

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 28th October, 2024

**DIVISION BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE
THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE**

I.A. No.01 of 2024 in CrI.A. No.27 of 2024

Appellant/Petitioner : Sushan Darjee (Hingmang)

versus

Respondent : State of Sikkim

Application under Section 389(1)
of the Code of Criminal Procedure, 1973

Appearance

Mr. Madan Sundas, Advocate (Legal Aid Counsel) for the
Petitioner.

Mr. Yadev Sharma, Additional Public Prosecutor for the State-
Respondent.

ORDER

Meenakshi Madan Rai, J.

1. Heard on I.A. No.01 of 2024 which is an application under Section 389(1) of the Code of Criminal Procedure, 1973 (hereinafter, "Cr.P.C."), filed by the Petitioner/Appellant/Convict, seeking suspension of the sentence imposed on the Petitioner by the Learned Trial Court and his enlargement on Bail. The Prosecution has filed its response to the Bail application.

2. Learned Counsel for the Petitioner submits that an Appeal has been filed before this Court by the Petitioner, assailing the Judgment dated 30-07-2024 and Order on Sentence dated 31-07-2024 of the Court of the Learned Special Judge (POCSO Act, 2012) in S.T. (POCSO) Case No.24 of 2021, whereby the Petitioner was convicted under Section 376(1) of the Indian Penal Code, 1860 (hereinafter, "IPC"). He was sentenced to imprisonment and fine vide the impugned Order on Sentence.

Learned Counsel submitted that an FIR was registered against the Petitioner on 14-05-2021 and he was arrested on 15-05-2021. The victim was allegedly sexually assaulted by the Petitioner on 12-04-2021. On 23-04-2021 when a pregnancy test was carried out by her with the assistance of a Pregnancy Test Kit, she tested positive for pregnancy. Both the Petitioner and the victim then eloped on 12-05-2021 and returned home after three days to complete the customary rites of elopement, but the Petitioner was arrested instead. That, the Petitioner upon his conviction was taken into custody on 30-07-2024 and is presently lodged at the Central Prison, Rongyek. That, the Petitioner has a *prima facie* good case of succeeding in the Appeal as the Prosecution failed to prove its case beyond reasonable doubt, regardless of which the Learned Trial Court pronounced the impugned Judgment on hypothesis and conjectures. That, the Prosecution failed to establish that the victim was a minor. However, the provisions of Section 222(2) of the Cr.P.C. was invoked on the Petitioner convicted by the offence of rape under Section 376(1) of the IPC as the act was consensual and in the absence of proof of age of the victim, the Petitioner could not have been convicted of the offences (*supra*). The Petitioner was twenty-two years of age and both were in fact in a romantic relationship. Besides, the Prosecution failed to establish the case of sexual assault against the Petitioner under Sections 5(j)(ii), 5(l) and 5(q) of the Protection of Children from Sexual Offences Act, 2012, punishable under Section 6 of the same Act read with Sections 376(2)(n), 376(2)(h) and 376(3) of the IPC. That, in the interregnum the victim married another person and the Petitioner now has a wife

and a child of twenty months and he is the only bread winner in his family. That, his wife is from West Bengal and as she is unemployed she would be reduced to vagrancy if the Petitioner continues to be incarcerated. That, he will abide by all conditions imposed by the Court and will not abscond if enlarged on Bail. That, in view of the said circumstances, the Petition be considered and allowed.

3. Learned Public Prosecutor objected to the Petition for Bail and contended that the Petitioner has been found guilty of a heinous offence by the Learned Trial Court and therefore the question of him being entitled to Bail does not arise. That, the Supreme Court in ***Preet Pal Singh vs. State of Uttar Pradesh and Another***¹ had observed that there is a difference between grant of Bail under Section 439 of the Cr.P.C. in case of pre-trial arrest and suspension of sentence under Section 389 Cr.P.C. and grant of Bail, post conviction. That, in the earlier case, there may be a presumption of innocence, which is a fundamental postulate of criminal jurisprudence and the Courts may be liberal, depending on the facts and circumstances of the case, on the ground that Bail is the rule and jail is an exception. That, however, in case of post-conviction Bail, by suspension of operation of the sentence, there is a finding of guilt and the question of presumption of innocence does not arise. The principle of Bail being the rule and jail an exception is not attracted, once there is conviction upon trial. In such a circumstance, Bail is granted only if there are strong and compelling reasons, notwithstanding an order of conviction.

¹ (2020) 8 SCC 645

4. Having given due consideration to the submissions advanced before us, although it is alleged that the relationship was a romantic one and the act alleged to be sexual assault was in fact consensual sex, these issues would be tested when the Appeal is heard. For now we are not inclined to either suspend the sentence or enlarge the Petitioner on Bail.

5. I.A. No.01 of 2024 is accordingly rejected and disposed of.

6. The observations made hereinabove are confined to the purposes of the instant Bail application and shall in no manner be construed as findings on the merits of the Appeal.

7. A copy of this Order be forwarded to the Learned Trial Court for information.

8. Copy of this Order also be made over to the Petitioner through the Jail Superintendent, Central Prison, Rongyek and to the Jail Authority at the Central Prison, Rongyek, for information.

(Bhaskar Raj Pradhan)
Judge
28-10-2024

(Meenakshi Madan Rai)
Judge
28-10-2024

Approved for reporting : **Yes**