

I.A. No. 02 of 2018
 IN
 CrI. A. No. 06 of 2018
 Arun Rai v. State of Sikkim

THE HIGH COURT OF SIKKIM: GANGTOK
(Criminal Appeal Jurisdiction)

 D.B.: THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, ACTING CHIEF JUSTICE
 THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

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IN
Criminal Appeal No. 06 of 2018

Arun Rai,
 Aged about 30 years,
 R/o Sakyong, West Sikkim Upper Onglop,
 Gyalshing, West Sikkim.

**At present Rongyek Jail,
 Gangtok, East Sikkim.**

.... Applicant

versus

State of Sikkim

.... Respondent

**Application under Section 389 of the Code of Criminal
 Procedure, 1973.**

Appearance:

Ms. Gita Bista, Legal Aid Counsel for the Applicant.

Mr. Karma Thinlay, Additional Public Prosecutor.

Mr. Thinlay Dorjee Bhutia, Additional Public Prosecutor.

Mr. S. K Chettri, Assistant Public Prosecutor for the State-
 Respondent.

O R D E R
(09.10.2018)

Bhaskar Raj Pradhan, J

1. On a joint trial conducted of the three convicted persons
 the learned Special Judge, (POCSO), West Sikkim at Gyalshing

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vide judgment dated 09.11.2017 convicted all of them including the present Applicant.

2. An appeal under Section 374(2) of the Code of Criminal Procedure, 1973 (Cr.P.C.) was preferred by the Applicant on 28.03.2018.

3. The present application under Section 389 of the Code of Criminal Procedure, 1973 for suspension of sentence pending the appeal was preferred by the Applicant on 28.03.2018 itself. The Applicant pleads that he is the only earning member of his family consisting of himself, his wife and two minor children who has been in judicial custody since 11.02.2017. The Applicant also pleads that although there was no material against the Applicant he was convicted under Section 8 of the Protection of Children from Sexual Offences Act, 2012 (POCSO) and under Section 506 of the Indian Penal Code, 1860 (IPC). It is pleaded that since the appeal may take considerable time for final disposal he may be released on bail. The Applicant is willing to appear before this Court on every date of hearing and abide by any stringent terms and conditions imposed. The Applicant is also ready to produce reliable sureties to the satisfaction of this Court.

4. On 04.05.2018 the appeal was admitted for hearing.

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5. On 10.05.2018 a reply to the said application was filed by the State-Respondent. The State-Respondent alleges that the offences are heinous and there are sufficient materials against the Applicant who was convicted not only for sexual assault upon the victim but also for criminally intimidating and threatening the victim.

6. On 08.10.2018 the connected matters on the joint request of the parties was listed for hearing on 18.04.2019.

7. Heard Ms. Gita Bista, learned legal aid counsel for the Applicant and Mr. Karma Thinlay Namgyal, learned Additional Public Prosecutor for the State-Respondent.

8. Ms. Gita Bista would point out that the Applicant although not named in the First Information Report (FIR) lodged against the other convicts was charge-sheeted nevertheless by the Investigating Officer in the same case on the basis of a statement of the victim recorded under Section 164 Cr.P.C. pursuant to the FIR lodged against the other two convicts. It is also submitted that the allegation in the statement of the victim recorded under Section 164 Cr.P.C. would reveal that the alleged incident was unconnected with the said FIR lodged against the other convicts. It is submitted therefore, that the entire prosecution against the Applicant was faulty relying upon a Division Bench judgment of

this Court in re: **Taraman Kami v. State of Sikkim**¹ in which it was held that if the Investigating Officer had during investigation of a particular case against a particular person stumbled upon an offence of the like nature committed against the victim by another it was his duty to record the facts stated, treat it as a fresh complaint and carry out investigation into the matter, the alleged offence being independent of the offence being investigated previously.

9. Ms. Gita Bista would also submit that in view of the fact that the connected matters would be listed for hearing only on 18.04.2019 the Applicant may be released on bail as it is causing immense hardship to his family.

10. A bare reading of Section 389 Cr.P.C. makes it evident that during the pendency of an appeal, an Appellate Court has the requisite power to suspend sentence on the Appellant by releasing him on bail. However, this power can be exercised after affording opportunity to the Public Prosecutor in case of offence punishable with death or imprisonment for life or imprisonment for 10 years or more and after recording reasons in writing.

11. The Applicant was convicted by the learned Special Judge for commission of sexual assault upon the victim under Section 8 of the POCSO Act, 2012 and for criminal intimidation and threatening the child under Section 506 IPC on 09.11.2017.

¹ SLR (2017) SIKKIM 781

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Appeal, as stated before was preferred by the Applicant on 28.03.2018 and is yet to be finally disposed of.

12. The Applicant's appeal having been admitted by this Court and pending final disposal it is clear that the conviction of the Applicant by the learned Special Judge is yet to be confirmed by this Court.

13. The learned Special Judge has convicted the Applicant holding that the statement of the victim under Section 164 Cr.P.C. was consistent with the testimony given by the victim before the Court stating that:

“Thereafter I have given my statement in the Court, here in Gyalshing, where I had also told the Madam about Arun Rai, a driver who had also tried to sexually molest me. After I had reported the matter to the police about Khantary and Tshering, Arun Rai had come and threatened me not to inform the police about it.”

14. The learned Special Judge has sentenced the Applicant under Section 8 of the POCSO Act, 2012 to undergo rigorous imprisonment for a term of 3 years and 6 months and to pay a fine of Rs.10,000/- and in default to undergo further imprisonment for a term of 1 year. The learned Special Judge has also sentenced the Applicant to undergo imprisonment for a term of 1 year under Section 506 IPC. It has been directed that both the sentences shall run concurrently.

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15. The learned Special Judge has noted that the Applicant has been under detention since 11.02.2017 and this detention is to be set of as provided under Section 428 Cr.P.C.

16. The Applicant has thus served 1 year 7 months and 28 days out of the total of 3 years and 6 months of imprisonment sentenced upon him. This is not an offence punishable with death or imprisonment for life or imprisonment for 10 years or more.

17. We have considered the gravity of the offence, the nature of the crime as well as the age and family condition of the Applicant as pleaded. The State-Respondent has not placed any adverse material against the Applicant regarding his criminal antecedents or otherwise.

18. In view of the aforesaid, we are of the considered view that the prayer of the Applicant must be granted. We direct pending hearing of the appeal, the order of execution of sentence against the Applicant shall remain suspended and the Applicant be released on bail to the satisfaction of the learned Special Judge, (POCSO), West Sikkim at Gyalshing on a bond of Rs.35,000/- with two sureties of the like amount each. The Applicant shall not travel beyond Sikkim during the pendency of the appeal and attend every date of hearing. The Applicant shall report to the Officer In-charge of the Gyalshing Police Station on every

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Monday of each week during office hours and stay away from the victim. The application is allowed and disposed of.

(**Bhaskar Raj Pradhan**)
Judge
09.10.2018

(**Meenakshi M. Rai**)
Acting Chief Justice
09.10.2018

to/
Approved for reporting: yes.
Internet: yes.