

GAHC010203382023



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

Case No. : I.A.(CrI.)/846/2023

SAIMUDDIN SK
S/O LATE NOSATULLAH SK,
VILL.- SATAGURI, PT- II,
P.S.- BAGRIBARI, DIST.- KOKRAJHAR, ASSAM, PIN- 783348.

VERSUS

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

2:DEBEN BARMAN
S/O LATE TUFAN BARMAN

VILL.- SATAGURI
PT- II

P.O.- MAKRIJHARA

P.S.- BAGRIBARI

DIST.- KOKRAJHAR
ASSAM
PIN- 783349

Advocate for the Petitioner : MR. M U MAHMUD

Advocate for the Respondent : PP, ASSAM

Linked Case : CrI.A./342/2022

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Advocate for : MR. M U MAHMUD
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM AND ANR.

BEFORE
HONOURABLE MR. JUSTICE MANISH CHOUDHURY
HONOURABLE MR. JUSTICE ROBIN PHUKAN

ORDER

Date : 19.04.2024

[Manish Choudhury.J]

Heard Mr. M.U. Mahmud, learned counsel for the applicant-appellant; Ms. S. Jahan, learned Additional Public Prosecutor, Assam for the opposite party-respondent no. 1, State of Assam; and Ms. L. Devi, learned Legal Aid Counsel for the opposite party-respondent no. 2, who was the informant the father of the prosecutrix.

2. The instant application has been preferred by the applicant, who is the appellant in the connected appeal, Criminal Appeal no. 342/2022. The connected appeal, Criminal Appeal no. 342/2022 has been preferred by the applicant as the appellant, against a Judgment and Order dated 23.11.2022 passed in Special Case no. 32/2020 by the Court of learned Special Judge [POCSO], Kokrajhar [‘the trial court’ for short]. By the Judgement and Order dated 23.11.2022, the applicant-appellant has been convicted for the offence under Section 6[1] of the Protection of Children from Sexual Offences Act, 2012 and he has been sentenced to undergo rigorous imprisonment for 20 years and to pay a fine of Rs. 20,000/-, in default of payment of fine, to undergo rigorous imprisonment for another period of 1 [one] year.

3. The instant application is preferred under Section 389[1], CrPC for suspension of execution of the sentence passed against the applicant-appellant by the learned trial court in Special Case no. 32/2020 and for his release on bail.

4. The allegations, against the applicant-appellant for commission of the offence under Section 6, POCSO Act, 2012 was brought by the opposite party no. 2 as the father of the prosecutrix, by way of a First Information Report [FIR] lodged before the Officer In-Charge, Bagribari Police Station on 14.09.2020. In the said FIR, it was inter alia alleged that at about 7-00 p.m. on 12.09.2020, when the prosecutrix went to the applicant’s grocery shop located at a market area the applicant by enticing her, committed sexual assault on the prosecutrix.

5. During the course of the trial, the prosecution side in order to bring home the charge under Section 6 of the POCSO Act, 2012 against the applicant-appellant, examined 11 [eleven] nos of witnesses including the Medical Officer and the Investigating Officer. The mother of the prosecutrix, the prosecutrix and the father of the prosecutrix–informant, were examined as P.W.1, P.W.2 and P.W.3

respectively. The learned trial court after appreciation of the evidence it is entirely reached a finding that the prosecutrix side had been able to bring home the charge beyond all reasonable doubts and, convicted and sentenced the applicant-appellant, in the manner, indicated above.

6. Mr. Mahmud, learned counsel for the applicant-appellant has submitted that there were many inconsistencies and contradictions in the testimonies of the prosecution witnesses including the testimony of the prosecutrix. He has strenuously argued that the alleged incident had occurred on 12.09.2020 but the FIR regarding the alleged incident was lodged after two days on 14.09.2020. By referring to the evidence of P.W.10, who as the Medical Officer had examined the prosecutrix on 15.09.2020, the learned counsel for the applicant-appellant has submitted that the ocular evidence of the prosecutrix is not supported by the medical evidence. He has further submitted that there was no eye-witness to the alleged incident and most of the witnesses were reported witnesses. On the aspect of delay, he has referred to a decision of the Hon'ble Supreme Court of India in, reported in [2020] 12 SCC 630. As regards medical evidence, he has referred to the decision of the Hon'ble Supreme Court in Devatha Venkataswamy vs. Public Prosecutor, High Court of Andhra Pradesh, reported in [2003] 10 SCC 700. It is his submission that in Bhagwan Ram Shinde Gosai and others vs. State of Gujarat, reported in [1999] 4 SCC 421, the Hon'ble Supreme Court of India in para-5 has observed that when a convicted person is sentenced to a fixed period of sentence and when he files an appeal under any statutory right, suspension of sentence can be considered by the appellate court liberally unless there are exceptional circumstances.

