

GAHC010044712023



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

Case No. : Crl.Rev.P./99/2023

JAMAL UDDIN
S/O ABDUL KHALEQUE
R/O VILL- HALDIBARI, PART-II, P.S. MERERCHAR, IN THE DISTRICT OF
BONGAIGAON, ASSAM

VERSUS

THE STATE OF ASSAM AND ANR
REP. BY THE LEARNED PP, ASSAM

2:ABED ALI SHEIKH
S/O SAYED ALI
R/O VILL- HALDIBARI PART-II

P.S. MERERCHAR
IN THE DISTRICT OF BONGAIGAON
ASSA

Advocate for the Petitioner : MR SARFRAZ NAWAZ

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MRS. JUSTICE MITALI THAKURIA

ORDER

Date : 23-03-2023

Heard Mr. S. Nawaz, learned counsel for the petitioner.

Also heard Mr. D. Das, learned Additional Public Prosecutor for the State respondent No. 1.

By this application under section 397 and 401 read with section 482 of the Cr.P.C the petitioner prayed for setting aside the impugned order dated 15.02.2023, passed by the learned Special Judge, North Salmara, Abhayapuri rejecting petitioner's prayer under section 217, Cr.P.C. to allow the defence to cross-examine PW1(victim) and PW2 informant after altering the charge against the petitioner in connection with Special (P) Case No.18 (MCR)/2020.

It is submitted by the learned counsel for the petitioner that the petitioner has statutory right to file a petition under section 217 Cr.PC. for recalling the PW1and PW2 for cross examination after alteration of the charge. It is the fact that PW1 and PW2 were cross-examined by the defence counsel but after alteration of charge immediately on the next date, the petitioner could not file the petition seeking re-cross examination of PW1 and PW2 and prayed adjournment before the Court.

However, on the very next date i.e on 17.08.2022 the petitioner filed a petition before the learned Special Judge to allow the petitioner to recall the PW1 and PW2 for cross examination. Accordingly, it is submitted by the learned counsel for the petitioner that the learned Special Judge not comply with the provision of section 217 Cr.P.C. and rejected the prayer of the petitioner for recalling PW1 and PW2 for cross-examination vide order dated 15.02.2023. Therefore, the petitioner has filed this petition before this Court and submitted that he will be prejudiced and injustice will be caused to the petitioner for the aforementioned impugned order dated 15.02.2023 and hence, prayed for setting aside the same by allowing the present petitioner to recall the PW1 and

PW2 for cross-examination.

In this regard, the learned APP has submitted that the petitioner has statutory right to file a petition under Section 217 Cr.P.C. as the charge is been altered to higher section i.e section 6 of the PCSO Act and the petitioner may be prejudiced if he is not allowed to cross-examine PW1 and PW2. However, considering the delay of disposal, the learned Special Judge, North Salmara, Abhayapuri has passed the order rejecting the prayer for by recalling PW1 and PW2 for cross-examination.

After hearing the submission of learned both sides, I have also perused the care records and order annexed along with the petition, it is seen that on 27.07.2022, the victim and the informant, were duly cross-examined by the learned defence counsel and thereafter considering the materials on evidence charge was altered from Section 4 to Section 6 of the POCSO Act. In the mean time, it is also seen that on the next date, though the petition could not be filed by the petitioner but on the subsequent date i.e on 18.08.2022 the petitioner filed the petition under section 217 Cr.P.C. praying for recalling PW1 and PW2 for cross-examination as the charge altered to a higher section.

The learned Court below while rejecting the prayer observed that the petitioner got ample opportunities to cross-examine PW1 and PW2 and that the alteration of charge is not likely to cause prejudice the petitioner as he already cross-examined PW1 and PW2. And accordingly he rejected the petition with further observation that it is against the interest of justice to allow the accused to recall PW1 and PW2 for cross-examination.

So, it is seen that charge which is altered to section 4 to section 6 of the POCSO Act which is higher and if the petitioner is not allowed to cross-examine PW1 and PW2, prejudiced may be caused to the petitioner as earlier PW1 and

PW2 cross-examined only considering charge under section 4 of the POCSO Act and hence, I find that for proper adjudication of the matter, PW1 and PW2 should be recalled for cross-examination on the basis of petition filed by the petitioner under section 217 of Cr.P.C.

In view of above, the present petition is allowed and disposed of accordingly with further direction to the petitioner that he will cross examine PW1 and PW2 without further delay.

With observations made above, the petition stands disposed of.

JUDGE

Comparing Assistant