

GAHC010072352024



2024:GAU-AS:11835

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

Case No. : I.A.(CrI.)/347/2024

SHYAM LAKHUWAR @ PAGLU AND ANR.
S/O BISHWANATH LAHUWAR, R/O SAMDANG T.E., 8 NO LINE, P.S.-
DOOMDOOMA, DIST.- TINSUKIA, ASSAM.

2: PINTU TANTI
S/O BIDYADHAR TANRI

R/O RAIDANG T.E.
8 NO LINE KHALA LINE
P.S.- DOOMDOOMA
DIST.- TINSUKIA
ASSAM

VERSUS

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

2:JAYMOTI TANTI
W/O DINESH TANTI

R/O HANSARA TEA ESTATE
7 NO LINE
P.O.- HANSARA
P.S.- DOOMDOOMA
DIST.- TINSUKIA
ASSAM
PIN- 786190

Advocate for the Petitioner : MR. N HASAN, MR. A HASAN,MR. I K BURAGOHAIN

Advocate for the Respondent : PP, ASSAM,

**BEFORE
HONOURABLE MRS. JUSTICE MITALI THAKURIA
ORDER**

28.11.2024

Heard Mr. N. Hasan, learned counsel for the applicant. Also heard Mr. M. P. Goswami, learned Additional Public Prosecutor for State respondent No.1 and Mr. S. Saikia, learned counsel for the respondent No.2.

2. This interlocutory application is filed under Section 389 of the Code of Criminal Procedure, 1973, praying for a stay of the operation of the impugned Judgment and Order dated 17.02.2024, passed by the learned Additional Sessions Judge No. 2 (FTC), Tinsukia, in Sessions Case No. 101(T)/2023 and to allow the applicants to be released on bail.

3. It is submitted by the learned counsel for the petitioner, Mr. Hasan, that the present applicants were convicted under Section 370 of the IPC and sentenced to undergo simple imprisonment (in short, 'S.I.') for 10 (ten) years, along with a fine of Rs. 10,000/- (Rupees ten thousand) only, and in default, to suffer S.I. for another 6 (six) months. From the charge framed by the learned Additional Sessions Judge No.2 (FTC), it is seen that the charge was framed against applicant No. 1, namely Shyam Lakhuwa @ Paglu, under Section 363 of the IPC, and without any alteration of the charge, he was convicted under Section 370 of the IPC without being given an opportunity of hearing regarding the alteration of the charge. However, applicant No. 2 was charged under Section 370 of the IPC and was accordingly convicted under the said section of law.

4. He further submits that the conviction was passed solely on the basis of the evidence of P.W.3, while P.W. Nos. 1 and 2 did not support the prosecution's case; rather, in their cross-examination, they stated before the court that they had no objection if the applicants were acquitted in this case. Thus, the applicants were convicted solely on the basis of the allegations made by P.W.3. He further submits that the IO and other material witnesses were not examined by the prosecution, and thus, the present applicants did not have the chance to contradict the evidence of P.W.3.

5. He also submits that only the statement of P.W.3 recorded under Section 164 of the Cr.P.C. was exhibited, but the FIR, charge framed, medical documents, etc., were not exhibited by the prosecution during the trial. Accordingly, he submits that there is a strong chance of acquittal in this case, and he prays for the release of the applicants, who are still detained in jail, i.e., applicant No. 1 for 404 days and applicant No. 2 for 403 days, by suspending the conviction imposed upon them until the disposal of the connected Criminal Appeal, being Crl.A Case No. 106/2024.

6. In support of his submission, he relies on the decision passed by the Hon'ble Apex Court in the case of **Omprakash Sahni vs. Jai Shankar Chaudhary & Anr.**, reported in (2023) SCC 123, wherein in paragraph 33 of the said judgment, it has been held that;

"33. Bearing in mind the aforesaid principles of law, the endeavour on the part of the Court, therefore, should be to see as to whether the case presented by the prosecution and accepted by the Trial Court can be said to be a case in which, ultimately the convict stands for fair chances of acquittal. If the answer to the above said question is to be in the affirmative, as a necessary corollary, we shall have to say that, if ultimately the convict appears to be entitled to have an acquittal at the

hands of this Court, he should not be kept behind the bars for a pretty long time till the conclusion of the appeal, which usually take very long for decision and disposal.....

