

GAHC010207652023



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

Case No. : I.A.(CrI.)/883/2023

MD. ABUL KALAM MAZUMDER
S/O LATE SOFIUL RAHMAN MAZUMDER, R/O HARISHNAGAR PT- II, P.S.-
LATLICHERRA, DIST.- HAILAKANDI.

VERSUS

THE STATE OF ASSAM AND ANR.
REP. BY THE LEARNED PUBLIC PROSECUTOR.

2:ANOWAR UDDIN MAZUMDER
S/O LATE MOHIBUR RAHMAN MAZUMDER

R/O VILL. HARISHNAGAR PT- II
P.S.- KATLICHERRA
DIST.- HAILAKANDI

Advocate for the Petitioner : MR M J QUADIR

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

Date : 03.04.2024

1. Heard Mr. A. M. Bora, learned senior counsel assisted by Mr. V. A. Choudhury, learned counsel for the applicant. Also heard Mr. K. Baishya, learned Additional Public Prosecutor for the State as well as Mr. B. U. Laskar, learned counsel for the informant.

2. This application has been registered on filing of an application under Section 389 of the Code of Criminal Procedure, 1973 by the applicant, namely, Md. Abul Kalam Mazumder praying for suspension of sentence imposed on the present applicant by the Judgment dated 28.08.2023 passed by the learned Additional Sessions Judge, Hailakandi in Sessions Case No. 94/2022 whereby the present applicant was convicted under Section 436 of the Indian Penal Code and was sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs.10,000/- only and in the default of payment of to undergo further imprisonment for three months. The aforesaid judgment has been impugned by the applicant by filing a criminal appeal which is registered as Criminal Appeal No. 346/2023.

3. Learned senior counsel for the applicant has submitted that by the impugned judgment, the trial court has convicted the present applicant under Section 436 of the Indian Penal Code for burning the house of the informant. It is also submitted by learned senior counsel for the applicant that though the prosecution side had examined five prosecution witnesses but the trial court mainly relied on the testimony of PW-2 for convicting the present applicant under Section 436 of the Indian Penal Code It is also submitted by the learned senior counsel for the applicant that the PW-2 has deposed during his cross-examination that he had not seen the present applicant setting the house of the informant on fire, and he had only seen three to four persons running away from the house and he could identify the present applicant amongst those three to four persons. However, the learned senior counsel has also submitted that the said testimony of the applicant was contradicted by his earlier statement as the Investigating Officer, who had deposed as PW-5, has stated during his cross-examination that PW-2 had not stated before him that he saw the three to four persons running away and that he could identify the present applicant amongst the said three to four persons.

4. The learned senior counsel for the applicant has also submitted that the

trial court had erred in relying on the testimony of the PW-2 in convicting the present applicant in spite of the fact that his testimony was contradicted by the testimony of PW-5, who is the Investigating Officer. The learned senior counsel for the applicant has further submitted that as the conviction is based on the testimony of only PW-2, which was also contradicted by his previous statement and there is every possibility of the applicant getting a verdict of acquittal in the connected criminal appeal and as the sentence imposed on the present applicant is only for seven years he would be prejudiced if he is not allowed to go on bail during the pendency of the connected criminal appeal.

5. On the other hand, learned Additional Public Prosecutor as well as learned counsel for the informant have submitted that the trial court had rightly convicted the applicant under Section 436 of the Indian Penal Code as the PW-2 has categorically mentioned the name of the present applicant and he has been identified by PW-2, the trial court was not drawn in coming to the finding of guilt of the present applicant under Section 436 of the Indian Penal Code.

6. I have considered the submissions made by the learned counsel for both the sides and have perused the materials available on record.

7. It appears that the trial court has mainly relied upon the testimony of PW-2, who has stated that he had identified the present applicant while he was running away from the house of his father along with three to four persons. However, it also appears that the said testimony was contradicted by the PW-5, who is the Investigating Officer and who deposed that the PW-2 had not stated so before the PW-5 during the investigation.

8. Considering the fact that apparently there appears to be a contradiction in the testimony of the PW-2 which he gave before the trial court there seems to be an arguable case in favor of the present applicant in the connected appeal and also

considering the fact that the applicant has been sentenced only for a duration of seven years and considering the fact that the connected criminal appeal being registered only in the year 2023, there is unlikelihood that same would be heard very soon and, therefore, unless the operation of the impugned judgment is suspended during the pendency of the connected criminal appeal, the applicant would suffer prejudice, if ultimately he is found to be innocent and this appeal is ultimately allowed.

9. For the reasons mentioned above, the operation of impugned judgment dated 24.08.2023 and order dated 28.08.2023 is hereby suspended during the pendency of the connected Criminal Appeal No. 94/2022 and the applicant is allowed to go on bail of Rs.30,000/- (Rupees Thirty Thousand) with one surety of like amount to the satisfaction of learned Sessions Judge, Hailakandi with following condition:-

- (i) That that he shall surrender before the court of learned Sessions Judge, if ultimately the appeal is decided against him;
- (ii) That he shall not indulge in any offence similar to that for which he has been convicted in this case during the pendency of the connected criminal appeal.

10. With the observation, this interlocutory application is disposed of.

JUDGE

Comparing Assistant