

GAHC010289802019



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

I.A.(Crl.)/892/2019
In Crl. Appeal No. 447 of 2019

PRASANNA THAKURIA
S/O UTTAM THAKURIA
R/O NOWAPARA
DEOCHAR
P.S.-BOKO
DIST-KAMRUP
ASSAM

VERSUS

THE STATE OF ASSAM AND ANR
REPRESENTED BY THE PUBLIC PROSECUTOR
ASSAM

2:KANDARPA KUMAR KALITA
S/O LATE BHADO RAM KALITA
R/O NOWAPARA
DEOCHAR
P.S.-BOKO
DIST-KAMRUP
ASSAM -----

Advocate for : MR. B K DAS

Advocate for : PP

ASSAM appearing for THE STATE OF ASSAM AND ANR

BEFORE

HON'BLE MRS. JUSTICE MALASRI NANDI

ORDER

10.01.2023

Heard Ms P Das, learned counsel for the applicant/appellant and Mr B Sarma,

learned Additional Public Prosecutor for the State of Assam.

2. This interlocutory application under Section 389 of the Code of Criminal Procedure, 1973, is filed for suspension of sentence and grant of bail to the applicant/appellant, namely, Prasanna Thakuria, who has been convicted by the learned Special Judge, Kamrup, Amingaon, in Special Sessions Case No. 13 of 2017, vide Judgment and Order dated 05.09.2019 and sentenced to undergo Rigorous Imprisonment for 10 (ten) years and to pay a fine of Rs. 10,000/-, and on default of paying fine, to undergo another period of Rigorous Imprisonment for 10 (ten) months, for the offence under Section 6 of the POCSO Act.

3. The applicant/ appellant has preferred jail appeal. Along with the appeal, the applicant/appellant has filed the present petition, seeking suspension of sentence by stating that the applicant/appellant has been falsely implicated in the case, in view of the fact that as the victim took away Rs. 50/- from his house, he slapped the victim as a result of which, this false case has been instituted.

4. It is also submitted that there is every likelihood of the applicant/ appellant to succeed in the appeal and there is every possibility of the applicant/appellant to be acquitted in this case.

5. Learned counsel for the applicant/appellant next, has submitted that there are lots of infirmities in the impugned judgment and the applicant/appellant has good case on merit in succeeding the appeal. He would submit that the applicant/appellant is the sole bread earner of his family, which consists of his wife and children and his old-aged parents and he has to look after them. He would submit that the applicant/appellant was in jail since 2019, apart from judicial custody, during trial.

6. The learned counsel then submitted that the appeal would not be taken up for hearing in the near future, and, therefore, the applicant/appellant is entitled to suspension of sentence, pending appeal and that the applicant/appellant undertakes to abide by the

conditions imposed by this Court.

7. Per contra, the learned Additional Public Prosecutor has submitted that the applicant/appellant is not entitled to suspension of sentence, taking into consideration the sexual assault upon the victim, who was 9 years old at the time of occurrence.

8. Learned Additional Public Prosecutor also submitted that the testimony of the prosecutrix remained consistent, while giving statement under Section 161 CrPC, before the Investigating Officer and under Section 164 CrPC, before the learned Magistrate and even before the learned trial Court at trial stage.

9. It is also the submission of the learned Additional Public Prosecutor that the evidence of the prosecutrix does not suffer from any sort of material omission and contradiction. There is nothing to disbelieve her. As a settled law, prosecutrix's statement is sufficient for the conviction of the accused person if it is trustworthy and believable. Learned Additional Public Prosecutor has prayed that at this stage, there is no question of suspending the sentence in such a heinous crime.

10. The applicant/appellant has challenged the judgment of the learned Special Judge, Kamrup, Amingaon on various grounds as could be seen from the grounds of appeal. The applicant/appellant has raised a ground that all the witnesses examined by the prosecution are the relatives of the victim and as the applicant/appellant slapped the victim for committing theft of Rs. 50/- from his house, they had enmity with the applicant/appellant. Therefore, in order to prove the charges leveled against the applicant/appellant beyond all reasonable doubts, it was necessary for the prosecution to examine natural and independent witnesses when they were available to them.

11. The other ground raised by the applicant/appellant is that there was no injury found by the doctor on examination of the victim. The medical evidence of PW-7, who is the doctor, shows that she did not find any injury on the private part of the victim.

12. It is also submitted by the learned counsel for the applicant/appellant that the

hymen of the victim was intact and as such, there was no question of committing penetrative sexual assault on the victim.

13. According to the learned counsel for the applicant/appellant, the doctor opined that there was no indication of any sexual abuse, when the child was physically examined.

14. It is also the submission of learned counsel for the applicant/appellant that the victim is aged about 9 years while the appellant is grown up man of 50 years. In such a situation, the act of penetrative sexual assault will have physical repercussions and indications of such an assault would be apparent on the genital/private parts of the victim.

