

GAHC010266302022



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

Case No. : I.A.(Crl.)/837/2022

HARIHAR THAKURIA
S/O PHATIK CH. THAKURIA, VILL.- KHAGRABARI, P.S.- SIMLA, DIST.-
BAKSA, ASSAM, PIN-

VERSUS

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

2:GOPESH DAS
S/O LATE JADAV DAS
VILL.- ROWMARI
P.S.- SALBARI
DIST.- BAKSA
ASSAM
PIN

Advocate for the Petitioner : MR. A CHAUDHURY

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HONOURABLE MRS. JUSTICE MALASRI NANDI

ORDER

Date : 17-10-2023
(M. Zothankhuma, J)

Heard Mr. A Chaudhury, learned counsel for the applicant. Also heard Ms. S Jahan, learned Additional Public Prosecutor appearing for the State respondent.

2. This application has been made under Section 389 Cr.PC to suspend the sentence made in pursuance to the impugned judgment dated 01.12.2022 passed by the learned Special Judge (POCSO), Baksa, Mushalpur in Special (POCSO) Case No. 06/2019, by which the applicant was convicted under Section 366 of the IPC and Section 4 of the POCSO Act. The applicant was sentenced to undergo rigorous imprisonment for 6 (six) years with a fine of Rs.5,000/-, in default to undergo rigorous imprisonment for 3 (three) months under Section 366 IPC. He was also sentenced to undergo rigorous imprisonment for 15 (fifteen) years with a fine of Rs.20,000/-, in default to undergo rigorous imprisonment for 8 (eight) months under Section 4 of the POCSO Act.

3. The applicant's counsel submits that the evidence recorded by the Prosecution Witnesses show that there was a love affair between the applicant and the victim girl. He submits that the victim girl had also been taken into the house of the applicant, wherein she had spent the night there. Further, a marriage proposal had been made by the girl's family, which had been rejected by the family of the applicant. He submits that the above facts go to show that the relationship between the applicant and the victim girl was a consensual relationship. He further submits that the learned Trial Court having not accepted the HSLC Admit Card and the Matriculation Certificate of the victim by discarding them, the learned Trial Court had to rely upon the evidence given by the Doctor to ascertain the age of the victim girl. He submits that as per the Doctor's evidence, the radiological report of the victim showed that she was above 18 years and below 20 years at the time of the incident. As such, the provision of the POCSO Act, 2012 could not be made applicable to the case of the applicant. He accordingly prays that as the age of the victim has not been ascertained in terms of Section 94 of the Juvenile Justice Act (Care and

Protection of Children) Act, 2015, the conviction and sentence of the applicant under the POCSO Act was not justified. He further submits that there was no question of the applicant having kidnapped the victim girl into his house where he lived with his parents and other family members. If it was a case of kidnapping, his family members would have surely been made co-accused.

4. Ms. S Jahan, learned Additional Public Prosecutor, on the other hand submits that the statement of the victim recorded under Section 164 Cr.PC and her testimony before the learned Trial Court are consistent to the effect that she was raped. Further, the age of the victim girl has been taken by the learned Trial Court as below 18 years in terms of the evidence given by the family members of the victim girl. She accordingly submits that the application should be dismissed.

5. We have heard the learned counsels for the parties.

6. The evidence of PW2, i.e., the victim, is to the effect that while the applicant was forcibly taking her on a motorcycle to his house they met a Police Patrolling party, who enquired about their destination as it was late night. The applicant introduced the victim as his sister and told them that they were going to visit Pathsala Hospital. As the applicant had told her to introduce herself as his sister, the victim also introduced herself to the Police as his sister. The victim in her evidence also states that the applicant took her to his home and kept her in his room where he had sexual relationship with her forcefully. On the next day morning, when the applicant went out of the house and she was waiting for his return, the parents of the applicant came to her room and started beating her. PW2 in her examination-in-chief also states that the applicant refused to marry her and hence brought her back to her house. Thereafter, the applicant's father filed a case.

7. In her cross-examination, the victim states that her father, mother, herself, brother, uncle and two aunts, besides the village Secretary went to the house of the applicant on 04.02.2019, to discuss the holding of a marriage between the applicant and the victim girl. However, they learnt that the applicant was going to marry someone else and when the applicant refused to marry the victim, the victim's father lodged a case.

8. The evidence of PW2 is also to the effect that when they had gone to the house of the applicant, they had seen marriage preparation being made in the house of the applicant. However, the cross-examination of PW7, who is the uncle of the victim, is to the effect that when they had gone to the house of the applicant, he did not see any marriage pandal being put up in his house.

9. In her cross-examination, PW1, who is the mother of the victim has stated that "after the occurrence, I came to know from the victim girl that there was love affair between her and the accused".

10. The victim girl in her statement made under Section 164 Cr.PC has stated that a love affair had developed between her and the applicant and though the applicant had often asked her to elope with him, she did not agree to his proposal.

11. A perusal of the impugned judgment passed by the learned Trial Court shows that photo copies of the HSLC Admit Card and HSLC certificate produced by the victim girl showing her date of birth as 20.10.2001 had not been accepted by the learned Trial Court as the originals of the HSLC certificate had not been produced. The HSLC Admit Card was however not accepted by the learned Trial Court in view of the contents of the same not having been proved by the authorities who had issued the said Admit Card. In terms of the said

certificates mentioned above, the victim girl would have been 17 years 6 months on the date of the incident. The learned Trial Court had accepted the age of the victim girl to be 17 years 6 months, by accepting the evidence of the father, sister-in-law, brother-in-law, uncle and the victim herself, despite the fact that in a dispute with regard to age, Section 94 of the Juvenile Justice Act (Care and Protection of Children) Act, 2015 would have to be followed, to determine the age of the victim girl or the accused. In the present case, the Doctor's evidence is to the effect that the age of the victim girl was between 18 years to 20 years, as per the radiological examination conducted on the victim.

12. On considering the above facts and without going too deep into the evidence, we are of the view that the sentence to be undergone by the applicant should be suspended. Accordingly, the sentence to be undergone by the applicant, pursuant to the impugned judgment dated 01.12.2022 passed by the learned Special Judge (POCSO), Baksa, Mushalpur in Special (POCSO) Case No. 06/2019 is suspended. The applicant is allowed to go on bail on furnishing a bail bond of Rs.30,000/- with one surety of the like amount, to the satisfaction of the learned Trial Court.

13. Interlocutory application is accordingly disposed of.

JUDGE

JUDGE

Comparing Assistant