

GAHC010075952023



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

Case No. : I.A.(Crl.)/397/2023

RAHIM ALI SHEIKH @ RAHIM ALI @ RAHIMUDDIN TALUKDAR
S/O MD. ATOWAR ALI TALUKDAR @ ALOR ALI SHEIKH, R/O NOONMATI
(THANERCHAR), P.S.- CHAPAR, DIST.- DHUBRI (ASSAM).

VERSUS

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

2:MD. HASHEM ALI MONDAL
S/O ANSER ALI MONDAL

R/O KATHALDI PART- III

P.S.- BILASIPARA

DIST.- DHUBRI (ASSAM)
PIN

Advocate for the Petitioner : MR H R A CHOUDHURY, assisted by MR. I U CHOWDHURY.

Advocate for the Respondent : PP, ASSAM,

**BEFORE
HONOURABLE MR. JUSTICE MANISH CHOUDHURY
HONOURABLE MRS. JUSTICE MITALI THAKURIA
ORDER**

21.08.2024

(M. Choudhury, J)

Heard Mr. H.R.A. Choudhury, learned Senior counsel assisted by Mr. I.U. Chowdhury, learned counsel for the applicant and Ms. B. Bhuyan, learned Senior Counsel & Additional Public Prosecutor for the State assisted by Ms. M. Chakraborty, learned counsel for the opposite party State.

2. The instant application under Section 389[1] of the Code of Criminal Procedure, 1973 ['the Code' or 'CrPC', for short] is preferred seeking suspension of the execution of sentence passed against the applicant and for his release on bail.

3. The applicant as the appellant has preferred the accompanying appeal, being Criminal Appeal no. 164 of 2023 against a Judgment dated 28.02.2023 and an Order on Sentence dated 04.03.2023 passed by the Court of learned Additional Sessions Judge, Bilasipara ['the trial court', for short] in Sessions Case no. 330 of 2014. In the case, Sessions Case no. 330 of 2014, two accused persons viz. [i] Rahim Ali Sheikh @ Rahim Ali @ Rahimuddin Talukdar [A-1], that is, the applicant-appellant; and [ii] Sattar Ali [A-2]; faced the trial. During the course of the trial, the prosecution side examined fifteen witnesses and exhibited six documents, in addition to material exhibits.

4. At the end of the trial, the learned trial court had found both the accused persons guilty of the offences under Section 302, IPC and Section 201, IPC in aid of Section 34, IPC. For the offence under Section 302/34, IPC, the accused persons have been sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 10,000/- [Rupees ten thousand] each, in default of payment of fine, to suffer simple imprisonment for another six months. For the offence under Section 201/34, IPC, they

have been sentenced to undergo rigorous imprisonment for four years and to pay a fine of Rs. 5,000/- [Rupees five thousand] each, with default stipulation.

5. Mr. Choudhury, learned Senior Counsel appearing for the applicant has submitted that the applicant was convicted by the learned trial court primarily on the basis of an extra-judicial confession made by A-1 before P.W.10 and a statement of P.W.9 recorded under Section 164, CrPC. He has submitted that apart from the said two pieces of evidence, there was no other evidence to link the applicant with the alleged homicidal death of the deceased. He has further contended that the statement of P.W.9 recorded under Section 164, CrPC cannot be taken into consideration due to non-compliance of the mandatory prescription contained Section 164, CrPC read with Section 281, CrPC. If this statement is disregarded, only the extra-judicial confession allegedly made before P.W.10 would remain. He has further contended that the circumstances surrounding the alleged extra-judicial confession were doubtful, as none other than P.W.10 had testified to that effect, and P.W.10 is incidentally the father of the other accused, A-2, against whom there are sufficient incriminating materials on record. He has submitted that there are fair chances of acquittal in the appeal preferred by the present applicant-appellant, and therefore, at this stage, the instant application for suspension of execution of the sentence deserves to be allowed. Mr. Choudhury has relied on the decision passed by the Hon'ble Supreme Court in **Nikhil Chandra Mondal vs. State of West Bengal**, reported in **[2023] 6 SCC 605**, wherein, it has been held that the extra-judicial confession is a weak piece of evidence.

6. Ms. Bhuyan, learned Senior Counsel & Additional Public Prosecutor appearing for the State has objected to the instant application by submitting that the circumstances relied upon by the learned trial court to find the applicant guilty have been satisfactorily established by cogent and reliable evidence and the chain was found to be complete. Ms. Bhuyan has contended that the testimony of P.W.8 has

further strengthened the case of the prosecution. In support of her submissions, Ms. Bhuyan has relied on the decisions in [i] **Kishori Lal vs. Rupa and others**, reported in **AIR 2005 SC 1481**; and [ii] **Maghar Singh vs. The State of Punjab**, reported in **[1975] 4 SCC 234**.

