

GAHC010271062022



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

Case No. : Crl.Rev.P./7/2023

AKASH BHUMIJ
S/O LATE TONKS BHUMIJ,
R/O RAJMAI KAKOJUNGLE,
P.O.- RAJMAI,
P.S.- DEMOW,
DIST.- SIVASAGAR, ASSAM.

VERSUS

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

2:XXXX
RE- VICTIM GIRL

REP. BY THE INFORMANT REKHA GOWALA

W/O RUPAK GOWALA

R/O RAJMAI KAKOJUNGLE GAON

P.O.- RAJMAI

P.S.- DEMOW

DIST.- SIVASAGAR
ASSAM

Advocate for the Petitioner : MR I HASSAN

Advocate for the Respondent : PP, ASSAM

:: BEFORE ::

HON'BLE MR. JUSTICE PARTHIVJYOTI SAIKIA

O R D E R

21.02.2023

Heard Mr. I. Hassan, the learned counsel appearing for the petitioner. Also heard Mr. KK Parasar, learned Addl. Public Prosecutor, Assam representing the State/respondent no.1. Mr. H.P. Gowala, learned counsel appears for respondent no.2.

This is an application under Section 397 of the CrPC read with Section 401 of the said Code whereby the order dated 14.10.2022 passed by the learned Special Judge (POCSO), Sivasagar, Assam in Special (P) Case No.41/2022 is under challenge.

The factual matrix giving rise to this petition lies within a very short compass.

On 14.10.2022, the Special (P) Case No.41/2022 was posted for recording prosecution evidence. One witness appeared with a 14 day old child on her lap. On that day, the defence counsel was absent. One Advocate on behalf of the defence counsel filed an application before the trial court stating that the defence counsel is out of station and on that ground an adjournment has been prayed for. The trial court insisted upon the said Advocate to take part in the hearing. But the said Advocate expressed inability on the ground that she did not have any

instructions to that effect. Finally, the trial court recorded the evidence of the woman witness and held that the defence counsel declined to cross-examine the witness.

I have given my anxious considerations to the submissions made by the learned counsels of both sides.

The learned trial court has relied upon the second proviso to sub-clause (c) of sub-section (2) of Section 309 of the CrPC.

Sub-clause (c) of sub-section (2) of Section 309 of the CrPC reads as

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“(c) where a witness is present in Court but a party or his pleader is not present or the party or his pleader though present in Court, is not ready to examine or cross-examine the witness, the Court may, if thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be.”

On a plain reading of the aforesaid provision of law, it is clear that the learned trial court has erroneously oriented itself while interpreting the said provision of law. In the case in hand, the conducting counsel prayed for an adjournment through another counsel because he/she had to go out of the town. The counsel who filed the application for adjournment, was not the defence counsel. Therefore, she refused to cross-examine the witness. There is nothing wrong on her part. The trial court erroneously insisted upon this counsel to cross-examine the witness and also erroneously interpreted the provisions of law to arrive at the impugned finding. For the aforesaid reasons, the impugned order 14.10.2022 whereby the trial court held that the defence counsel has declined to

cross-examine the witness, is set aside.

The trial court is directed to afford one single opportunity to the defence counsel to cross-examine the witness and thereafter, the court shall proceed to expeditiously dispose of the case.

Criminal Revision Petition stands disposed of accordingly.

JUDGE

Comparing Assistant