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

Case No. : I.A.(CrI.)/539/2024

PRABIN NARZARY
S/O EUNUS NARZARY,
VILL.- NO. 1 TUKRAJHAR,
P.S.- RUNIKHATA, DIST.- CHIRANG, BTR, ASSAM.

VERSUS

THE STATE OF ASSAM AND ANR
REP BY THE PP, ASSAM

2:AJOY NARZARY
VILL. NO. 1
SALBARI
P.S.- RUNIKHATA
DIST.- CHIRANG
ASSAM

Advocate for the Petitioner : MR. A M BORA, MR. V A CHOWDHURY,MS. C
CHOUDHURY,MR. M S HUSSAIN

Advocate for the Respondent : PP, ASSAM, MR. K P PATHAK (LEGAL AID COUNSEL FOR R-2)

Linked Case : CrI.A./118/2024

PRABIN NARZARY
S/O EUNUS NARZARY

VILL.- NO. 1 TUKRAJHAR

P.S.- RUNIKHATA
DIST.- CHIRANG
BTR
ASSAM.

VERSUS

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

2:AJAY NARZARY
VILL. NO. 1
SALBARI
P.S.- RUNIKHATA
DIST.- CHIRANG
ASSAM.

Advocate for : MR. A M BORA
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM AND ANR.

BEFORE
HONOURABLE MR. JUSTICE SUMAN SHYAM
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

Date : 18/12/2024
Suman Shyam, J

Heard Mr. A.M. Bora, learned senior counsel assisted by Mr. V.A. Chowdhury, learned counsel for the applicant/appellant. We have also heard Ms. B. Bhuyan, learned senior counsel and APP, Assam, assisted by Ms. R. Das, learned counsel, appearing for the State/respondent no. 1. Mr. K.P. Pathak, learned Legal Aid Counsel is present in behalf of the informant/respondent no. 2.

The applicant/appellant herein was made to face trial in connection with Special (PCOSO) Case No. 25/2021 before the Court of the learned Special Judge, POCSO, Chirang at Kajalgaon, in respect of the charges framed under section 376(3)/201/306 of the IPC read with section 6 of the POCSO Act,

2012. On completion of the trial, the applicant was convicted under section 6 of the POCSO Act whereas, he was acquitted in respect of the charge framed under section 306 of the IPC.

Assailing the judgement dated 04/03/2024 and the order dated 07/03/2024 passed by the learned Special Judge, POCSO, Chirang, the applicant, as appellant, has preferred Criminal Appeal No. 118/2024, which is pending disposal before this Court. The applicant is presently in jail. The instant IA has been filed with the prayer to suspend the jail sentence and also to release him on bail.

The prosecution story, in a nutshell, is that the accused had committed rape upon the victim which had prompted her to commit suicide. The said fact was revealed by an SMS allegedly sent by the victim to her boy friend i.e. the PW-1 through her mobile phone just before ending her life. The Police had seized the mobile phone of PW-1 and sent the same for forensic analysis. Based on the report of the Forensic laboratory and the testimony of PW-1, the accused/applicant was convicted under section 6 of the POCSO Act although, the medical evidence in the form of post-mortem report conducted on the dead body of the victim on the very next day of the incident, did not find any trace of sexual assault on her.

By referring to the materials available on record, Mr. Bora, learned counsel for the applicant has argued that the prosecution has failed to establish the fact that the alleged SMS was sent from the mobile phone of the victim. In support of his above statement, Mr. Bora has invited the attention of this Court to the report submitted by the Forensic Laboratory, Directorate of Forensic Science, Assam, to submit that the mobile phone could even be opened since it was pass-word protected and hence, the data could not be extracted therefrom. Moreover, the IO (PW-27) has clearly admitted in his cross examination that he did not find the SIM card in the mobile phone.

If that be so, submits Mr. Bora, this is a case where the prosecution has clearly failed to establish a vital link in the chain of circumstances so as to connect the accused/applicant with the offence charged.

Ms. B. Bhuyan, learned APP, Assam, on the other hand, has strenuously opposed the submission of Mr. Bora and has pointed out that the transcription of the text clearly goes to show that the victim was ravished by the accused. She submits that there is evidence to indicate that the victim was living in the house of the accused around the time when the incident had allegedly occurred. Under the circumstances, it cannot be said that the charges brought against the accused had not been established.

We have considered the arguments made at the Bar and have also gone through the materials available on record.

After a careful scrutiny of the materials available on record, we find that the learned trial Court had acquitted the accused in respect of the charge framed under section 306 IPC. However, the State has not preferred any appeal against the judgement of acquittal.

Be that as it may, in so far as the conviction of the applicant/accused under section 6 of the PCOSO Act is concerned, after *prima facie* examination of the materials on record, more particularly, the fact that the IO has apparently failed to collect evidence to show that the SMS in question, was in fact, sent from the mobile phone of the victim, we find force in the submission of the learned counsel for the applicant that it is doubtful as to whether, the charge brought against the accused under section 6 of the POCO Act could at all be said to have been established, more so, when there is no medical evidence supporting the prosecution story. However, the said aspect of the matter can be conclusively gone into only at the time of hearing of the appeal.

For the reasons stated herein above, we are of the view that this is a fit case where the accused/applicant deserves to be released on bail during the pendency of the appeal.

We, accordingly, direct that the applicant/accused **Prabin Narzary** be released on bail on furnishing a bond of Rs. 50,000/- (Rupees fifty thousand) and two local sureties of like amount to the satisfaction of the learned Special Judge, POCSO, Chirang at Kajalgaon.

We also make it clear that it would be open for the learned Special Judge, POCSO, Chirang to impose any other condition(s) upon the accused/applicant for his release on bail.

Before parting with the case record, we make it clear that the observations made herein above are tentative in nature and have been made purely for the purpose of considering the prayer made in the IA. Such observations shall have no bearing at the time of hearing of the appeal on merit.

IA stands disposed of accordingly.

JUDGE

JUDGE

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Comparing Assistant