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

Case No. : I.A.(Crl.)/798/2022

MOSTAFIZUR RAHMAN @ MUSTAKIN @ KHUJU
S/O BANISH UDDIN, VILL.- BORABALU, P.O.- HAJIRHAT, P.S.- SUKCHAR,
DIST.- SOUTH SALMARA MANKACHAR, ASSAM, PIN- 783128.

VERSUS

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

2:ABED HUSSAIN
S/O MOFFIUL HOQUE

VILL.- BORABALU

P.O.- HAJIRHAT

P.S.- SUKCHAR

DIST.- SOUTH SALMARA MANKACHAR
ASSAM
PIN- 783128

Advocate for the Petitioner : MR. S C BISWAS, MR P KATAKI,MS. J GHOSH,MRS R BEGUM,MS A BORAH

Advocate for the Respondent : PP, ASSAM, MR A TEWARI, AMICUS CURIAE R2

Linked Case : Crl.A./335/2022

MOSTAFIZUR RAHMAN @ MUSTAKIN @ KHUJU
S/O BANISH UDDIN

VILL.- BORABALU

P.O.- HAJIRHAT

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Advocate for : MR. S C BISWAS
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM AND ANR.

BEFORE

HON'BLE MR. JUSTICE PARTHIVJYOTI SAIKIA

HON'BLE MR. JUSTICE SANJEEV KUMAR SHARMA

O R D E R

12.10.2026

(SK Sharma, J)

Heard Mr. B.K. Mahajan, learned counsel for the applicant/appellant. Also heard Mr. R.R. Kousik, learned PP for the State and Mr. A. Tewari, learned Amicus Curiae for the respondent No. 2.

2. This is an application under Section 480 of the BNSS seeking suspension of the sentence imposed by the learned Trial Court upon conviction of the applicant/appellant under Section 4(2) of the POCSO Act by the impugned judgment dated 14.11.2022 passed by the learned Trial Court whereafter the applicant/appellant was sentenced to undergo R.I. for 20 years and to pay a fine of Rs. 20,000/- only in default, S.I for 6 months.

3. The brief facts are that on 09.09.2019, one FIR was lodged before the O/C Sukchar Police Station, alleging that on 07.09.2019, at 08.00 PM, accused Mostakin S/O: Banezuddin, came near to the tube well of the house of the informant and after threatening his minor sister i.e. S.K. (name not disclosed) who came out of their house, then, took away her to Borobalu LP School and raped her there. It is also stated in the FIR, that, when the victim raised hue and cry, informant and others, caught the accused red handed, but he managed to flee. As they waited for amicable settlement, there was delay in lodging of the FIR.

4. Mr. B.K. Mahajan, learned counsel for the applicant/appellant submits that the prosecution has failed to discharge its basic burden of proof as regards the identity of the perpetrator of the alleged offence.

5. It is submitted that in the FIR, the informant has mentioned the assailant as Md. Mustakin whereas in the chargesheet, Md. Mustakin has not been sent up for trial, and rather, the chargesheet was filed against Md. Mustatizur Rahman, that is the present appellant.

6. It is stated in the FIR that Md. Mustakin had raped the minor daughter of the informant, but in his evidence as PW2, he stated that it was Md. Mustatizur, who was the assailant.

7. The victim PW3 also stated that it was Mustakin who had attacked her and raped her and both PW2 and PW3 stated that there are three brothers, namely, Jamsher(JONGSER), Mustifizur and Mustakin.

PW3 also admitted in her cross-examination that she stated the name as Mustafizur before the Police and as Mustakin before the Magistrate.

8. It is further pointed out that the I.O failed to satisfactorily collect sufficient evidence to establish that the appellant and the alleged assailant are one and the same person, and having failed to prove this foundational fact, the conviction cannot be sustained.

9. It is the further submission of learned counsel that the victim had alleged that the assailant had bitten her on her faceand breasts, and that in cross-examination, she stated that the bite marks lasted for a month, but the M.O., who examined the victim after about 4 days did not find any external injury on the victim, which shakes the credibility of the victim. Furthermore, the medical evidence also does not suggest any recent sexual intercourse having taken

place.

