

GAHC010258552023



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

Case No. : I.A.(Crl.)/1177/2023

MUBID ALI @ MD. MOBID ALI
S/O MD. BHOLA ALI
R/O BOLIAGHAT
P.S.- SIVASAGAR IN THE DISTRICT OF SIVASAGAR
ASSAM.

VERSUS

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

2:MOMI BEGUM
W/O MD. GIYASUDDIN ALI

R/O CHINTAMONIGARH
P.S.- GAURISAGAR
IN THE DISTRICT SIVASAGAR ASSAM.

Advocate for : MR. A K BHUYAN
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM AND ANR.

BEFORE
HONOURABLE MR. JUSTICE MANISH CHOUDHURY
HONOURABLE MR. JUSTICE KAUSHIK GOSWAMI

ORDER

Date : 14.08.2024
(Kaushik Goswami, J)

Heard Mr. A.K Bhuyan, learned counsel for the applicant/appellant. Also heard Mr. K.K. Das, learned Addl. PP for the State respondent and Ms. B. Sarma, learned counsel for the opposite party No. 2/informant.

2. This application is preferred under Section 389 of the Code of Criminal Procedure, 1973 seeking suspension of execution of the sentence passed against the applicant/appellant in the Judgment & Order dated 30.09.2023 and for his release on bail.

3. By the aforesaid Judgment & Order dated 30.09.2023, the Addl. Sessions Judge-cum-Special Judge, (POCSO), Sivasagar in Special (POCSO) Case No. 01/2023 convicted the applicant/appellant under Section 6 of the POCSO Act and sentenced the accused thereof to undergo Rigorous Imprisonment for 20 (Twenty) years and also to pay a fine of Rs. 10,000/- (Rupees Ten Thousand) only.

4. Mr. Bhuyan, learned counsel for the applicant/appellant submits that it is evident from the records that the victim girl has not been consistent as regards the allegation of physical relation with the applicant/appellant in the statement made before different authorities at different times. He specifically draws the attention of this Court to the statement made by her before the Child Welfare

Committee to buttress the said point home. He further submits that it comes out clearly from the testimony of the prosecution witness herself that the applicant/appellant and the **victim/PW-1** were in love and when the applicant/appellant married another girl, the **victim/PW-1** alongwith her **mother/PW-2** lodged the instant FIR against the applicant/appellant. He therefore submits that the conviction impugned in the accompanying appeal being totally erroneous, the impugned Judgment & Order of the Trial Court dated 30.09.2023 ought to be suspended and the applicant/appellant be released on bail.

5. He further relied upon the decision of the Apex Court in the case of ***P. Yuvaprakash Vs. State Rep. by Inspector of Police***, reported in **2023 INSC 626** and the decision of the Bombay High Court in the case of ***Ashik Ramjaii Ansari Vs. State of Maharashtra and Another***, reported in **2023 Cri LJ 3633 Bom 1390**.

6. Mr. K.K. Das, learned Addl. PP on the other hand strongly opposes the prayer for suspension of the sentence passed in the Judgment & Order dated 30.09.2023 passed by the Trial Court and the prayer for bail.

7. He submits that the **victim/PW-1** has clearly implicated the applicant/appellant of establishing physical relationship with her without her consent when her mother was in the hospital. He further submits that the said deposition of the **victim/PW-1** is supported by her **mother/PW-2**. He therefore submits that the testimony of the **victim/PW-1** is wholly trustworthy and reliable and therefore, the impugned Judgment & Order dated 30.09.2023 passed by the Trial Court warrants no interference from this Court.

8. Ms. B. Sarma, learned counsel for the opposite party No. 2/informant submits that there is no inconsistency as regards the version of the **victim/PW-1** relating to applicant/appellant establishing physical relation with her without her consent when her **mother/PW-2** was in the hospital.

9. We have gone through the contents of the application preferred by the applicant/appellant under Section 389 Cr.PC and the objection filed to the said application on behalf of the State, apart from the materials/evidence on record available in the case record of Special (POCSO) Case No. 01/2023 and the citations relied by the learned counsels for the parties.

10. Reading of the evidence/materials on record, it is found that the applicant/appellant established physical relation with the **victim/PW-1** by blackmailing her. It further appears that the defence could not prove anything contrary to the same by eliciting any material fact from the mouth of the **victim/PW-1** or by bringing any other witness. It is established as evident from the evidence on record that the offence in this case has been committed against a child of less than 16 years at the time of incident. It further appears that the testimony of the **victim/PW-1** to the fact that when her mother was hospitalized at Dibrugarh because of her gall bladder operation, in absence of other members in their house, the applicant/appellant used to come to their house and used to forcefully establish physical relation with her on number of days is consistent with her statement made under Section 164 Cr.PC and is also supported by her **mother/PW-2**.

11. It is well settled that the Appellate Court at the stage of Section 389 of Cr.PC would not re-appreciate the evidence and would not try to pick up few

lacunas or loop holes here or there in the case of the prosecution. The test is to see as to whether the case presented by the prosecution and accepted by the Trial Court can be said to be a case in which, ultimately the convict stands for fair chances of acquittal. If the answer to the above said question is to be in the affirmative, as a necessary corollary, if ultimately the convict appears to be entitled to have an acquittal at the hands of this Court, he should not be kept behind the bars for a pretty long time till the conclusion of the appeal, which usually takes a long time for decision and to be disposed of. However, while undertaking the said test, to ascertain whether the convict has fair chances of acquittal, what is to be looked into is something palpable. In other words, something which is very apparent or gross on the face of record, on the basis of which the Court can arrive at a prima facie satisfaction that the conviction may not be sustainable.

12. Pertinent that under the provisions of the POCSO Act, 2012, even at the pre-conviction stage, statutory presumption of offence, is drawn against the accused unless the contrary is proved.

13. In the present case, the applicant/appellant was sentenced to undergo rigorous imprisonment for 20 years apart from other punishment under Section 6 of the POCSO Act. Thus, the offence is grave.

14. It appears that, the inevitable conclusion of the evidence/materials available on record are that :-

1. The victim girl was a minor girl below the age 16 years.
2. The applicant/appellant is related to the victim girl.

3. The applicant/appellant forcefully established physical relation with the victim girl.

15. The contention of love affair as contended by the learned counsel for the applicant/appellant cannot be taken into account as the victim was a minor at the time of the incident.

16. Therefore, if the aforesaid test is applied to the facts and circumstances of the present case, we do not find any palpable or apparent error on the face of the record.

17. As such, we are of the considered opinion that this is not a fittest case to suspend the sentence.

18. Thus, the prayer made by the applicant/appellant for suspension of the execution of sentence passed against him and for his release on bail is found bereft of merit.

19. Resultantly the instant application stands dismissed.

20. Needless to clarify that the observation made herein above are only for the purpose of considering the applicant/appellant prayer for suspension of execution of the sentence passed against him and for his release on bail and such observation shall not have any bearing on the merits of the accompanying criminal appeal.

JUDGE

Comparing Assistant