

GAHC010096762023



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

Case No. : Crl.Pet./412/2023

RAKESH KUMAR PAUL
S/O RANJIT KUMAR PAUL R/O HOUSES NO. 47 SAKTIGARH PATH P.S.
BHANGAGHAR DIST. KAMRUP M GUWAHATI 781005

VERSUS

THE STATE OF ASSAM
THROUGH PP, ASSAM

Advocate for the Petitioner : MR. D DAS SR. ADV

Advocate for the Respondent : PP, ASSAM

:::BEFORE:::
HON'BLE MRS. JUSTICE MITALI THAKURIA

Date of hearing : 01.03.2024

Date of Judgment & Order : 03.05.2024

JUDGMENT & ORDER (CAV)

Heard Mr. M. K. Choudhury, learned Senior Counsel assisted by Mr. S. Das, learned counsel for the petitioner. Also heard Mr. M. Phukan, learned Public Prosecutor assisted by Mr. P. P. Dutta, learned Special Public Prosecutor, APSC.

2. This is an application under Section 482 of the Code of Criminal Procedure, 1973 *read with* Articles 226 & 227 of the Constitution of India for setting aside and quashing of the relevant portion of the Orders dated 16.11.2022, 11.04.2023 & 25.04.2022, passed by the learned Special Judge, Assam in Special Case No. 05/2021, and also with a further prayer to give reasonable opportunities to the accused/petitioner to defend himself by cross-examining the witnesses and along with some other prayers.

3. In brief, it is the case of the petitioner that in pursuant to the F.I.R. dated 17.08.2017, the investigation of the case was carried out over a period of 3 years 1 month 23 days till the submission of the 6th Supplementary Charge-Sheet dated 09.10.2020. Thereafter, the charges were framed only on 18.12.2021 after a long delay of 4 years 2 months and 10 days from the date of filing of the Charge-Sheet. The first witness in the instant case was examined on

06.04.2022, i.e. after the delay of 4 years 5 months 29 days after filing of the Charge-Sheet, only with a view to delay the trial and the learned Court below in complete oblivion to the petitioner's valuable right to a fair and speedy trial under Article 21 of the Constitution of India, turned a nelson's eye to the fact that the petitioner was languishing in prison for unreasonably prolonged period awaiting trial and in spite of the specific direction of the Court from time to time, the learned Special Judge refused to commence day-to-day trial. However, after passing of the order dated 21.09.2022 by this Court, the learned Court below started taking up the trial on day-to-day basis. The accused/petitioner, through his engaged counsel, on various occasions made submission before the learned Court below stating about the constraints faced by him in defending his trial while the petitioner was produced from jail. However, vide order dated 26.09.2022, the learned Special Judge pleased to pass an order to conduct the trial at 2.00 p.m. on day-to-day basis. But, due to paucity of time, the petitioner was being deprived of his fundamental right to a reasonable opportunity to consult his advocate for preparing his defence and those facts were also apprised before the learned Court below by the petitioner to consult his advocate and to prepare his defence. But the learned Court below vide order dated 16.11.2022, in the most insensitive manner, refused to acknowledge the petitioner's fundamental right to consult his lawyers in a congenial environment to prepare his defence so that he can reasonably defend himself and was *inter alia* pleased to direct the P.I. to produce the petitioner before the learned Court below 15 minutes ahead of schedule time so that the petitioner can prepare his defence with his engaged counsel. It is submitted that the 15 minutes time, which was allowed by the learned Court below, is neither reasonable nor sufficient for the petitioner to prepare his defence and effectively defend himself

in the trial. Thus, the order dated 16.11.2022, passed by the learned Trial Court, is not only violative of the principle of natural justice, but also in gross violation of basic human right of a Under Trial Prisoner. More so, the infrastructure and the ambiance of the Court Room in the Court of learned Special Judge, Assam is also not congenial and/or suitable for any criminal trial in the nature of the instant case. Thus, the petitioner is not getting a fair trial in the instant case inasmuch as the petitioner has been deprived of reasonable opportunity to consult his defence counsel to prepare his defence in a proper manner while he was in custody.

4. Subsequently, the petitioner was released from jail on 27.03.2023 and after his release, he was regularly and diligently attending the instant trial on day-to-day basis. The P.W.-49, who was the examining authority of the Forensic Science Laboratory, was continuously appearing before the learned Court below since 23.03.2023 and the prosecution took 6 days to record her examination-in-chief and the examination-in-chief of the said witness was completed only on 04.04.2023. But, while recording the cross-examination, the said P.W.-49 remain absent on 3 occasions and the cross-examination of the said P.W.-49 was only commence from 05.04.2023 and was completed on 12.04.2023. In between on 10.04.2023, the said P.W.-49 remained absent. Further, on 10.04.2023, after attending the Court, the petitioner was admitted in Nemcare Hospital in the night hours with multiple ailments and accordingly on 11.04.2023, the learned counsel for the petitioner informed the learned Court below about the ailment of the petitioner and prayed for adjournment to cross-examine the P.W.-49 for want of necessary instructions. However, the learned Court below had rejected the petition with an observation that in earlier occasion also, the learned

