

GAHC010097372023



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

Case No. : Crl.Rev.P./183/2023

JON SING ENGTI KATHAR
S/O JOY SING ENGTI KATHAR R/O VILL. BIRLA P.S. DIPHU P.S. DIPHU DIST
KARBI ANGLONG PIN 782460

VERSUS

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

2:ISHTA TERANGPI
D/O INDRAJIT TERANG R/O VILL. RONGNEHANG P.S DIPHU P.S. DIPHU
DIST. KARBI ANGLONG ASSAM PIN 78246

Advocate for the Petitioner : ALHAJJ I UDDIN

Advocate for the Respondent : MR. D DAS(ADDL.PP, ASSAM)

BEFORE
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

JUDGMENT

Date : 12-09-2023

1. Heard Mr. A.I. Uddin, learned counsel for the petitioner and Mr. D. Das, learned Additional Public Prosecutor, Assam, appearing for the State respondent No.1.
2. The petitioner in this case is Jon Sing Engti Kathar and the respondents are the State of Assam and the victim 'X'. The petitioner has filed this criminal revision petition under Section 397 read with

Section 401 of the Code of Criminal Procedure, 1973 (Cr.P.C. for short) read with Article 227 of the Constitution of India challenging the legality and propriety of the order dated 10.04.2023 passed by the learned Special Judge, (POCSO), Karbi Anglong in connection with POCSO Case No. 7 of 2021, corresponding to G.R. Case No. 224/2021, arising out of Diphu P.S. Case No. 118 of 2021 registered u/s 376(3) of the Indian Penal Code, 1860 (IPC for short) read with Sections 6 and 17 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act for short).

3. It is submitted that an FIR was lodged by the respondent No. 2, Ishta Terangpi, Centre Administrator of Centre of Sakhi One Stop Centre, Karbi Anglong contending inter alia that a girl named 'X' (name withheld), aged 15 years was sexually assaulted and mentally tortured by Sri Jackson Kathar alias Jackson Kramsa (petitioner of this case). It is alleged that the mother of the victim 'X' sent her to the house of the accused Sri Jackson Kathar and she too has abetted the accused to commit the offence. The accused frequently committed sexual assault on the victim and impregnated her. When the victim was three months pregnant, the accused and the victim's mother took her to a Pharmacy for abortion. On 1st May, 2021 the accused tried to take the victim back to his house but the victim fled and took shelter in her elder sister's house. The victim informed the KNCA (Karbi Nimso Chingthan Arong) about her plight and implored for help. The President and Secretary of KNCA then apprised the informant about the incident. The informant is respondent No. 2 in this case. As soon as the FIR was registered, investigation commenced and finally charge-sheet was laid against the accused (hereinafter referred to as the petitioner). The victim's mother was also arraigned as an accused and charge-sheet was laid against her. Trial commenced and evidence was recorded. It is submitted that the petitioner repeatedly prayed for bail but his prayer for bail was rejected and he is in custody since 04.05.2021.

4. It is averred that the medical report, the statement of the victim u/s 164 Cr.PC, and the seized article do not support the prosecution case. As the petitioner was in jail since 04.05.2021 he did not have the opportunity to appoint an Advocate of his choice to defend his case in a proper manner. Consequentially the victim who was examined as PW-1 was not properly cross-examined. The prosecution evidence has already been closed and the case is fixed for recording of statement of the petitioner u/s 313 Cr.PC. For a fair verdict, the petitioner filed an application u/s 311 Cr.PC to cross-examine the victim on certain vital points but the prayer of the petitioner was rejected vide order dated 10.04.2023.

5. The learned Addl. P.P., on behalf of respondent No. 1 laid stress in his argument that at the fag-end of this case, the victim may not be re-examined again. On re-examination of the victim the defence may fill-up lacunae.

6. The order dated 10.09.2023, impugned by the petitioner reflects that all the cited witnesses including the victim have already been examined by the prosecution and they were duly cross-examined by the defence. After examination of all the prosecution witnesses, the prayer for re-cross-examination of the victim was made at the fag-end of the trial on 30.03.2023. The defence had sufficient opportunity to cross-examine all the witnesses and all the witnesses were cross-examined at length. It was held by the trial Court that there was no reasonable and satisfactory ground to allow the defence to re-cross-examine the victim, and the prayer for re-examination of the victim u/s 311 Cr.PC was thereby rejected by the learned trial Court.

7. The learned counsel for the petitioner laid stress in his argument that the learned trial Court has erred in law as well as in fact by rejecting the application of the petitioner u/s 311 Cr.PC. The sole ground for rejection of the petition was that all the witnesses were duly cross-examined. It is averred that the Code is clear that u/s 311 Cr.PC, the trial Court can recall the witnesses at any time and at any stage of trial. It is submitted that both the victim as well as the accused are entitled to a fair trial. The plight of the accused that he was in the jail and was unable to appoint a Lawyer for adequate defence

was not taken into consideration. Fair trial is guaranteed under Article 21 of the Constitution of India.

8. The learned Addl. PP and the learned counsel for the OP No. 2 raised serious objection stating that the re-examination will facilitate filling-up of lacunae. It is submitted that the cross-examination depicts that no vital points have been left out or overlooked by the defence counsel while cross-examining PW-1.