7. Opposing the prayer for suspension of execution of the sentence, the learned Additional Public Prosecutor appearing for the opposite party-respondent no. 1 and the learned Legal Aid Counsel appearing for opposite party-respondent no. 2 have submitted that the learned counsel for the applicant has not been able to show any illegality or perversity on the part of the learned trial court in appreciation of the evidence brought on record. In so far as the delay of two days in filing the FIR is concerned, they have submitted that the period of delay in filing the FIR had been sufficiently explained. It has been further submitted that in a case of this nature, it is the testimony of the prosecutrix which is of utmost significance. The aspect regarding the medical evidence is to be read only with the testimony of the prosecutrix and other evidence. If the testimony of the prosecutrix inspires confidence, conviction of the accused can be based upon it.

8. We have considered the submissions of the learned counsel for the parties and have also gone through the materials available on record including the testimonies of the witnesses for the purpose of consideration as to whether the applicant has been able to make out a *prima facie* case for suspension of execution of the sentence.
9. It is true that as per the FIR lodged on 14.09.2020, the alleged incident had occurred on 12.09.2020, meaning thereby, there was delay of two days in reporting the matter to the police by lodging the FIR. The informant was the father of the prosecutrix and in his testimony, when he was examined as P.W.3, he stated that the villagers wanted the matter to be settled at the village-level itself and he had lodged the FIR thereafter. There was no cross-examination of P.W.3 on that aspect by the defence.
10. In the case of *State of Punjab vs. Gurmit Singh and others*, reported in [1996] 2 SCC 384, it has been held that in cases involving sexual harassment, molestation, etc., the court is duty bound to deal with such case with utmost sensitivity. Minor contradictions or insignificant discrepancies in the statements of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. Evidence of the victim of sexual assault is sufficient enough for conviction and it does not require any corroboration unless there are compelling reasons for seeking corroboration. The court may look for some assurance for her statement to satisfy judicial conscience. The statement of the prosecutrix is more reliable than that of an injured witness as she is not an accomplice. The Hon'ble Supreme Court has further held that delay in filing the FIR for sexual allegation may not be properly explained but even then the accused cannot be given any benefit thereon.
11. In so far as the allegation made against the applicant-appellant, the version of the prosecutrix given in the court is found consistent in her previous statements recorded under Section 161, CrPC, under Section 164, CrPC, exhibited as Ext.-2 during the trial. The defence side did not bring out any contradiction as regards the testimony of the prosecutrix with regard to her such previous statements, in the manner required by the Evidence Act and the Code of Criminal Procedure.
12. The learned trial court on the basis of the Birth Certificate of the prosecutrix seized vide Ext.-1, had reached a finding that the date of birth of the prosecutrix was 18.03.2009 and since the alleged incident had occurred on 12.09.2020, the victim was admittedly below 12 years of age on the

date of the incident. The defence during the course of the trial did not raise any objection as regards the date of birth or age of the prosecutrix.

13. We have found on analysis of the testimonies of the prosecution witnesses that in the evening hours on the date of incident, the prosecutrix went to the grocery shop of the applicant-appellant located in a market area, to buy some item. There are sufficient corroboration evidence on the point that the prosecutrix was found inside the grocery shop of the applicant-appellant. After the alleged incident, one of the prosecution witnesses handed over the prosecutrix to her maternal uncle, P.W.6. Though there are some discrepancies as regards handing over the girl either by P.W.4 or by one Akbar to the maternal uncle of the prosecutrix, P.W.6, we are of the considered view that those are contradictions in respect of events which were after the alleged incident and the same does not have any material effect for consideration of an application under Section 389 CrPC. Absence of marks of injuries of the person of the prosecutrix of itself may not be sufficient to draw any inference. Having considered the testimony of the witnesses, more particularly, that of the prosecutrix; the nature of the allegation made regards the manner of the alleged sexual assault; and the time-period after which the prosecutrix was medically examined; the alleged variance between the ocular evidence vis-a-vis the medical evidence is not enough for casting doubt in the prosecution story, of this stage.

14. It is settled that while considering the application for suspension of the execution of the sentence at the stage under Section 389 CrPC, what is to be looked into is whether there is something palpable or apparent 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 while considering an application under Section 389, CrPC. is not supposed to re-appreciate the evidence meticulously to pick up few lacunas or loopholes here and there in the case of the prosecution.

15. After going through the evidence on record, we are not persuaded to agree with the submissions advanced by the learned counsel for the applicant that the evidence against the applicant is weak in nature, as inconsistencies, etc. pointed out are of insignificant nature.

16. After giving consideration to the relevant factors like the nature of accusation, made against the applicant-appellant; the manner of commission of the alleged crime; and the gravity of the offence and the sentence imposed, we are of the considered view that the applicant-appellant has not been able

to made out a prima facie case for granting relief of suspension of execution of the sentence pending disposal of the connected appeal in exercise of the power under Section 389[1] CrPC. Consequently, the application is found bereft of merits and the same is accordingly dismissed.

17. It is, however, made clear that the observations made hereinabove are only for the purpose of considering the prayer for suspension of execution of the sentence and grant of bail to the applicant-appellant and the same shall not be construed as observations made with regard to the merits of the connected appeal.

JUDGE

JUDGE

Comparing Assistant