

GAHC010212982023



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

Case No. : I.A.(Crl.)/910/2023
in Crl. A. 363/2023

MD. SHAHIL KHAN @ HUSSAIN
S/O LATE JAMIR KHAN,
R/O NO. 2, NIZARAPAR (SALBARI),
P.S.- NOONMATI,
DIST.- KAMRUP (METRO),
ASSAM, PIN- 781020.

VERSUS

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

2:MD. NUR MOHAMMAD ALI
S/O LATE SAMSUDDIN ALI
R/O NO. 2 NIZARAPAR (SALBARI)
P.S.- NOONMATI
DIST.- KAMRUP (METRO)
ASSAM PIN- 781020

Advocate for the Petitioner : MR. S NATH, MD. A MATLIB, MR R DHAR

Advocate for the Respondent : PP, ASSAM, MR S DUTTA (LEGAL AID COUNSEL FOR R-2),

MR. S DUTTA, LEGAL AID COUNSEL FOR R-2

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HONOURABLE MRS. JUSTICE MITALI THAKURIA
ORDER

Date : 18.09.2024

(M. Zothankhuma, J.)

Heard Mr. S. Borthakur, learned counsel for the applicant and Mr. K.

Baishya, learned Addl. Public Prosecutor, Assam. Also heard Mr. S. Dutta, learned Legal Aid Counsel for the respondent No. 2.

2. This is an application under Section 389(2) Cr.P.C. for suspension of execution of the sentence dated 30.08.2023 passed by the learned Session Judge -cum- Special Judge (POCSO), Kamrup (M) in Sessions Case No. 976/2019, arising out of Noonmati P.S. Case No. 776/2017 by which the applicant has been convicted under Section 6 of the POCSO Act, 2012.

3. The applicant's counsel submits that the FIR filed by the informant, who is PW1, i.e., the father of the victim girl, is to the effect that the applicant had committed aggravated penetrative sexual assault on his minor daughter within the last 2/3 months of submitting the FIR.

4. The applicant's counsel submits that though the victim had given her statement under Section 164 Cr.P.C., the victim was not examined as a prosecution witness. He further submits that in terms of Section 118 of the Evidence Act, 1872, all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. He submits that as no finding has been made by the learned Trial Court with regard to whether the victim girl could not adduce evidence by examining the victim girl, the non-examination of the victim girl vitiated the entire trial proceedings. He further submits that as per the evidence of PW7, i.e. Medical Officer, the alleged incident occurred around 10 months prior to 21.11.2017, while the FIR had been filed on

20.11.2017. He submits that in view of the fact that the victim girl had not been examined by the learned Trial Court, the trial being vitiated, the applicant should be released on bail, after the sentence imposed upon the applicant is suspended.

5. Mr. K. Baishya, learned Addl. Public Prosecutor, Assam, on the other hand, submits that the allegation made by the applicant is serious and the learned Trial Court in the impugned judgment and order had held that the mental condition of the victim girl became worse during trial and her evidence could not be recorded by the learned Trial Court. This was also reflected in para 26 of the impugned judgment and order. He also submits that as per the medical examination undergone by the victim girl before PW7, i.e., the Medical Officer, the same showed that there was old tears in the hymen of the victim girl. He further submits that cross-examination of PW7, i.e., the Medical Officer, is to the effect that the mother of the victim girl had narrated to her that the occurrence of the illegal act of the applicant occurred about 10 months back. Further, the mother informed PW7 that the victim girl had been behaving in a restless and irritable way. Further, the mother of the victim girl stated that she did not know as to when the victim girl started behaving in a restless way and when her mental condition was retarded. He submits that as the victim girl had given her statement under Section 164 Cr.P.C., implicating the applicant, which was exhibited by the Magistrate who had recorded the said statement, in the learned Trial Court, there is no infirmity with the conviction of the applicant on the basis of the 164 Cr.P.C. statement.

6. Mr. S. Dutta, learned counsel for the respondent No. 2 echoes the

same argument put forth by the learned Addl. Public Prosecutor.

7. I have heard the learned counsels for the parties.

8. As can be seen from the submissions made by the learned counsels for the parties and the records, the applicant has been basically convicted on the basis of the statement made by the victim girl under Section 164 Cr.P.C., by which the victim girl had implicated the appellant as the person who had committed aggravated penetrative sexual assault on the victim. Thus, in terms of the decision of the learned Trial Court, the victim's statement under Section 164 Cr.P.C. was given by the applicant, when she was in a stable state of mind. However, the learned Trial Court has apparently not taken the evidence of the victim on the ground that the mental condition of the victim became worse during trial to such an extent that her evidence could not be recorded by the learned Trial Court. However, the learned Trial Court has not given the basis for making such a finding. There is no medical document to show that the victim was having any mental disability. There is nothing on record to show that the victim had been produced before the learned Trial Court or that the learned Trial Court had asked the victim girl any preliminary questions or that the victim girl had given any answers to the preliminary questions, to enable the learned Trial Court to come to a finding that the victim was able/not able to give rational answers to questions put forth by the learned Trial Court. Thus, the finding of the learned Trial Court that the victim was not mentally fit to give evidence prima facie cannot be accepted, as the procedure to come to such a finding has not been followed.

9. It is also settled law that the statement made under Section 164 Cr.P.C. is not a substantive piece of evidence and is to be used for the purpose of corroboration. The date of occurrence of the illegal act committed on the victim by the applicant is also contradictory, when considering the alleged date of the incident in the FIR, which is 2 to 3 months prior to the filing of the FIR and the evidence given by PW7, who stated in evidence that the mother of the victim had stated that the incident occurred around 10 months prior to examination of the victim by PW7. It may be stated here that the FIR was filed one day prior to examination of the victim by PW7 and as such, there is a discrepancy with regard to the date of the incident by around 7 to 8 months.

10. On considering all the above, the sentence imposed upon the applicant, in pursuance to the impugned judgment and order dated 30.08.2023 passed by the learned Session Judge -cum- Special Judge (POCSO), Kamrup (M) in Sessions Case No. 976/2019, arising out of Noonmati P.S. Case No. 776/2017, is suspended in terms of Section 389(2) Cr.P.C., in view of the fact that the defence were not able to cross-examine the victim without any finding being made by the learned Trial Court under Section 118 of the Evidence Act, 1872, regarding the victim's ability to testify in Court. Consequently, the applicant is allowed to go on bail of Rs. 50,000/- (Rupees Fifty Thousand) with one surety of like amount to the satisfaction of the learned Trial Court. The applicant should not try to contact the victim or go into the house or compound of the victim at any time. Further, the applicant shall not contact/communicate with the victim in any manner, directly or indirectly. A copy of the Adhar Card and Pan

Card of the applicant should be submitted before the learned Trial Court by the applicant.

11. The I.A. is accordingly allowed and disposed of. However, any observation and finding made in this order shall not be considered to be the final observation or finding of this Court at the time of final hearing of the appeal.

JUDGE

JUDGE

Comparing Assistant