15. In support of her submissions, the learned counsel for the applicant/appellant has placed reliance on the following case-laws:-

- 1) *Rahim Beg & Anr. vs. State of U.P.*; AIR 1973 SC 343.
- 2) *Kashmira Singh vs. The State of Punjab*; AIR 1977 SC 2147.
- 3) *Sh. Satish Mehra vs. Delhi Administration & Anr.*; (1996) 9 SCC 766.
- 4) *Habibur Rahman vs. State of Assam*; 2001 (3) GLT 510.
- 5) *Raju Das vs. State of Assam & Anr.*; (2019) 8 GLR 57.
- 6) *Ranjit Tanti & Ors. Vs. State of Assam & Ors.*; (2020) 2 GLR 499.
- 7) *Ash Bahadur Subba vs. State of Sikkim*; (2022) 05 SIK CK 0004.

16. I have considered the submissions of learned counsel for the parties.

17. The aforesaid grounds raised by the applicant/appellant and referred to before this Court cannot be gone into at this stage as the same would involve arguments coupled with the judicial pronouncements in that regard. Further, the merits of the judgment regarding no injuries on the private parts of the victim, canvassed by the learned counsel for the applicant/appellant also cannot be gone into at this stage.

18. Now, the question which comes for consideration is as to whether the applicant/appellant is entitled to be enlarged on bail by suspending the sentence on pending appeal.

19. It is an admitted fact that the appeal was admitted in the year 2019. The Paper Book has not yet been prepared. This Court finds that due to practical reason, the appeal could not be disposed of expeditiously. At this juncture, it is to be pointed out that time and again, the Hon'ble Supreme Court held that when a convicted person is sentenced to a fixed period of sentence and the appellate Court finds that due to practical reason the appeal cannot be disposed of expeditiously, it can pass appropriate orders for suspension of sentence.

20. In *Bhagwan Rama Sindhe Gosai & Ors. Vs. State of Gujarat*; (1999) 4 SCC 421, the Hon'ble Supreme Court held that when a convicted person is sentenced to a fixed period of sentence and when he files an appeal under any statutory right, suspension of sentence can be considered by the appellate court liberally unless there are exceptional circumstances.

21. In *Union of India vs. Ram Samujh & Anr.*; (1999) 9 SCC 429, the Hon'ble Supreme Court held that the jurisdiction of the Court to grant bail is circumscribed by the Act. The bail can be granted and sentence suspended in a case where there are reasonable grounds for believing that the accused is not guilty of the offence for which he has been convicted and he is not likely to commit any offence while on bail and during the period of suspension of sentence.

22. Where an appeal is preferred against conviction before the High Court, the High Court has ample power and discretion to suspend the sentence. That suspension has to be exercised judiciously depending upon the facts and circumstances of the case. While considering the suspension of sentence, each case has to be considered on the basis of the nature of the offence, the manner in which the occurrence had taken place, whether bail granted earlier had been misused. There was no straitjacket formula which could be

applied in exercising discretion and the facts and circumstances of each case would govern the exercise of judicious discretion while considering an application filed by a convict under Section 389 CrPC.

23. It appears from the record that the applicant/appellant is a resident of Village Nowapara Deochar under Boko Police Station, where the family of the victim also resides. Therefore, there is no apprehension that the applicant/appellant will abscond if he is released on bail. Nothing has been produced by the prosecution to show that the applicant/appellant has absconded during trial and will abscond during the bail period. Though the seriousness or gravity of offence is to be seen in cases where the convict is sentenced to death penalty, life imprisonment or imprisonment for more than 10 years, wherein while considering the application for suspension and bail, the judicial discretion lies in the wisdom of the Court.

24. Right to Life and Liberty of an individual is precious under Article 21 of the Constitution of India and is also a valuable right of an accused/convict, which also continues during the appeal period, as appeal is the continuation of the trial.

25. In view of the above, the prayer of the applicant/appellant is allowed. The sentence imposed on the applicant/appellant in Special Sessions (POCSO) Case No. 13 of 2017, against the applicant/appellant by the learned Special Judge (POCSO), Kamrup, Amingaon, vide order dated 05.09.2019 is suspended, subject to the following conditions:-

- a) The applicant/appellant is directed to be released on bail on his furnishing a bond of Rs. 50,000/- (Rupees Fifty Thousand) only, with two sureties of the like amount to the satisfaction of the learned Special Judge (POCSO), Kamrup, Amingaon
- b) The applicant/appellant on his being enlarged on bail is directed to report before the learned Special Judge (POCSO), Kamrup, Amingaon, on all Mondays and Fridays, at 10:00 am, till the disposal of the appeal, pending before this Court.

- c) The applicant/appellant shall not indulge in any criminal activities during the period of suspension of sentence.
- d) The Officer-In-Charge, Boko Police Station is directed to monitor the applicant/appellant and if they find the applicant/appellant involves in any criminal activities, the Officer-In-Charge, Boko Police Station is at liberty to bring it to the notice of the Court through the Public Prosecutor.
- e) The applicant/appellant shall not leave the jurisdiction of the Court.
- f) In case of violation of any of the above conditions, the prosecution may ask for cancellation of bail.
- g) It is made clear that this Court has not delved into the merits of the appeal.

With the aforesaid observations, this Interlocutory Application stands disposed of.

JUDGE

Comparing Assistant