

GAHC010244392022



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

Case No. : I.A.(CrI.)/757/2022

KHANDAKAR MEZBAHUL ALOM
S/O LATE KH. MATIAR RAHMAN, VILL.- METUAKUCHI, P.S. AND DIST.-
BARPETA, ASSAM, PIN- 781308.

VERSUS

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

2:AMIR HUSSAIN
S/O LATE GAJI MIYA

VILL.- CHASRA GAON

P.O.- SATRA KANARA

P.S.- BAGHBAR
PIN- 781308

Advocate for the Petitioner : MR. M U MAHMUD

Advocate for the Respondent : PP, ASSAM

Linked Case : CrI.A./319/2022

KHANDAKAR MEZBAHUL ALOM
S/O LATE KHANDAKAR MATIAR RAHMAN

VILL.- METUAKUCHI

P.S. AND DIST.- BARPETA
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Advocate for : MR. M U MAHMUD
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM AND ANR.

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

Date : 20.09.2023
(K.R. Surana, J)

By filing this application under Section 389 CrPC, the applicant, who is the appellant in the connected Crl. Appeal No. 319/2022, has prayed for suspension of sentence.

2) The applicant was convicted by judgment and order dated 14.11.2022, passed by the learned Special Judge, POCSO, Barpeta in Special

(POCSO) Case No. 25/2018, for committing offence punishable under Sections 5(i) and (m) and 6 of the POCSO Act and was sentenced to undergo rigorous imprisonment for 12 (twelve) years and to pay a fine of Rs.20,000/- with default stipulation.

3) Mr. M.U. Mahmud, the learned counsel for the applicant has submitted that the learned trial Court had mechanically appreciated the evidence on record by ignoring the glaring contradictions in the evidence of the witness. It has been submitted that the applicant has been convicted on the basis of surmises and conjectures, which cannot be said to be a legal evidence, and therefore, on the ground that there was total lack of legal evidence, this was otherwise a fit case for acquittal and therefore, the applicant is liable to be enlarged on bail till the conclusion of the trial.

4) It has been submitted that the respondent no. 2, who was the informant and the father of the alleged minor victim was allowed by the appellant to reside in the house constructed by him and when he had asked the respondent no. 2 to vacate the house, allegation was made that he had raped his minor daughter.

5) It has been submitted that the victim had clearly stated in her examination-in-chief that she had fallen from a guava tree and sustained injury, for which the prosecution had declared her as hostile witness, and the said evidence of the victim is corroborated by the evidence of DW-1, who had deposed to the effect that the mother of the victim (PW-2) who was working in her place had asked for money from her to treat her daughter i.e. the victim, who had fallen down from a tree, which was ignored by the learned trial Court. It has also been submitted that the said evidence of the victim (PW-3) is also

corroborated by medical evidence of the doctor (PW-6), who had stated that there was no sign of any recent intercourse. It has been submitted that the mother of the victim (PW-2), during her examination-in-chief, did not give any incriminating statement against the appellant, which was also ignored by the learned trial Court.

6) It has also been submitted that the alleged occurrence took place on 07.03.2018 and the FIR was lodged on 23.03.2018, after getting sufficient time to tutor her minor daughter, i.e. the victim, without explaining the delay. Moreover, the Investigating Officer did not send the alleged blood stained clothes of the victim to the FSL for serological examination and to match the same with the blood of the appellant and the victim.

7) It has also been submitted that the appellant was about 72 years of age on the date of occurrence, which is an impossible age for raping a minor girl. Moreover, it was submitted that during the medical examination of the victim, no injury marks were detected.

