

GAHC010180222023



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

Case No. : I.A.(Crl.) 878/2023
in Crl. A.(J) 103/2023

AJAY DAS
S/O-SRI ANANDA DAS
R/O-VILL-NO.2 GOSSAIGAON
P.S- GOSSAIGAON DIST.-KOKRAJHAR ASSAM

VERSUS

THE STATE OF ASSAM AND ANR
REPRESENTED BY LD. PUBLIC PROSECUTOR
GUWAHATI ASSAM

2:RATNA DUTA
W/O-SANTOSH DUTTA R/O-VILL-NO.2 GOSSAIGAON
P.S.-GOSSAIGAON DIST.-KOKRAJHAR
ASSAM PIN -783360

Advocate for : MS N HASSAN
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM AND ANR

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HONOURABLE MRS. JUSTICE MALASRI NANDI

ORDER

Date : 12.01.2024
(M. Zothankhuma, J.)

Heard Ms. N. Hassan, learned counsel for the applicant/appellant and Ms. S. H. Bora, learned Addl. Public Prosecutor, Assam.

This is an application under Section 389 Cr.P.C. for suspending the sentence awarded to the applicant pursuant to the judgment and order dated 21.12.2022, passed by the learned Special Judge, Kokrajhar in Special Case No. 8/2020, by which the applicant had been convicted under Section 6 of the POCSO Act.

Ms. Hassan, learned counsel for the applicant, submits that the evidence of the doctor, PW8, shows that there was no injury to the body or the private parts of the victim. Further, the hymen of the victim girl being intact, there was no proof that the applicant had raped the minor girl. She submits that the evidence shows that the victim girl had bled from her private parts, a day after the incident. However, if the victim had been raped, she would have bled from her private parts on the date of the incident and not on a subsequent date. She further submits that the framing of charge and conviction of the applicant under Section 6 of the POCSO Act might have been a misnomer, inasmuch as, the victim was 9 years old and she might not have known the actual meaning of the word penetration, while giving her testimony. As such, keeping in view the evidence of the doctor, it could not be said that the penetration had been proved. She also submits that the case at best could have been a case of conviction under Section 8, i.e., sexual assault and not under aggravated penetrative sexual assault, under Sections 5 and 6 of the POCSO Act. She, accordingly, prays that the sentence should be suspended and the applicant should be released on bail.

Ms. S. H. Bora, learned Addl. Public Prosecutor, on the other hand, submits that as the victim girl has vividly given in detail the manner in which the applicant had raped her, there is no reason to doubt the testimony of the victim. Moreover, the victim girl was examined by the doctor after six days of the incident and, as such, though there was no injury seen, any injury mark that might have been there could have disappeared by that time. Ms. Bora, accordingly, submits that the application should be rejected.

We have heard the learned counsels for the parties. The learned Trial Court had

stated in the impugned judgment that prior to recording the evidence of the victim, the learned Trial Court had satisfied itself that the victim was able to give rational answers to the questions put to her on the day her testimony was recorded.

In the case of *State of H.P. -Vs- Manga Singh*, reported in (2019) 16 SCC 759, the Supreme Court has held that merely because there was no rupture of the hymen, it cannot be said that there was no penetration. In a case of rape, it is not necessary that external injury is to be found on the body of the prosecutix.

Section 3 of the POCSO Act defines penetrative sexual assault to mean penetration to any extent and does not give the minimum extent of penetration required, for the act of penetration to come within the provision of Section 3 of the POCSO Act.

Further, in terms of Section 30 of the POCSO Act, 2012, the applicant would have to prove that he was innocent of the accusation, as the culpable mental state of the offence is against the person accused of the crime.

On considering that the act of rape of a minor is a heinous crime and as we do not find anything to doubt the testimony of the victim girl prima facie at this stage, we are not inclined to suspend the sentence. Accordingly, the application is rejected and disposed of.

Any observation and finding made herein shall not be considered to be the final observation and finding of this Court at the time of final hearing of the appeal.

JUDGE

JUDGE

Comparing Assistant