

GAHC010234812022



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

Case No. : I.A.(CrI.)/728/2022

PANI RAM TOKBI
S/O SIKARI TOKBI,
VILL.- UPPER OKEIHAI SIKARI TOKBI GAON,
P.O. AND P.S.- DILLAI, IN THE DISTRICT OF KARBI ANGLONG, PIN- 782462.

VERSUS

THE STATE OF ASSAM AND ANR.
REPRESENTED BY THE PP, ASSAM, GAUHATI HIGH COURT, GUWAHATI.

Advocate for the Petitioner : MR. M KALITA

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

Date : 07.11.2023

- 1.** Heard Mr. M. Kalita, learned counsel for the applicant/appellant. Also heard Mr. D. Das, learned Additional Public Prosecutor for the State as well as Ms. S. Medhi, learned Legal-aid-counsel for respondent No. 2.
- 2.** This application under Section 389(2) of the Code of Criminal Procedure, 1973 has been filed by the applicant/appellant in Criminal Appeal No. 292/2022 praying for suspension of sentence imposed upon the applicant/appellant by the

impugned judgment dated 07.09.2022 passed by learned Assistant Sessions Judge, Karbi Anglong, Assam in Sessions Case No. 149/2017 whereby the present appellant/applicant was convicted under Section 376 of the Indian Penal Code and was sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.10,000/- and in default of payment of fine to further undergo simple imprisonment for two months.

3. The facts, relevant for adjudication of the instant interlocutory application, in brief, are as follows:-

(i) That on 05.05.2016, the informant/respondent No. 2 lodged an FIR before the Officer-in-Charge of Dillai Police Station, *inter alia*, alleging that on 02.05.2016 at about 3.30 PM when the first informant was all alone in her house, the present applicant/appellant came to her house with a gun in his hand and committed rape on her putting her under threat and thereafter left. It is further stated in the FIR that the informant informed about the incident to her parents, who along with her brother and with the assistance of public later on found out that it is the present appellant who committed the alleged offence. On receipt of the FIR, Dillai P.S. Case No. 11/2016 was registered and after completion of the investigation, charge-sheet was laid against the present appellant/applicant. After completion of the trial, the present appellant/applicant was convicted under Section 376 of the Indian Penal Code and was sentenced as stated herein above.

4. Learned counsel for the applicant/appellant has submitted that the learned Trial Court failed to properly scrutinize the entire materials on record and failed to take into consideration that the circumstances proved by the evidence in this case does not unerringly points towards the guilt of the present applicant/appellant. It is stated that there are contradictions in the testimony of the

victim who was examined as PW1 in the trial. Learned counsel for the applicant/appellant has also tried to bring to the notice of this Court of contradictions amongst the testimony of the prosecution witnesses, which rendered their testimony unreliable of any credence. It is also submitted by the learned counsel for the applicant/appellant that the medical report/testimony of the doctor also does not support the prosecution case. It is further submitted by the learned counsel for the applicant/appellant that it is mentioned in the FIR that after the incident victim went to the paddy field, where her parents and brother were cultivating and informed them about the incident. She has stated that similarly during recording of her statement under Section 164 of the Code of Criminal Procedure, 1973. However in her testimony before the Court as PW1, she has stated that she informed about the incident when her mother and brother returned back from the paddy field. It is also stated by the victim that on the date of incident itself she along with her parents went to the Police Station and filed the case, however it is submitted by the learned counsel for the applicant/appellant that admittedly there was a delay in filing the FIR.

5. Learned counsel for the applicant/appellant has, thus, prayed for suspension of sentence during the pendency of the appeal and also prayed for allowing the applicant to remain on bail during the pendency of the connected appeal.

6. On the other hand, the learned counsel for the opposite party/State respondent have filled their written objection opposing the suspension of sentence and grant of bail to the present applicant /appellant during the pendency of the appeal.

7. Learned Additional Public Prosecutor has submitted that the applicant/appellant has committed the alleged offence on the victim girl on gun

point and has also confessed about the commission of the offence before the Sarkari Gaonbura as well as other villagers. It is also submitted that during the investigation, one SBML gun was also recovered from the bedroom of the present applicant/appellant.

8. Learned Additional Public Prosecutor also submits that the offence involved in this present case is under Section 376 of the Indian Penal Code, where a helpless girl was raped on gun point and appellant/applicant has been convicted by the learned Trial Court after a full trial and, therefore, the benefit of suspension of sentence can only be granted if there is something very apparent or gross on the face of record which may lead to the satisfaction that conviction may not be sustained, however, same is not the case in the instant case.

9. Learned Amicus Curiae has also vehemently opposed the suspension of sentence and grant of bail to the present appellant/applicant during the pendency of the appeal.

10. I have considered the rival submissions made by the learned counsel for the applicant, learned Additional Public Prosecutor as well as Amicus Curiae. I have also carefully perused the materials on record.

11. It has been observed by the Hon'ble Apex Court in catena of judgments that at the stage of considering an application under Section 389 of the Code of Criminal Procedure, 1973, the Appellate Court should not re-appreciate the evidence and try to pick up lacuna here or there in the case of prosecution.

12. Hon'ble Apex Court has also observed that principle of presumption of innocence and that the "bail is the rule and Jail is the exception" may not be applicable to the applicant who has suffered conviction after a full trial.

13. I have considered the materials available on record and without going into depth about the available evidence on record, I am of the considered opinion

that, *prima facie*, there are incriminating evidence against the present applicant/appellant and the learned Trial Court appears to have arrived at a finding of the guilt of the present applicant/appellant on the basis of incriminating evidence present against the present applicant/appellant on record.

14. The nature of contentions raised by the learned counsel for the applicant/appellant show that it requires in depth scrutiny of evidence available on record and after consideration of rival submission made by learned counsel for both sides which may only be done at the time of final consideration of the connected appeal and at the stage of considering an application under Section 389 of the Code of Criminal Procedure, 1973. This case, in my considered opinion, does not fall within the category where there is something very gross or apparent on the face of record that makes it into a category of exceptional case justifying suspension of sentence imposed on the applicant at this stage.

15. For the reasons discussed above, this interlocutory application for suspension of sentence is hereby dismissed. However considering the fact that learned counsel for the applicant/appellant has made a submission for expeditious disposal of the main appeal and may be listed for hearing at an early date.

16. With the above observation, this interlocutory application is disposed of.

JUDGE

Comparing Assistant