7. On the other hand, Mr. Goswami, learned Additional Public Prosecutor has submitted that the P.W.3 has brought clear allegation against the accused/applicants including one Keshar Proja @ Shekhar. It is very evident from the testimony of P.W.3 that both the victims were taken to Tezu, Arunachal Pradesh for labour work and on the basis of the said evidence of the P.W.3, the order of conviction was passed by the learned Additional Sessions Judge No. 2 (FTC), Tinsukia.

8. He further submits that while dealing with Section 389 of Cr.P.C. the Court is not supposed to appreciate the evidence of the P.Ws which may be appreciated at the time of final hearing of appeal. He further relied on the case of **Omprakash Sahni** (supra) and emphasis on paragraph 33 of the said judgment which has also been relied by the learned counsel for the petitioner, wherein it has been held that “.....*However, while undertaking the exercise to ascertain whether the convict has fair chances of acquittal, what is to be looked into is something palpable. To put it in other words, something which is very apparent or gross on the face of the record, on the basis of which, the Court can arrive at a prima facie satisfaction that the conviction may not be sustainable. The Appellate Court should not reappreciate the evidence at the stage of [Section 389](#) of the CrPC and try to pick up few lacunas or loopholes here or there in the case of the prosecution. Such would not be a correct approach*”.

9. Thus, referring to the above-mentioned judgment, he submits that it is not

a fit case in which the accused/applicants can be released on bail by suspending the conviction.

10. In this context, Mr. Saikia, learned counsel for respondent No. 2, has submitted that he has no objection if the accused/applicants are granted bail by suspending the sentence imposed upon them. He further submitted that he had already submitted before the learned Trial Court that he has no objection if the accused/applicants are acquitted of the charges.

11. After hearing the submissions made by the learned counsels for both sides and on perusal of the case record, as well as the annexures annexed with the petition, including the statements of the witnesses and other evidence on record, it is observed that the conviction was based on the testimony of three witnesses, two of whom, P.W. Nos. 1 and 2, did not support the prosecution's case. It is also seen that the most vital documents of the prosecution, i.e., the FIR and the charge-sheet, were not exhibited, and no reasons were assigned by the learned Trial Court for this omission. Moreover, it is an admitted fact that applicant No. 1 was convicted under Section 370 of the IPC despite being charged under Section 363 of the IPC. Thus, it is evident that the charge was altered at the time of passing judgment without giving the applicants an opportunity for a hearing. Therefore, there are *prima facie* materials warranting the allowance of the present petition.

12. Considering the submissions of the learned counsels for both sides, as well as the facts and circumstances on record and the grounds raised in the criminal appeal, I find it appropriate to allow this interlocutory application. Accordingly, the operation of the impugned Judgment and Order dated 17.02.2024, passed by the learned Additional Sessions Judge No. 2 (FTC), Tinsukia, in Sessions Case

No. 101(T)/2023, is hereby stayed/suspended until the disposal of the Criminal Appeal, being Crl.A Case No. 106/2024.

13. Further, it is provided that on furnishing a bond of Rs. 20,000/- (Rupees twenty thousand) only each with one surety of like amount to the satisfaction of the learned Additional Sessions Judge No. 2 (FTC), Tinsukia, the accused/applicants, namely **Shyam Lakhuwar @ Paglu** and **Pintu Tanti**, be enlarged on bail, subject to the following conditions:

- (i) that the applicants shall not leave the jurisdiction of the learned Additional Sessions Judge No. 2 (FTC), Tinsukia, without prior permission.

14. In terms of above, this interlocutory application stands disposed.

JUDGE

Comparing Assistant