

GAHC040009172022



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

Case No. : IA(Crl)/42/2022

Barun Singh
Age: 44
Occupation :
Address:S/o Rajeshwar Singh

Vill Baghmajuagga
PO and PS Koilabar
Dist. Arah
Bihar
Pin 802163

VERSUS

THE STATE OF AP and Anr.
Age: 0
Occupation :
Address:Represented by the Public Prosecutor
Arunachal Pradesh.
2:Preety Sonar
Age: 0
Occupation :
Address:D/o Sri Raju Sonar

C/o T. Pongtey Laktong area
Changlang.
Post Office Changlan
District Changlang
(A.P)

Advocate for : A Saikia
Advocate for : P P of AP appearing for THE STATE OF AP and Anr.: Advocate ,
appearing for 2, respectively.

**BEFORE
HONBLE MRS. JUSTICE MITALI THAKURIA**

ORDER

Date : 30.01.2024

Heard Mr. A. Saikia, learned counsel for the applicant. Also heard Mr. G. Tado, learned Additional Public Prosecutor for the State respondent No. 1 and Mr. C. Modi, learned Amicus Curiae for the respondent No. 2.

2. This is an application under Section 389 of the Code of Criminal Procedure, 1973 praying for suspension of sentence and to release the accused/applicant on bail during the pendency of the appeal.

3. It is to be mentioned herein that vide judgment and order dated 29.04.2022, the learned Special Judge (POCSO), Khonsa Division, Tirap District, Arunachal Pradesh, in POCSO Case No. 09/2020, convicted the present applicant under Sections 447/365/376-D/511 of the Indian Penal Code *read with* Section 8 of the POCSO Act; and vide order dated 03.06.2022, the learned Special Judge (POCSO), Khonsa Division, Tirap District, Arunachal Pradesh, sentenced the applicant to suffer Simple Imprisonment for 3 (three) months and to pay a fine of Rs. 500/- for the offence under Section 447 of the Indian Penal Code and Rigorous Imprisonment for 7 (seven) years and to pay fine of Rs.

5,000/- for the offence under Section 365 of the Indian Penal Code and further sentenced to undergo Rigorous Imprisonment for 10 (ten) years and to pay fine of Rs. 20,000/- for the offence under Sections 376-D/511 of the Indian Penal Code and in default of payment of fine to undergo Simple Imprisonment for 2 (two) months in addition to above sentence and the sentences to run concurrently.

4. The learned counsel for the applicant, Mr. Saikia, has submitted that a criminal appeal, being CrI. Appeal No. 25(AP)/2022, has already been preferred against the judgment and order, dated 29.04.2022, passed by the learned Special Judge (POCSO), Khonsa Division, Tirap District, Arunachal Pradesh convicting the accused/applicant under Sections 447/365/376D/511 of the Indian Penal Code and the present Interlocutory Application is filed praying for suspension of sentence imposed on the accused/applicant till disposal of the connected appeal and along with a prayer to release the accused on bail.

5. It is submitted that there are lots of contradictions in the evidence of the witnesses, especially the victim girl, who had contradicted her own statement recorded under Section 164 Cr.P.C. and while adducing evidence before the Court as a witness. It is further submitted that the F.I.R. is lodged after a delay of 7 (seven) days without any proper explanation which alone creates a doubt in the entire prosecution case and to base the conviction on the sole testimony of the prosecutrix, the nature of evidence of the victim girl has to be of sterling quality and it is a well settled law that the conviction can be based on the sole testimony of the prosecutrix if it inspires confidence and got support by the other facts and circumstances of the case. But, here in the instant case, the

evidence of the victim is found not consistent and there are sufficient contradictions in the statement made by her at the stage of investigation and while deposing before the Court. He further pointed out that it was the allegation that the victim was lifted over the fencing of the Assam Rifle campus, but from the medical evidence, it is seen that there is no injury mark on her body and it is not possible that there would have no injury if a person is lifted through the barbed fencing wire. That apart, in her statement recorded under Section 164 Cr.P.C., she stated the accused/appellant was wearing a long pant, but in her statement recorded under Section 161 Cr.P.C., she stated that he was wearing a half pant. In the same time, as per her statement under Section 164 Cr.P.C., she utters about 2 (two) Assam Rifle persons, but in her statement recorded under Section 161 Cr.P.C., she utters only the name of the present accused/applicant. Again, in her statement under Section 164 Cr.P.C., she stated that the present accused/applicant did not commit any penetrative sexual assault on her as he was completely drunk, but in her statement under Section 161 Cr.P.C., it is stated by her that the present accused/applicant had committed slight penetrative sexual assault on her. In the same time, she again contradicted her own statement recorded under Section 164 Cr.P.C. and stated that 2 (two) persons committed rape on her one by one. It is further submitted that in her statement under Section 164 Cr.P.C., the victim stated that when her guardian called her, the 2 (two) accused dressed her and pushed her out of the room. But in her statement under Section 161 Cr.P.C., it is stated by her that she was forced to have alcohol after the incident. As per the victim, she sustained injury on her lip, whereas as per her father, i.e. P.W.-2, she had the scar mark on her lip since her childhood.

