

GAHC010204972023



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

Case No. : Crl.Rev.P./562/2023

SHAHADAT ALI @ SAHINUR
S/O MAJIBAR ALI
R/O VILL- CHAKLA
P.S. ABHAYAPURI
DIST. BONGAIGAON, ASSAM

VERSUS

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

2:SRI MOKBUL ALI
S/O KURBAN ALI
R/O VILL- NOWAGAON
P.S. MANIKPUR
DIST. BONGAIGAON
ASSA

Advocate for the Petitioner : MR. M I HUSSAIN

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI

ORDER

22.12.2023

Heard Mr. MI Hussain, learned counsel for the petitioner. Also heard Mr. B Sarma, learned Additional Public Prosecutor, Assam for the State respondent.

This petition has been preferred by the petitioner under Sections 397/401 read with Section 482 Cr.P.C. against the order dated 16.06.2023 passed by the learned Special Judge(P), Bongaigaon in Special(P) Case No. 61(M)/22 whereby the petition No.1161/23 dated 17.05.2023 filed under Section 311 Cr.P.C. was rejected.

Learned counsel for the petitioner has submitted that on 23.02.2023 the victim girl was examined and cross-examined. But the victim girl could not be examined properly by the engaged counsel and, hence, the accused person i.e. the present petitioner on being dissatisfied had changed the engaged counsel. The newly engaged counsel filed a petition on 17.05.2023 before the trial court under Section 311 Cr.P.C., with a prayer to allow him to further cross-examine the PW-1 i.e. the victim girl and submitted the probable questions before the trial court which are required to be put during cross examination. The trial Court fixed the matter on 03.06.2023 for hearing of the petition and after hearing the matter on 03.06.2023 fixed the matter on 16.06.2023 for necessary order. The trial court vide order dated 16.06.2023 rejected the petition filed by the petitioner under Section 311 Cr.P.C.

It is further submitted by the learned counsel for the petitioner that the learned trial court has miserably failed to appreciate the relevant law and facts from its proper perspective and without considering the hardship of the petitioner, passed the impugned order on 16.06.2023, which caused serious miscarriage of justice and prejudice to the petitioner. As such, the order dated 16.06.2023 is liable to be set aside.

Learned counsel for the petitioner also pointed out that Section 311 Cr.P.C. clearly mandates for re-examination of any person already examined, but the trial court failed to understand the clear provision of law. As such, the order dated 16.06.2023 may be

interfered with.

In support of his submissions, the learned counsel for the petitioner has placed reliance on the following cases:

(i) *1981 AIR SC 1400 rendered in Rafiq and Another Vs. Mushilal and Another.*

(ii) *1968 AIR SC 178 rendered in Jamatraj Kewalji Govani Vs. State of Maharashtra.*

Learned Additional Public Prosecutor, on the other hand submits that the victim was thoroughly cross examined by the defence counsel. The trial court has passed the order very carefully after considering the provisions of law. Hence, the learned Additional Public Prosecutor prays to reject the prayer of the petitioner.

I have considered the submission made by the learned counsel for the parties and also perused the order of the learned Special Judge, Bongaigaon.

It is seen that the victim was examined by the trial court on 23.02.2023 and she was cross examined on the same day by the defence counsel. After almost three months i.e. on 17.05.2023 the petitioner filed a petition before the trial court for further cross-examination of PW-1, who is a minor girl. The probable questions to be asked to the PW-1 was also shown in the petition. It appears that to some extent such questions have already been answered by the victim girl.

The learned Special Judge in the order dated 16.06.2023 has mentioned the provisions of POCSO Act that under Section 33 (5), it is specifically stated that the Special Court shall ensure that the child is not called repeatedly to testify in the Court. Some case laws are also mentioned in the order by the trial judge that while examining power under Section 311 Cr.P.C. power cannot be exercised to fill up the lacunae to put the unfair advantage to the opposite party.

It is also reflected in the order of the trial judge that change of counsel by

defence and failure to put certain questions to the witnesses is no ground to recall witnesses.

After going through the order of the trial judge, as well as in the background of the case, this Court is of the opinion that the order passed by the trial court is a reasoned order which cannot be interfered with.

The citations submitted by the learned counsel for the petitioner are not applicable in the facts and circumstances of the case. Hence, the criminal petition stands dismissed and disposed of accordingly.

JUDGE

Comparing Assistant