously ailing and any moment she may pass away.

7. The learned counsel for the applicant has also taken us through the merits of the evidence.

The applicant Sri Lakhi Baruah was convicted under Sections 376/417 IPC by the learned Sessions Judge, Biswanath Chariali in Sessions Case No. 225/2013 and sentenced to undergo R.I. for 7 years under Section 376 IPC and to pay a fine of Rs. 5,000/- with default clause and was sentenced to undergo R.I. for 6 months under Section 417 IPC.

The Judgement and Order was passed on 17.09.2022 and since then the accused/applicant is in jail hazot. The victim 'X', who was more than 16 years old had a consensual relationship with the accused/applicant for more than 2

years and she attained majority and when she was more than 18 years of age, she gave birth to a child. The accused/applicant has been erroneously convicted under Section 376 IPC.

8. I have heard the submissions on behalf of the respondents.

9. It is submitted that the trial Court has judiciously passed an order convicting the applicant/accused under Section 376/417 IPC.

I have perused the Judgment of the trial Court in Judgment dated 17.09.2022 of the trial Court in Sessions Case No. 225/2013 and I have also perused the LCR. It is apparent that the victim 'X' used to work as a maid servant in the applicant's house and both the the applicant and the victim had a love relationship.

The applicant impregnated the victim. When the victim was suffering from pain in her abdomen, she was taken to the doctor and then she learnt that she was pregnant. On examination by the doctor, the age of the victim was found to be 18 years. Although the applicant allured the victim to marry her, he failed to keep his promise and refused to marry her.

10. It is submitted on behalf of the respondents that the Judgment of the trial Court was in order.

When the applicant did not marry the victim he was rightly convicted of having cheated the victim after inducing her to have sexual intercourse with him.

11. Per contra, the learned counsel for the applicant laid stress in his argument that there is every possibility that the applicant may be acquitted.

12. At this juncture, I would not like to deal with the nitty gritty of the merits of this case.

A decision regarding the merits of this case will be like deciding the appeal. The applicant's mother is an old and ailing lady of 89 years. She has to be taken

care of.

It is also apparent from the medical certificate that the applicant's mother is residing alone.

It is also submitted on behalf of the appellant that during the pendency of the trial, the applicant was regularly attending Court and this clearly depicts the conduct of the applicant.

It is also submitted that the victim 'X' passed away and the informant is not at all interested to proceed with the appeal which is why, the informant failed to appear despite receipt of notices.

13. In view of my foregoing discussions, the applicant/appellant is enlarged on bail, on furnishing bail bond of Rs.50, 000/- with one suitable surety of like amount to the satisfaction of the learned Sessions Judge, Biswanath Chariali.

Accordingly, it is provided that the execution of sentence in respect of the applicant/appellant shall remain suspended till disposal of the connected appeal.

I.A. stands disposed of in the aforesaid terms.

JUDGE

Comparing Assistant