

GAHC010250882023



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

Case : I.A.(CrI.)/1179/2023

NASIR UDDIN @ NASIR ISLAM
S/O ABDUL KARIM @ ABDUL HOQUE
R/O DUBACHURI PART- I
P.S.- BILASIPARA
DIST.- DHUBRI (ASSAM).

VERSUS

THE STATE OF ASSAM AND ANR.
TO BE REP. BY THE P.P.
ASSAM.

2:SAMINA KHATUN
W/O MOHOR ALI
R/O DUBACHURI PART- I
P.S.- BILASIPARA
DIST.- DHUBRI (ASSAM)
PIN- 783348.

Advocate for : MR H R A CHOUDHURY
Advocate for : PP ASSAM appearing for THE STATE OF ASSAM AND ANR.

BEFORE
HONOURABLE MR. JUSTICE SUMAN SHYAM
HONOURABLE MR. JUSTICE ARUN DEV CHOUDHURY

ORDER

Date : 13-05-2024
Suman Shyam, J

Heard Mr. H.R.A. Choudhury, learned Sr. counsel assisted by Mr. A. Ahmed, learned counsel for the appellant. Also heard Ms. S.H. Ahmed, learned Addl. P.P. Assam appearing for the State. None has appeared for the respondent No. 2 despite service of notice.

By the judgment and order dated 12-10-2023 passed by the learned Addl. Sessions Judge, Bilasipara in Sessions Case No. 14/2020, the applicant herein was convicted under Sections 448/ 376/ 506 IPC and sentenced to *inter-alia* undergo rigorous imprisonment for 15 years and also to pay fine.

The applicant is in jail since 12-10-2023. The applicant has assailed the impugned judgment and order dated 12-10-2023 by filing Crl. Appeal No. 447/2023, which is pending disposal before this Court.

The present application under Section 389 Cr.P.C. has been filed with a prayer to suspend the jail sentence of the applicant and release him on bail during the pendency of the appeal.

By referring to the materials available on record, Mr. Choudhury, learned Sr. counsel appearing for the applicant submits that the version of the victim is self-contradictory. According to Mr. Choudhury, no case under Section 376 IPC could be proved based on the evidence on record. Mr. Choudhury further submits that the genesis of the case pertains to a land dispute between the applicant and husband of the victim as well as theft of a mobile phone of the applicant, which was lying in the custody of the victim. In order to avoid prosecution on such count, the applicant has been falsely implicated in this case. Contending that the medical evidence also does not support the version of the victim, Mr.

Choudhury submits that the present is a fit case for the applicant to be released on bail.

Opposing the bail prayer, Ms. Bora, learned Addl. P.P. Assam has argued that the testimony of the victim (PW-4) finds due corroboration from the version of PWs 2 and 3 and therefore, merely because the medical evidence does not support the prosecution case, the same cannot be a ground to doubt the prosecution story, particularly in view of the fact that the victim is a married woman having two children aged about 12/ 13 years. Ms. Bora has prayed for dismissal of the bail petition.

We have considered the arguments made at the Bar and have also gone through the materials available on record. We find that in her statement recorded under Section 164 Cr.P.C. as well as deposition before the court, the victim (PW-4) has specifically alleged that the applicant had committed rape on her. However, from the testimony of the Doctor (PW-5), who had medically examined the victim, it appears that the victim had stated before the Doctor that there was only an attempt to commit rape.

As noted above, medical evidence does not support the prosecution story. We also find that the incident took place on 29-01-2020 but the ejahar was lodged on 02-02-2020. The explanation for the delay is due to holding of a village 'bichar' but we do not find any material on record to show that a village 'bichar', was in fact convened, so as to discuss the matter. Moreover, from a reading of the impugned judgment, it *prima-facie* appears that the learned trial court had shifted the burden of proof upon the defense side, inasmuch as, there are observations to the effect that the defense side has failed to properly cross-examine the witness on certain points, thus establishing the prosecution case.

Whether such observations of the learned trial court are sustainable in the eyes of law would be a matter to be examined at the stage of final hearing of the appeal. However, taking note of the two mutually contradictory version of the prosecution on the basic allegation of rape as well as the allegation that the genesis of the dispute lies elsewhere and also in view of the fact that the medical evidence does not support the prosecution story, we are of the *prima facie* opinion that the arguments of Mr. Choudhury that the charge against his client under Section 376 IPC has not been proved beyond reasonable doubt and deserves consideration by this Court at this stage.

As such, it is hereby directed that the applicant, *viz.* Nasir Uddin @ Nasir Islam be released on bail on furnishing bond of Rs. 30,000/- with one local surety of like amount, to the satisfaction of the learned Addl. Sessions Judge, Bilasipara.

It will be open for the learned Addl. Sessions Judge, Bilasipara to impose any other additional condition(s) for the release of the applicant on bail as may be deemed fit a proper in the facts and circumstances of the case.

Before parting with the record of this case, we make it clear that the observations made hereinabove are purely for the purpose of disposal of the I.A. and are tentative in nature. Such observations would not have any bearing at the stage of final hearing of the connected appeal.

I.A. stands disposed of.

JUDGE

JUDGE

GS

Comparing Assistant