

GAHC010056672024



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

Case No. : Crl.Rev.P./107/2024

ALIM UDDIN
S/O BADSA ALI
VILL- KRINGMARI
P.O. BAJNAPATHAR
P.S. SIPAJHAR
DIST. DARRANG, ASSAM

VERSUS

THE STATE OF ASSAM AND ANR
REPRESENTED BY THE PP, ASSAM

2:MORIOM KHATUN
W/O SOFER ALI
VILL- BHATNAPAITY
P.O. BAGHMARA CHAR

P.S.ALOPATI CHAR

DIST. BARPETA
ASSAM
PIN-78112

Advocate for the Petitioner : MR. B C DAS

Advocate for the Respondent : PP, ASSAM

**BEFORE
HONOURABLE MRS. JUSTICE MITALI THAKURIA**

ORDER

Date : 09.05.2024

Heard Mr. B.C. Das, learned senior counsel assisted by Mr. S.H. Rahman, learned counsel for the petitioner. Also heard Mr. M.P. Goswami, learned Addl. P.P., Assam for the State respondent No. 1 and Mr. D.A. Kaiyum, learned counsel for the respondent No. 2.

This application under Section 401 read with Section 397 of the Code of Criminal Procedure, 1973 has been filed praying for setting aside and quashing of the order dated 05.03.2024 passed by the learned Addl. Sessions Cum Special Judge (POCSO), Barpeta in Special POCSO P.S. Case No. 47/2022 whereby the petition vide No. 249/2024 filed by the petitioner under Section 311 of the Cr.P.C. praying for recalling the witnesses to cross examine was rejected.

It is submitted by Mr. B.C. Das, learned senior counsel that when the witnesses No. 1,3 & 5 by cross examination by the engaged counsel for the petitioner, he was in custody and therefore he could not properly instruct the counsel who cross-examined the aforesaid witnesses. He further submitted that there are several discrepancies in regards to the age of the victim which is most vital point to be decided in the case under the POCSO Act. In the FIR it is stated that the present petitioner along with 2 (two) other co-accused was committed the offence as alleged in the FIR. But while deposing before the Special Judge, POCSO she did not name the other persons and implicated only the petitioner. But due to non-availability of proper instruction the witnesses i.e. PWs 1,3 & 5 could not be properly cross-examined as the petitioner was in custody when those witnesses were examined/ cross-examined in the Court. The learned Court below did not consider those facts while passing the order dated 05.03.2024 and rejected the prayer for recalling the witnesses No. 1,3 & 5 for cross-examination under Section 311 Cr.P.C. It is

simply observed by the learned Court below that “ the petition filed by the petitioner does not merit consideration”. But the learned Court below did not pass any reasoned order and rejected the prayer for recalling the witnesses 1,3 & 5 and passed the order mechanically.

Mr. Das, the learned senior counsel submitted that the learned Court below did not appreciate the scope of Section 311 Cr.P.C. which goes to the root jurisdiction in exercising the power that there may not be failure of justice on account of mistake of either party in making the best available evidence on record and as such, the impugned order is bad in law and liable to be set aside and quashed.

Mr. Das further submitted that as per Section 33(5) of the POCSO Act the child can not be called repeatedly by the Court.

However, Section 33(5) cannot be read alone as a balance of rights under Section 33(5) and Section 311 Cr.P.C. needs to be maintained. The right to fair trial as well as the bar under Section 33 (5) both need to be looked into while deciding such application, depending upon facts of each case. Mr. Das, the learned senior counsel has also referred the decision of Delhi High Court passed in Crl. M.C. 3634/2022 and Crl. M.A. 15292/2022.

Accordingly, the learned senior counsel further submitted that if the petition under Section 311 Cr.P.C. is not allowed giving a chance to the petitioner to cross-examine the witnesses, the petitioner will be prejudiced as there were some vital point left to be cross-examined as the petitioner could not properly instruct his engaged counsel.

In this context Mr. Goswami, the learned Addl. P.P. has submitted that the engaged counsel for the petitioner had thoroughly cross-examined all the witnesses i.e. the witness Nos. 1,3 & 5 and the statement of the victim is also found to be consistent. There may be some minor contradictions in regards to the place where she first met the petitioner but the said contradictions will not go into the root of the prosecution case.

Mr. D.A. Kaiyum, learned counsel for the respondent No. 2 has submitted that he has no objection if the PWs are recalled and cross examined by the accused petitioner.

However, he submitted that necessary costs may be imposed for recalling those witnesses before the Court for their further cross examination.

I have heard the submissions made by the learned counsel appearing for the parties. I have also perused the materials annexed along with the petition. It is seen that as per the petitioner the PWs 1,3 & 5 could not properly cross examined as the petitioner was in custody and he could not properly instruct the engaged counsel. On the other hand, it is seen that the learned Court below did not record any reason for rejection of the prayer for recalling the witness Nos. 1,3 & 5. However, further cross examination of witnesses may cause delay in disposing of the case. But, considering submission made by the learned counsel appearing on behalf of the informant respondent No. 2 and other aspects of the case, I find it justified to grant one more chance to the present petitioner to cross examine the PWs 1,3 & 5. Accordingly, the order dated 05.03.2024 in respect of rejecting the prayer for recalling the PWs 1,3 & 5 is hereby set aside.

Accordingly, the prayer is allowed with costs of Rs. 500/- which would be given by the petitioner to the PWs 1,3 & 5 on their appearance before the Court.

It is submitted by Mr. Das, learned senior counsel for the petitioner that case is fixed on 30.05.2024 for evidence of DWs. The learned Additional Sessions cum Special Judge (POCSO), Barpeta, is hereby asked to record the further cross evidence of PWs 1,3 & 5 giving only one chance on 30.05.2024, the date fixed by the learned Court below. The prosecution will accordingly produce the PWs 1,3 & 5 before the Court. However, any other convenient date may be fixed by the learned Court below, if required.

With the above observation and discussion, this petition is disposed of.

JUDGE

Comparing Assistant