8) In support of his submissions, the learned counsel for the applicant has placed reliance on the following cases, viz., (i) *Kunju Muhammed @ Khumani & Anr. v. State of Kerala*, (2004) 9 SCC 193, (ii) *Devatha Venkataswamy @ Rangaiah v. Public Prosecutor, High Court of A.P.*, (2003) 10 SCC 700, (iii) *State of Haryana v. Jai Parkash & Ors.*, (2002) 9 SCC 663, (iv) *Hiren Das & Ors. v. State of Assam*, 2014 (3) GLT 134, (v) *Bul Turi v. State of Assam*, 2014 (2) GLT 252, (vi) *Suren Kalita @ Anr. v. State of Assam*, 2013 (1) GLT 113.

9) Per contra, Ms. S. Jahan, the learned Addl. P.P. has submitted that at the stage of considering the application for suspension of sentence, it would

not be proper to evaluate the evidence on record to find out if the conviction was sustainable or not. Rather, if the Court is of the considered opinion that the prosecution case is *prima facie* based on some evidence, then the accused would not be entitled for suspension of sentence.

10) Considered the submissions of both sides as well as the cases cited by the learned counsel for the applicant.

11) On a perusal of the impugned judgment, it is seen that the PW-1 and PW-2 had stated that on the date of occurrence, they had come home and had seen that their daughter, i.e. the victim aged about 9 (nine) years was profusely bleeding from her private part and her garments were stained with blood. They then took her to FAAMCH, Barpeta where the doctors had given 5 (five) stitches on her private part to stop the bleeding. Initially the victim had told her parents that she had sustained injury after falling from a guava tree, but later she had disclosed that she was sexually assaulted by the appellant.

12) It is also seen that during her examination-in-chief, the victim had stated that she had sustained injury after falling from a tree, the prosecution got her declared to be hostile and in her cross examination by the prosecution, she had admitted her statement made before the I.O., thereby implicating the appellant of sexually assaulting her.

13) As per the medical evidence of the Medical Officer (PW-6), the victim was examined on 23.03.2018 and she had found that the hymen of the victim torn; an already healed wound was observed in the left vaginal wall; sign of old sexual intercourse was found as there was an already healed wound was observed in the left vaginal wall. The Doctor (PW-6) had also specifically opined that such an injury cannot be caused by falling over hard substance.

14) Therefore, *prima facie*, it appears that on the basis of some cogent materials as indicated herein before, the learned Special Judge had convicted the appellant.

15) One of the submissions of the learned counsel for the applicant was that the applicant was 73 years of age at the time of the connected appeal was filed and that he is presently 74 years of age. Therefore, if the applicant is aged about 74 years now, on 07.03.2018, the date of alleged occurrence of sexually assaulting a 9 year aged minor victim, the applicant would be about 69 years of age. Therefore, the Court is of the considered opinion that the age of the applicant cannot be the sole criteria to suspend his sentence.

16) It may be stated that all the cases cited by the learned counsel for the applicant are authorities which deal with insufficiency of evidence which would lead to acquittal of a convict in appeal. However, the learned counsel for the appellant could not show that the said cases are also authorities for considering the prayer for suspension of sentence under Section 389 CrPC. In other words, the cited cases are not the authorities on the point that if any evidence is found unfavourable to the prosecution, the sentence imposed on the accused was liable to be suspended and that the said accused would become entitled to be enlarged on bail. Therefore, no purpose would be served by burdening this order with discussion of the said cases.

17) In this regard, it would be appropriate to refer to the observations of the Supreme Court of India in the case of *Satender Kumar Antil v. Central Bureau of Investigation*, (2022) 0 Supreme(SC) 588. The relevant paragraph nos. 42 and 43 are extracted below:-

“**42.** Section 389 of the Code concerns itself with circumstances pending appeal

leading to the release of the appellant on bail. The power exercisable under Section 389 is different from that of the one either under Section 437 or under Section 439 of the Code, pending trial. This is for the reason that "presumption of innocence" and "bail is the rule and jail is the exception" may not be available to the appellant who has suffered a conviction. A mere pendency of an appeal per se would not be a factor.