9. The learned counsel for the petitioner relied on the decision of the Hon'ble Supreme Court in *Zahira Habibulla H. Sheikh and Another vs State of Gujarat and Others* reported in (2004) 4 SCC 158, wherein it has been observed that:-

“Ultimately, as noted above, ad nauseam the duty of the court is to arrive at the truth and subserve the ends of justice. Section 311 of the Code does not confer on any party any right to examine, cross-examine and re-examine any witness. This is a power given to the court not to be merely exercised at the bidding of any one party/person but the powers conferred and discretion vested are to prevent any irretrievable or immeasurable damage to the cause of society, public interest and miscarriage of justice. Recourse may be had by courts to power under this section only for the purpose of discovering relevant facts or obtaining proper proof of such facts as are necessary to arrive at a just decision in the case.”

10. The respondents have relied on the decision of Hon'ble the Supreme Court in *State (NCT of Delhi) v. Shiv Kumar Yadav and Another*, reported in (2016) 2 SCC 402, wherein it has been observed that:-

“27. It is difficult to approve the view taken by the High Court. Undoubtedly, fair trial is the objective and it is the duty of the court to ensure such fairness. Width of power under Section 311 Cr.PC is beyond any doubt. Not a single specific reason has been assigned by the High Court as to how in the present case recall of as many as 13 witnesses was necessary as directed in the impugned order. No fault has been found with the reasoning of the order of the trial court. The High Court rejected on merits the only two reasons pressed before it that the trial was hurried and the counsel was not competent. In the face of rejecting these grounds, without considering the hardship to the witnesses, undue delay in the trial, and without any other cogent reason, allowing recall merely on the observation that it is only the accused who will suffer by the delay as he was in custody could, in the circumstances, be hardly accepted as valid or serving the ends of justice. It is not only matter of delay but also of harassment for the witnesses to be re recalled which could not be justified on the ground that the accused was in custody and that he would only suffer by prolonging of the proceedings. Certainly recall could be permitted if essential for the just decision but not on such consideration as has been adopted in the present case. Mere observation that recall was necessary “for ensuring fair trial” is not enough unless there are tangible reasons to show how the fair trial suffered without recall. Recall is not a matter of course and the discretion given to the court has to be exercised judiciously to prevent failure of justice and not arbitrarily. While the party is even permitted to correct its bona fide error and may be entitled to further opportunity even when such opportunity may be sought without any fault on the part of the opposite party, plea for recall for advancing justice has to be bona fide and has to be balanced carefully with the other relevant considerations including uncalled for hardship to the witnesses and uncalled for delay in the trial. Having regard to these considerations, we do not find any ground to justify the recall of witnesses already examined.

29. We may now sum up our reasons for disapproving the view of the High Court in the present case:

(i) The trial court and the High Court held that the accuse had appointed counsel of his choice. He was facing trial in other cases also. The earlier counsel were given due opportunity and had duly conducted cross-examination. They were under no handicap;

- (ii) No finding could be recorded that the counsel appointed by the accused were incompetent particularly at the back of such counsel;
- (iii) Expeditious trial in a heinous offence as is alleged in the present case is in the interests of justice;
- (iv) The trial court as well as the High Court rejected the reasons for recall of the witnesses;
- (v) The Court has to keep in mind not only the need for giving fair opportunity to the accused but also the need for ensuring that the victim of the crime is not unduly harassed;
- (vi) Mere fact that the accused was in custody and that he will suffer by the delay could be no consideration for allowing recall of witnesses, particularly at the fag end of the trial;
- (vii) Mere change of counsel cannot be ground to recall he witnesses;
- (viii) There is no basis for holding that any prejudice will be caused to the accused unless the witnesses are recalled;
- (ix) The High court has not rejected the reasons given by the trial court not given any justification for permitting recall of the witnesses except for making general observations that recall was necessary for ensuring fair trial. This observation is contrary to the reasoning of the High Court in dealing with the grounds for recall i.e. denial of fair opportunity on account of incompetence of earlier counsel or on account of expeditious proceedings;
- (x) There is neither any patent error in the approach adopted by the trial court rejecting the prayer for recall nor any clear injustice if such prayer is not granted.”

11. I have considered the ratio of the decisions of the Hon’ble Supreme Court in *Shiv Kumar Yadav’s* case (*supra*). The High of judiciary at Delhi had allowed 13 witnesses to be re-examined for the sake of ensuring fair trial which indeed appears to be cumbersome. In the instant case the petitioner has prayed to cross-examine only one witness. I have perused the evidence of the victim who deposed as PW-1. This deposition of the victim is marked as Annexure-9. It is true that this case is at the fag-end of the trial. As per Section 311 of the Cr.PC “*any Court may, at any stage of enquiry, trial or other proceeding summon any person as a witness, or recall and re-examine any person already examined, if the evidence of such person appears to it to be essential to the just decision of the case*”. Even in *Shiv Kumar Yadav’s* case (*supra*) it has been observed by the Hon’ble Supreme Court that certainly recall could be permitted if essential for the just decision.

12. In the instant case, it appears that the petitioner’s prayer cannot be ignored just because this case is at the fag-end of the trial. The petitioner is also entitled to a fair trial. His prayer is very limited. His contention is that the victim was not cross-examined on her statement u/s 164 Cr.PC or on the medical report. For the interest of justice, the prayer of the petitioner to cross-examine the victim only on her statement u/s 164 Cr.PC and on her medical report is allowed. The cross-examination is to be limited only to the point of statement of the victim u/s 164 Cr.PC and on the Medico Legal Report of the victim.

13. With these observations, the petition is disposed of.

JUDGE

Comparing Assistant