

GAHC010128502023



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

Case No. : Crl.Rev.P./237/2023

ASKAR ALI TALUKDAR
S/O LATE HAJI TOSIR ALI TALUKDAR
PERMANENT R/O HILL VIEW, MARGHERITA, P.O. AND P.S. MARGHERITA,
DIST. TINSUKIA, ASSAM

VERSUS

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

2:MD. MAHIBUL ISLAM
S/O LT. NURUDDIN ISLAM
R/O HILL VIEW
MARGHERITA
P.S. MARGHERITA

DIST. TINSUKIA
ASSAM
PIN-78618

Advocate for the Petitioner : MR. S BORTHAKUR

Advocate for the Respondent : PP, ASSAM

**BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI**

ORDER

Date : 14.06.2023

Heard Mr. S. Borthakur, learned counsel for the petitioner. Also heard Mr. D.P. Goswami, learned Additional Public Prosecutor for the State/respondent.

2. The petitioner as accused in POCSO Case No. 172/2022 pending in the court of learned Additional Sessions Judge-cum-Special Judge(POCSO), Tinsukia has filed an application under Section 397/401 Cr.P.C. r/w Section 482 Cr.P.C. praying for setting aside the impugned order dated 02.06.2023 passed by the learned Additional Sessions Judge-cum-Special Judge(POCSO), Tinsukia, wherein the learned Special Judge(POCSO) has rejected the petition which was preferred by the accused/petitioner under Section 311 Cr.P.C. r/w Section 137 of the Indian Evidence Act.

3. The case of the petitioner is that on 14.01.2022 at about 10.00 p.m., the respondent No. 2 lodged an FIR before the Officer-in-charge, Margherita Police Station stating *inter alia* that on the same day, the accused/petitioner at his motor garage had committed rape upon his minor daughter aged about 14 years. On receipt of the FIR, a case was registered vide Margherita Police Station Case NO. 15/2022 under Section 376(3) IPC r/w Section 4 of POCSO Act. On completion of investigation, charge-sheet was submitted against the accused/petitioner under the aforementioned provision of law. Accordingly, cognizance was taken and charge was framed by the learned Special Judge(POCSO), Tinsukia and trial was going on. All the prosecution witnesses were examined in the case and the statement of the accused/petitioner was also recorded. After hearing the argument of the learned counsel of both sides, the case was fixed for judgment on 02.06.2023. Thereafter, the petitioner filed a petition under Section 311 Cr.P.C. praying for calling three witnesses as court

witnesses so as to enable the court to know and ascertain the real facts of the case. But the said petition was rejected by the learned trial court.

4. The learned counsel for the petitioner has submitted that the learned trial court has not considered the materials available in the case record as three witnesses whom the petitioner desired to call as court witnesses have vital role in the case. But the learned trial court without going into the aspect of the matter mechanically passed the impugned order by rejecting the prayer of the petitioner.

5. According to the learned counsel for the petitioner, as per sketch map vide Ext.7, the incident occurred adjacent house of the three witnesses i.e. Md. Sahid Iqbal, Md. Rustam Moulana and Md. Altab Ansari. But they were not examined by the investigating officer and their testimonies are necessary to come just and fair finding of the learned trial court as such, the impugned order dated 02.06.2023 is liable to be set aside.

6. In support of his submissions learned counsel for the petitioner has placed reliance on the following case laws –

(i) (2021) vol.3 SCC 661 V.N. Patil vs. K. Nirajan Kumar & Ors.

(ii) (2013) vol.14 SCC 461 Rajaram Prasad Yadav vs. State of Bihar & Anr.

(iii) 1991 Supp(1) SCC 271 Mohanlal Shamji Soni vs. Union of India and Anr.

7. On the other hand, the learned Additional Public Prosecutor for the State has submitted that the learned trial court after considering the facts and circumstances of the case has passed the impugned order by rejecting the petition for examining the witnesses under Section 311 Cr.P.C. It is also submitted that at the time of recording the statement of the accused/petitioner under Section 313 Cr.P.C. on being asked the accused replied that he did not

have any witness to be examined in the case. Under such backdrop, the petitioner has filed this application to examine some witnesses only to fill up the lacunae which cannot be entertained by this Court.