43. *A suspension of sentence is an act of keeping the sentence in abeyance, pending the final adjudication. Though delay in taking up the main appeal would certainly be a factor and the benefit available under Section 436A would also be considered, the Courts will have to see the relevant factors including the conviction rendered by the trial court. When it is so apparent that the appeals are not likely to be taken up and disposed of, then the delay would certainly be a factor in favour of the appellant."*

18) In the case of *Devatha Venkataswamy @ Rangaiah (supra)*, which has been relied upon by the learned counsel for the applicant, the observations of the Supreme Court of India is as follows:-

"5. *It is a well-settled principle in law that though the first appellate court like the High Court in this case sits as a court of appeal on facts also while considering an appeal from the judgment of the trial court and in that process it can reappreciate the evidence on record to arrive at a just conclusion, this Court in more than one case has held that while so re-appreciating the evidence, the appellate court should first analyse the findings of the trial court and then for valid reasons to be recorded the appellate court can reverse such finding of the trial court. The said decisions also hold that the appellate court while sitting as a court of appeal should not substitute the finding of the trial court merely because another view is possible to be taken on the same sets of facts. [See *Rajendra Prasad v. State of Bihar*, (1977) 2 SCC 205, *Harisingh M. Vasava v. State of Gujarat*, (2002) 3 SCC 476, and *Joseph v. State of Kerala*, (2003) 1 SCC 465.]"*

19) The Supreme Court of India, in the case of *Anil Ari v. State of West Bengal*, (2009) 0 Supreme(SC) 204: (2009) 11 SCC 363, had observed as follows:-

"9. *The appellate Court is duty bound 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.

10. *The mere fact that during the trial, they were granted bail and there was no allegation of misuse of liberty, is really not of much significance. The effect of bail granted during trial loses significance when on completion of trial, the accused persons have been found guilty. The mere fact that during the period when the accused persons were on bail during trial there was no misuse of liberties, does not per se warrant suspension of execution of sentence and grant of bail. What really is necessary to be considered by the High Court is whether reasons existed to suspend the execution of sentence and thereafter grant bail.*

11. *In Vijay Kumar v. Narendra and others, (2002) 9 SCC 364 and Ramji Prasad v. Rattan Kumar Jaiswal and another, (2002) 9 SCC 366, it was held by this Court that in cases involving conviction under Section 302 IPC, it is only in exceptional cases that the benefit of suspension of sentence can be granted. In Vijay Kumar's case (supra) it was held that in considering the prayer for bail in a case involving a serious offence like murder punishable under Section 302 IPC, the Court should consider the relevant factors like the nature of accusation made against the accused, the manner in which the crime is alleged to have been committed, the gravity of the offence, and the desirability of releasing the accused on bail after they have been convicted for committing the serious offence of murder.*

12. *The above position was highlighted in Kishori Lal v. Rupa and Others, (2004) 7 SCC 638, Vasant Tukaram Pawar v. State of Maharashtra, (2005) 5 SCC 281, and Gomti v. Thakurdas and Ors. (2007) 11 SCC 160."*

20) From the cases of *Satender Kumar Antil (supra)*, *Devatha Venkataswamy @ Rangaiah (supra)* and *Anil Ari (supra)*, it can be seen that mere pendency of the appeal is not a factor to suspend the sentence. Moreover, the Supreme Court of India had held that the principle of "presumption of innocence" and "bail is the rule and jail is the exception" may not be available to the appellant who has suffered a conviction.

21) Thus, in view of the discussions herein before, the Court is of the considered opinion that the accusation for which the applicant was tried and convicted is grave and therefore, this is not found to be a fit case for suspending the sentence of the applicant and/or to release the applicant on bail.

Therefore, the prayer made in this interlocutory application is rejected. This application is dismissed.

22) Nonetheless, taking into consideration the age of the applicant, a separate order is being passed in the connected appeal, for an out of turn hearing.

JUDGE

JUDGE

Comparing Assistant