7. The FIR was lodged by Hashem Ali Mondal as the informant, before the In-Charge, Salkocha Police Out-Post on 14.06.2012. The informant inter-alia alleged that his niece was murdered by the two accused persons, A-1 and A-2, named in the FIR. The FIR was registered as Chapar Police Station Case no. 207/2012 for the offences under Sections 376/302/201/34, IPC, and the investigation was accordingly commenced.

8. Admittedly, the prosecution's case was resting on circumstantial evidence, as there was no direct ocular evidence. According to the FIR, A-2 considered the father of the deceased as his religious father-in-law. The informant, Hashem Ali Mondal is the younger brother of Md. Ajahar Ali Mondal [P.W.5] who is the father of the deceased. On 07.06.2012, the deceased, Ashbhanu Khatun, the daughter of Md. Ajahar Ali Mondal [P.W.5] was taken to A-2's house along with her two younger brothers. When Md. Ajahar Ali Mondal [P.W.5] visited A-2's house on 12.06.2012, A-2 informed him that the deceased had been missing from his house since the night of 11.06.2012. On 13.06.2012, A-2 lodged a missing report at the Salkocha Police Out Post, which was recorded as General Diary Entry no. 221. It was later revealed, as also mentioned in the FIR, that the body of the deceased was found floating in a tributary of the Brahmaputra River, in front of a temple called Doodhnath Mandir on 14.06.2012.

9. According to the testimony of the Autopsy Doctor [P.W.7] and the Post-Mortem Examination [PME] Report, the deceased's body was found in a decomposed state. Upon perusal of the record, it is seen that there is no material on record indicating that the deceased was last seen alive in the company of A-1 [the present applicant] between the time she went to A-2's house and when her body was found

floating on 14.06.2012. The deceased was known to be missing from A-2's house, where she was staying with A-2's family members and her two younger brothers.

10. Upon going through the testimony of P.W.9 and the statement of P.W.9 recorded under Section 164, CrPC, which is exhibited as Ext.-4, it is noticed that P.W.9's signature is absent in Ext.-4, and P.W.9 also testified to that effect. This statement recorded under Section 164, CrPC appears to be prima facie in violation of the mandatory provisions contained in sub-section [4] of Section 164 read with Section 281, CrPC. If the statement is excluded [Ext-4] from consideration, the only remaining circumstance against the applicant, A-1, is the extra-judicial confession allegedly made by him before P.W.10. P.W.10 testified that this confession was made in presence of villagers. However, apart from P.W.10, the prosecution did not examine any other witnesses to corroborate such version of P.W.10. It is also noticeable that P.W.10 is the father of A-2, from whose house the deceased went missing. According to P.W.10, the alleged extra-judicial confession was made by the applicant, A-1, after he was apprehended by the villagers. However, P.W.10 deposed that he did not see A-1 going to the house of A-2 to take the deceased away from there.

11. In **Maghar Singh** [supra], it has been observed that if the Court believes the witnesses before whom the confession is made and it is satisfied that the confession was voluntary, then in such a case the conviction can be founded on such evidence alone, provided the witness falls in the category of independent witness. In **Nikhil Chandra Mondal** [supra], it has been held that an extra-judicial confession is a weak piece of evidence and where an extra-judicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance. It has been held as well settled that the Court, as a rule of caution, would generally look for an independent reliable corroboration before baring any reliance upon such extra-judicial confession. As previously mentioned, P.W.10 is the father of A-2 and as such, prima facie, he does not appear to fall *stricto sensu*, in the category of independent witness.

12. In such obtaining facts and circumstances of the case, we consider that the applicant has established a prima facie case for suspension of the execution of the sentence. Considering the submissions made by the learned counsel for both sides and also considering the entire circumstances of the case, we find it appropriate to allow this interlocutory application. Accordingly, it is observed that the operation of the sentence passed by the learned Additional Sessions Judge, Bilasipara, Dhubri in Sessions Case no. 330/2014 vide Judgment and Order dated 28.02.2023 and 04.03.2023 shall stand suspended till disposal of the connected appeal, being Criminal Appeal no. 164 of 2023 in so far as against the applicant is concerned.

13. The applicant is hereby allowed to go on bail by executing a bond of Rs. 25,000/- [Rupees twenty-five thousand] only with one surety of like amount to the satisfaction of the learned Additional Sessions Judge, Bilasipara, Dhubri.

14. This interlocutory application stands disposed of in the above terms.

15. It is made clear that the observations made hereinabove are only for the purpose of the consideration of the application of the applicant-appellant seeking suspension of the execution of sentence passed against him and the observations made hereinabove shall not be construed as observations in respect of the merits of the accompanying criminal appeal.

JUDGE

JUDGE

Comparing Assistant