8. I have considered the submissions made by the learned counsel for the parties. I have also perused the order passed by the learned trial court dated 02.06.2023.

9. Section 311 Cr.P.C., power to summon material witness or examine person present which reads as follows-

Power to summon material witness, or examine person present.- Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

10. The nature and extent of the power vested in the Courts under Section 311 Cr.P.C. to recall witnesses was examined by Hon'ble Supreme Court in ***Hanuman Ram v. The State of Rajasthan & Ors. (2008) 15 SCC 652***, it was held that the object underlying Section 311 was to prevent failure of justice on account of a mistake of either party to bring on record valuable evidence or leaving an ambiguity in the statements of the witnesses. The Court observed:-

“This is a supplementary provision enabling, and in certain circumstances imposing on the Court, the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the Court should be exercised, or with regard to the manner in which it should be exercised. It is not only the

prerogative but also the plain duty of a Court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the Court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the Section merely because the evidence supports the case of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquires and trials under the Code and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind."

11. In **Mohanlal Shamji Soni vs. Union of India and Another**(supra), it was observed that it is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to

establish its respective case by adducing the best available evidence and the Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their sides. It is the duty of a Court not only to do justice but also to ensure that justice is being done.

12. It was further held that the second part of the Section does not allow for any discretion but it binds and compels the Court to take any of the aforementioned two steps if the fresh evidence to be obtained is essential to the just decision of the case. It was emphasized that power is circumscribed by the principle that underlines Section 311 cr.P.C., namely, evidence to be obtained should appear to the Court essential to a just decision of the case by getting at the truth by all lawful means. Further, that the power must be used judicially and not capriciously or arbitrarily. It was further observed that evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties and the discretion of the Court must obviously be dictated by exigency of the situation and fair play and good sense appear to be the safe guides and that only the requirement of justice command the examination of any person which would depend on the facts and circumstances of each case.

13. Reverting back to the present case, it appears from the record that the trial was commenced by framing of charge and on 28.10.2022 first witness i.e. P.W.1 was examined. Then after closer of the evidence, the statement of the accused/petitioner was recorded under Section 313 Cr.P.C. on 03.05.2023 and the learned trial court in question No. 26 asked the accused/petitioner whether he would like to adduce any evidence in support of his defence and the accused/petitioner replied negative. Subsequently, after hearing the argument of both the parties, when the case was fixed for judgment, the petitioner filed the petition under Section 311 Cr.P.C. before the learned trial court stating that

as the incident took place in the garage and the three witnesses Md. Sahid Iqbal, Md. Rustam Moulana and Md. Altab Ansari are adjacent neighbor as such, their examination in the case are required for fair adjudication of the case.

14. I have perused the evidence of the witnesses including the victim. It reveals that the victim stated in her evidence that the incident occurred in a garage but the victim did not state that any person had witnessed the incident. The investigating officer was examined before the learned trial court as P.W. 12. According to him(P.W.12), he visited the place of occurrence and there was no eye witness with the alleged incident of rape on the victim as such, he did not record the statement of Md. Sahid Iqbal, Md. Rustam Moulana, Md. Altab Ansari and Md. Kamal Amhed as mentioned in Ext. 7. According to the investigating officer, during investigation, he could come to know that Aftab had seen the victim when she got down from the vehicle and then he had taken her home.

15. As per evidence of the witnesses, it reveals that there is no eye witness to the incident. The investigating officer also did not find any eye witness to the incident.

16. Under such backdrop, I do not think it proper to interfere in the impugned order dated 02.06.2023 passed by the learned Additional Sessions Judge-cum-Special Judge(POCSO), Tinsukia in POCSO Case No. 172/2022. Accordingly, the petition is dismissed.

JUDGE

Comparing Assistant