6. Coming to the age of the victim, it is submitted by the learned counsel for the applicant that as per the Medical Board or opinion of the Doctor, the victim was 16-17 years of age at the time of her examination. But they failed to produce any evidence as to how the medical examination was conducted on her. Rather, from the evidence of the Doctor, i.e. P.W.-11, the Medical Board mentioned the age of the victim as disclosed by her and also did not mention the age of the wound found on her lip at the time of examination. He further submitted that in the case under the POCSO Act, it is the duty of the prosecution to prove the age of the victim. But, here in the instant case, it is seen that the age of the victim is not proved and the prosecution also failed to produce any Birth Certificate or School Certificate or any other document to prove the age of the victim. In that context, the learned counsel for the applicant also relied on a decision of this Court passed by a co-ordinate Bench in **Crl. Appeal No. 124 (J)/2014 (Md. Nasib Hussain Vs. The State of Assam & Anr.)** and emphasized on paragraph No. 16 of the judgment, which reads as under:

"16. while dealing with similarly situated matters regarding the dispute regarding the age of the victim, in a case reported in 2012 SCR 2723, Smti. Kavita v. U.P. & ors., it has been held that the determination of ages in on the realm of being the estimated age on account of scientific exercise. This is the reason, the Hon'ble Apex Court in a case of Jaya Mala v. Home Secretary, AIR 1982 SC 1297, has observed that if the age has been determined by the Doctor, medically, then 3 years have to be added to such assessed age. The judgment has consistently been followed in cases of such nature to give weightage the age of victim so as to appreciating the evidence of minority/majority of the victim in favour of the accused. In addition to that, it is trite that if the girl who is at the verge of majority walks out of her parent's house to go with any man then it could not be a case of kidnapping as the same could not be said to act of taking away or enticing away a woman below 18 years of age. It could be a mere case of elopement. The proposition was laid down by the Hon'ble Apex Court in the case of S. Varadarajan v. State of Madras, Manu/SC/0081/1964, AIR 1965 SC 962."

7. Accordingly, it is submitted by the learned counsel for the accused/applicant that there is an ample chance of success in the appeal, preferred by the applicant, and the applicant has brought good reasons in the connected criminal appeal and accordingly prayed for suspension of the sentence and release of the accused/applicant on bail during the pendency of the connected criminal appeal. Further it is submitted that the accused/applicant is a married man and has 3 (three) children and he is the only bread earner of the family and there is no chance of absconding if the accused is released on bail by suspending the sentence imposed on him.

8. In this context, Mr. G. Tado, learned Additional Public Prosecutor, has submitted that the statement of the victim recorded under Sections 161 & 164 Cr.P.C. as well as her evidence adduced before the Court are consistent and there is no reason to disbelieve the victim girl. Further he submitted that it is not the case of the defence that the victim or her family members had any enmity with the accused to falsely implicate the present accused/applicant along with the co-accused. More so, the victim girl identified the accused persons while conducting the TIP and she made her statement under Section 164 Cr.P.C. accordingly before the learned Magistrate, wherein she brought the clear allegation against the present accused/applicant. He further submitted that the victim was duly examined by Medical Board constituted in that regard, wherein her age was stated to be 16-17 years at the time of examination and more so, as per the father of the victim also, she was 16 years at the time of relevant incident. Her statement also supports the injury she sustained on her lip at the time of relevant incident. He further submitted that as the case falls under the POCSO Act, the presumption under Sections 29 & 30 of the POCSO Act will

come into play and as per Sections 29 & 30 of the POCSO Act, there can be a presumption of committing the offence under the POCSO Act unless the contrary is proved. Unlike the other offence, the accused cannot be presumed to be innocent and the reverse burden is on the defence to prove his innocence. But, here in the instant case, it is seen that the prosecution has been able to prove the foundational facts against the accused/applicant and the defence could not discharge the burden to prove himself to be innocent.

