

GAHC010157492023



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

Case No. : I.A.(CrI.)/633/2023

BIJIT KALITA @ CHOUDHURY
S/O PRAFULLA KALITA, VILL.- HALOGAON, P.S.- SUALKUCHI, DIST.-
KAMRUP, ASSAM.

VERSUS

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

2: LANKESWAR DAS
S/O LATE BAHURAM DAS

VILL.- RAMDIYA KAMARTOLA
P.S.- HAJO
DIST.- KAMRUP
ASSAM

Advocate for the Petitioner : MR. P HAZARIKA

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE MANISH CHOUDHURY
HONOURABLE MR. JUSTICE KAUSHIK GOSWAMI

ORDER

Date : 24.07.2024

[Manish Choudhury, JJ]

Heard Mr. P.K. Munir, learned counsel for applicant-appellant; Mr. K.K. Das, learned Additional

Public Prosecutor for the opposite party no. 1, State of Assam; and Ms. P.B. Bordoloi, learned Legal Aid Counsel for the opposite party no. 2-informant.

2. The instant application under Section 389[1], Code of Criminal Procedure, 1973 is filed seeking suspension of execution of the sentence passed against the applicant-appellant and for his release on bail. The applicant as the appellant has preferred the accompanying appeal under Section 374[2], CrPC to assail a Judgment and Order dated 16.06.2023 passed against him by the Court of Additional Sessions Judge-cum-Special Judge [POCSO], Amingaon, Kamrup in Special [P] Case no. 14/2016. Two persons including the applicant-appellant, stood in the trial in Special [P] Case no. 14/2016. While the applicant-appellant has been convicted under Section 4, Protection of Children from Sexual Offences [POCSO] Act, 2012, the co-accused person after being acquitted from the charge under Section 4, POCSO Act, 2012, has been convicted under Section 17, POCSO Act. The applicant-appellant has been sentenced under Section 4, POCSO Act to undergo rigorous imprisonment for 20 years and to pay a fine of Rs. 25,000/-, with default stipulation. The co-accused person has been sentenced to undergo rigorous imprisonment for 20 years and to pay a fine of Rs. 25,000/-, with default stipulation.

3. Mr. Munir, learned counsel for the applicant-appellant has submitted that there were inconsistencies in the testimonies of the prosecution witnesses, including the prosecutrix who adduced her evidence as P.W.2. He has specifically raised a point regarding the age of the prosecutrix by making reference to Section 94 of the Juvenile Justice [Care and Protection of Children] Act 2015 ['J.J. Act', for short]. It is his contention that in absence of the documents referred to in sub-clauses [i] and [ii]; of sub-section [2] of Section 94, J.J. Act, the learned Special Court ought to have resorted to the procedure prescribed in sub-clause [iii] of Section 94[2], JJ Act. As age determination of the prosecutrix was not made properly and the prosecution side had failed to produce the birth certificate/matriculation certificate, etc. during the trial, the benefit should have been accorded to the applicant-appellant. It is further contended that the prosecution story, even from a cursory look, appears to be not believable. Mr. Munir has also pointed out certain inconsistencies in the testimony of the prosecutrix, P.W.2 by making reference to her previous statement recorded under Section 164, CrPC.

4. Mr. Das, learned Additional Public Prosecutor appearing for the opposite party no. 1 and Ms. Bordoloi, Legal Aid Counsel appearing for the opposite party no. 2 have opposed the application by submitting, in unison, that during the entire course of the trial, the defence did not raise any serious challenge as regards the age of the prosecutrix. It is further submitted by them that the doctor who examined the prosecutrix, on 28.01.2015, had clearly stated, on the basis of reports of the radiological examination, that the age of the prosecutrix was above 16 years and below 18 years. It is further contended by them that the prosecutrix is found to be consistent right from the stage of recording of her statement under Section 164, CrPC till her deposition before the court on material points. Mere inconsistencies on some immaterial points would not entitle the applicant-appellant for the benefit under Section 389, CrPC in view of the presumptions incorporated in Section 29 and Section 30 of the POCSO Act.

5. We have given due consideration the submissions of the learned counsel for the parties. We have also gone through the materials available in the case records also, for the limited purpose of considering the instant interlocutory application under Section 389[1], CrPC.

6. It needs no iteration that the power exercisable under Section 389, CrPC is different with that of one either under Section 437 or under Section 439 of the Code, pending a trial. The primary reason is that presumption of innocence and bail is the rule and jail is the exception may not be available to the appellant who has suffered a conviction. A mere pendency of an appeal *per se* would not be a factor for a favourable consideration of an application under Section 389, CrPC. One of the essential ingredients of Section 389, CrPC is the requirement for the appellate court to record reasons in writing for ordering suspension of execution of the sentence or order appealed. The requirement of recording reasons in writing clearly indicates that there has to be careful consideration of the relevant aspects and the order directing suspension of sentence and grant of bail should not be passed as a matter of course. In considering the prayer for bail in a case involving serious offence, the court is to consider the relevant factors like the nature of accusations made against the accused, the manner which the crime is alleged to have been committed, the gravity of the offence and the desirability of the accused; to be released on bail after he has been convicted for committing a serious offence.

7. The offence under Section 4, POCSO Act, and Section 376, CrPC are under serious offences inviting punishment from seven years of imprisonment to life imprisonment.

8. Taking note of the above parameters, it is necessary to refer to the testimony of the prosecutrix who was examined as P.W.2. When such testimony of the prosecutrix, P.W.2 is compared with her statement recorded at the earliest point of time under Section 164, CrPC on 29.01.2015, we have found that *prima facie* the prosecutrix was consistent on the material points as regards commission of penetrative sexual assault on her on the date of the incident. From the evidence of the applicant-appellant, who adduced evidence as D.W.1, it has clearly emerged that on the date of the incident, the prosecutrix was taken as a rider in the motor cycle by the applicant-appellant with the aid of the co-accused. From Ext.-6, G.D. Entry, it transpires that after the alleged incident, the prosecutrix appeared at a particular place in a disoriented state and there, she was surrounded by a number of persons resided in that place. What was material were the events which occurred in the interregnum. So far as the events which occurred in the interregnum, there was no eye-witness, save and except the prosecutrix and the applicant-appellant.

9. In so far as the age of the prosecutrix is concerned, the learned Special Court in paragraph 9 of the impugned Judgment has discussed the evidence laid by the prosecution in an elaborate manner. Admittedly, in the case in hand, there was no document like birth certificate/matriculation certificate, etc. Apart from the ocular testimony of the prosecution witnesses, more particularly, the prosecutrix who had stated that she was below 18 years of age, the medical examination report [Ext.-2], goes to indicate that the prosecutrix had undergone radiological examination and the Doctor who examined the prosecutrix, determined her age to be below 18 years, on the basis of the radiological report and the teeth formation. At this stage, the matter whether the accused is entitled to any kind of benefit on that count is a matter of thorough appreciation of the entire evidence/materials on record, which is required to be done at the stage of final hearing.

10. In view of the categorical finding of the learned Special Court to the effect that the age of the victim claimed by the witnesses remain unassailed during the trial, the contention raised in that connection by the learned counsel for the applicant-appellant is considered but is found not acceptable

because of the parameters within which an application under Section 389, CrPC is to be considered. As we have found that the prosecutrix was consistent as regards the incident of sexual assault right from the stage of recording her statement under Section 164, CrPC to her deposition before the trial court, we are of the considered view that the instant application under Section 389, CrPC is bereft of merits. Consequently, the application stands rejected.

11. 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 on merits in respect of the accompanying appeal.

JUDGE

JUDGE

Comparing Assistant