10. Furthermore, as far as the age of the victim is concerned, it is submitted that the I.O failed to collect documentary evidence in the form of any school certificate or birth certificate to prove that the victim was a minor, although she was a student, and the age of the victim was considered only on the basis of the medical evidence, which suggested her age to be in between 14 and a half years to 15 and a half years. Therefore, the prosecution did not present the best evidence in the case by proving the Birth Certificate or School Certificate, and therefore, the age of the victim had not been proved in the mode mandated by the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 (in short 'JJ Act').

11. Learned counsel has also pointed to the evidence of some of the prosecution witnesses which would also indicate that the victim had attained majority at the time of occurrence.

12. Learned Addl. P.P. and learned Amicus Curiae opposing the prayer for suspension of sentence have submitted that the deposition of the victim is also corroborated by eyewitness account of the informant and also the previous statements of the victim before the I.O. and the Magistrate, and therefore, the impugned judgment suffers from no such glaring infirmity which would lead the Court to suspend the sentence pending determination of the appeal.

13. Learned Amicus Curie also submitted to the same effect and further stated that in the absence of other evidence, it is the medical evidence that is to be taken into consideration, and the mere oral versions of some of the witnesses cannot be taken into consideration for the purpose of coming to a conclusion as regards the age of the victim.

14. We have given our anxious considerations to the rival submissions.

15. The Hon'ble Supreme Court in ***Bhagwan Rama Shinde Gosai & Ors. Vs. State of Gujarat***, reported in ***(1999) 4 SCC 421***, wherein it has been held as follows:-

> *"3. 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. Of course, if there is any statutory restriction against suspension of sentence it is a different matter. Similarly, when the sentence is life imprisonment the consideration for suspension of sentence could be of a different approach. But if for any reason the sentence of a limited duration cannot be suspended every endeavor should be made to dispose of the appeal on merits more so when a motion for expeditious hearing of the appeal is made in such cases. Otherwise the very valuable right of appeal would be an exercise in futility by efflux of time. When the appellate court finds that due to practical reasons such appeals cannot be disposed of expeditiously the appellate court must bestow special concern in the matter of suspending the sentence, so as to make the appeal right, meaningful and effective. Of course, appellate courts can impose similar conditions when bail is granted."*

16. The Hon'ble Apex Court in the case of Asif @ Pasha vs. State of U.P & Ors., reported in ***2025 INSC 944*** and ***Jamnalal vs. State of Rajasthan***, reported in ***2025 INSC 935***, after referring to various precedents, has held as follows:-

> *"33. Bearing in mind the aforesaid principles of law, the endeavor on the part of the court, therefore, should be 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 abovesaid question is to be in the affirmative, as a necessary corollary, we shall have to say that, if ultimately the convict appears to be entitled to have an*

acquittal 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 very long for decision and disposal. However, while undertaking the exercise to ascertain whether the convict has fair chances of acquittal, what is to be looked into is something palpable. To put it in other words, something which is very apparent or gross 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 should not reappreciate the evidence at the stage of Section 389 CrPC and try to pick up a few lacunae or loopholes here or there in the case of the prosecution. Such would not be a correct approach."

17. Upon consideration of the rival submissions, there appears to be a significant question as regards the identity of the actual assailant, which goes to the root of the matter and in the event the same is held to be not satisfactorily established, the applicant/appellant would be subjected to grave prejudice if the sentence is not suspended during the pendency of the appeal.

18. Considering the above in the light of the decisions of the Apex Court referred to hereinbefore, we are of the view that the impugned sentence is required to be suspended pending disposal of the appeal.

19. Accordingly, the remainder of the impugned sentence stands suspended pending disposal of the appeal and it is directed that the applicant/appellant be released on bail of Rs. 50,000/- with two sureties of like amount to the satisfaction of the learned Trial Court.

20. The IA stands allowed and disposed of accordingly.

JUDGE **JUDGE**

Comparing Assistant