9. The learned Amicus Curiae, Mr. C. Modi, appearing on behalf of the victim, also subscribed the submissions made by the learned Additional Public Prosecutor and further submitted that the learned Court below rightly convicted the accused/applicant under Sections 447/365/376-D/511 of the Indian Penal Code *read with* Section 8 of the POCSO Act. The statement of the victim also remained consistent in her statement recorded under Sections 161 & 164 Cr.P.C. and when she adduced her evidence before the Court. More so, the other witnesses also supported the prosecution version and there are several witnesses who saw the victim girl inside the compound of the Assam Rifle. Accordingly, he submitted that the present Interlocutory Application under Section 389 Cr.P.C. is liable to be dismissed.

10. After hearing the submissions made by the learned counsels appearing for the parties, I have perused the judgment passed by the learned Special Judge (POCSO), Khonsa Division, Tirap District, Arunachal Pradesh as well as the evidence recorded by the learned Court below and the other relevant documents.

11. It is the case of the prosecution that the victim was lifted through the fencing wire while she was in the bathroom for urination and then the 2 (two) accused persons, including the present accused/applicant, tried to commit rape on her. It is the point raised by the learned counsel for the accused/applicant that the victim girl did not sustain any injury while she was lifted through the fencing wire which is not at all possible. But, from the evidence of the victim, i.e. P.W.-1, it is seen that while one person lifted her from their compound and was trying to cross the boundary fencing, the other man was already on the other side, who helped in lifting her through the boundary fencing towards their compound. Thus, in such a situation or circumstances, there may not be any injury if 2 (two) persons lifted the girl, one from each side of the fencing wire. There may be some minor contradiction in the evidence of the P.W.-1, i.e. the victim girl, but she adduced in her evidence as well as in her statement recorded under Sections 161 and 164 Cr.P.C. that both the accused persons, including the present accused/ applicant, lifted her to their compound, undressed her and even tried to commit rape on her. All the contradictions, as raised by the learned counsel for the applicant, may be considered at the time of hearing of the appeal, and accordingly, I do not find it justified to release the accused on bail only on some contradictions as raised by the learned counsel for the applicant.

12. Further, it is the admitted position that no injuries were found on the body of the victim as well as on her private parts, except injury mark on her lower lip, which also corroborates her statement made before the Court. But it is a case under Section 376D/511 of the Indian Penal Code *read with* Section 8 of the POCSO Act, with allegation that there was an attempt to commit rape on her

and in that process, there was slight penetration from one of the accused, and thus, there may not be any possibility of finding any injury on the body of the victim or on her private parts, wherein only attempt was made by the accused/applicant.

13. Coming to the age of the victim, it is seen that as per the Medical Board, the age of the victim was 16-17 years at the relevant time of incident, but those may be considered at the time of the final disposal of the appeal and on that ground only, it cannot be held that there is good chance of acquittal of the present accused/applicant. The judgment, which is relied by the applicant's side, was passed at the appellate stage by the co-ordinate Bench of this Court and not at the stage while considering the Interlocutory Application under Section 389 Cr.P.C. In this context, a judgment of the Hon'ble Supreme Court can be relied on which was reported in **2008 4 Supreme 486 : [2008] 0 AIR (SC) 2889 [Sidharth Vashisht @ Manu Sharma Vs. The State (N.C.T. of Delhi)]**, wherein, in paragraph No. 32 of the judgment, it has been held as under:

"32. In the above cases, it has been observed that once a person has been convicted, normally, an appellate Court will proceed on the basis that such person is guilty. It is no doubt true that even thereafter, it is open to the appellate Court to suspend the sentence in a given case by recording reasons. But it is well settled, as observed in Vijay Kumar 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 all 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, the desirability of releasing the accused on bail after he has been convicted for committing serious offence of murder, etc. It has also been observed in some of the cases that normal practice in such cases is not to suspend the sentence and it is only in

exceptional cases that the benefit of suspension of sentence can be granted.”

14. Here in the instant case also, it is the case of the prosecution that the sexual assault has been committed on the victim, who is stated to be a minor at the relevant time of incident. So, considering the nature of accusation and the other relevant factors of the crime, which is alleged to have been committed by the accused, I find that it is not a fit case wherein the accused can be released on bail by suspending the sentence imposed on him by the learned Special Judge (POCSO), Khonsa Division, Tirap District, Arunachal Pradesh. More so, the submissions made by the learned Amicus Curiae appearing on behalf of the victim/respondent No. 2 that the probability of absconding of the accused/applicant, if he is released on bail, also cannot be denied at this stage. Moreover, the Paper Book is already ready and the case is at the stage of final hearing.

15. In view of above and also considering the entire aspects of the case, this Court is of the view that it is not a fit case where the accused can be released on bail by suspending the sentence and accordingly, the same stands rejected.

16. In terms of above, this Interlocutory Application stands disposed of.

JUDGE

Comparing Assistant