defence counsel for the petitioner had cross-examined the witnesses representing the petitioner and there is no justifiable ground to defer the cross-examination of P.W.-49 and with that observation, the petition was rejected. The petitioner was the master of the facts and hence, not only his presence, but his instructions were also very much essential for the purpose of his defence. But the learned Trial Court failed to appreciate the said fact and passed the order rejecting the prayer for adjournment. Thereafter, on 12.04.2023, under compelling circumstances, the petitioner had to discharge from the hospital against medical advice to give necessary instructions to his engaged counsel for preparation of his defence and considering the prayer of the prosecution for examination of 30 most material witnesses, the learned Court below had examined 59 numbers of witnesses. But, vide order dated 09.03.2023, the learned Court below further pleased to allow the petition filed by the prosecution under Section 311 Cr.P.C. for examining 9 other additional witnesses and thus, the list of prosecution witnesses stood up to 68 numbers. On 24.04.2023, the petitioner again filed a petition before the learned Court below praying to provide advance list of witnesses to be examined on day-to-day basis. The petition was heard by the learned Trial Court on 25.04.2023 and the prosecution also filed their written objection and accordingly, vide order dated 25.04.2023, considering the prayer of the prosecution, the petition of the present petitioner was rejected and the learned Court below failed to appreciate that such unfair conduct of the prosecution had caused grave prejudice to the petitioner getting a reasonable opportunity to defend his trial. More so, the list of most material witnesses submitted by the prosecution on 15.12.2022 was also not furnished to the petitioner by the learned Special Judge, whereby the prosecution informed the learned Court below that they are going to examine

30 more witnesses. Accordingly, it is stated that from the conduct of the prosecution, it is clear that the prosecution is conducting the instant trial in a very unfair and dishonest manner with the sole intention to secure conviction of the petitioner.

5. It is further stated that the learned Court below failed to appreciate that the impugned orders dated 16.11.2022, 11.04.2023 & 25.04.2023 are manifestly arbitrary in nature defying all possible test of reasonableness and therefore the same are also violative of Articles 14 and 21 of the Constitution of India. It is further stated that the learned Court below also failed to appreciate that in view of nature of allegation and type of evidence adduced against the petitioner in the instant case, it is not possible for the petitioner to reasonably prepare his defence and/or defend his case in 15 minutes time inside an open congested Court Room just before the commencement of the trial on a day-to-day basis. Thus, the approach and procedure adopted by the learned Trial Court to pass the impugned orders is grossly oppressive, unjust, unfair, unreasonable, arbitrary, whimsical, unconstitutional and illegal, which is also violative of his fundamental right under Article 21 of the Constitution of India.

6. Mr. M. K. Choudhury, learned Senior Counsel for the petitioner, submitted that in the light of peculiar facts and circumstances in this case, as stated above, and to ensure the fair trial to the petitioner, it would be just and expedient that the petitioner's cross-examination of witnesses during the period of 26.09.2022 till 27.03.2023 be expunged and the petitioner be permitted to cross-examine the said witnesses afresh otherwise the petitioner shall not only be highly prejudice, but also suffer from grave and irreparable loss and injury inasmuch as petitioner's liberty is at stake in the instant trial.

7. Mr. Choudhury, learned Senior Counsel, further relied on a decision of Hon'ble Apex Court passed in **Mohd. Hussain Vs. State (NCT of Delhi)**, reported in **(2012) 2 SCC 584**, wherein, it has been held that "*the assistance of a counsel has to be provided in a substantial and meaningful sense (emphasis laid). It is essential that the accused is given a reasonable opportunity to defend himself in the trial.*"

8. He also relied on another decision of Hon'ble Apex Court in **Chaluvegowda & Ors. Vs. State**, reported in **(2012) 13 SCC 538**, wherein, it has been held that "*the right to be represented by a lawyer must not be an empty formality. It must not be sham or an eyewash. The due process of law incorporated in our constitution system demands that a person not only be given an opportunity of being heard before being condemned, but also that such opportunity be fair, just and reasonable.*"

9. Further, relying on a judgment of the Hon'ble Apex Court passed in **Natasha Singh Vs. CBI**, reported in **(2013) 5 SCC 471**, it is submitted by the learned Senior Counsel for the petitionr that adducing evidence in support of the defence is a valuable right. Denial of such right would amount to denial of fair trial.

10. Mr. Choudhury, learned Senior Counsel, further relied on a decision of Hon'ble Supreme Court passed in **Anokhilal Vs. State of Madhya Pradesh**, reported in **(2019) 20 SCC 196**, and emphasized on paragraph Nos. 23, 25 & 26, which read as under:

“23. ... In the process, the assistance that the appellant was entitled to in the form of a legal aid, could not be real and meaningful.

25. ... In no circumstance, can be the cause of justice be made to suffer, though, undoubtedly, it is highly desirable that the finality of any trial is achieved in the quickest possible time.

26. ... attempts to expedite the process should not be at the expense of the basic elements fairness and the opportunity to the accused, on which postulates, the entire criminal administration of justice is founded. In pursuit for expeditious disposal, the cause of justice must never be allowed to suffer or be sacrificed. ...”

11. The learned Senior Counsel for the petitioner further submitted that the learned Court below did not give reasonable opportunity to the petitioner to defend the trial which is incurable as the question of infringement of right to have a reasonable opportunity to defend the trial is one of the fairness in the administration of criminal justice system.

12. In this context, Mr. M. Phukan, learned Public Prosecutor assisted by Mr. P. P. Dutta, learned Special Public Prosecutor, APSC, has submitted that considering the prayer of the accused/petitioner, the learned Special Judge had directed the P.I. to allow the accused/petitioner to take food during the custody period and also allowed him to discuss with his engaged counsel for 15 minutes time before proceeding of the Court. Thus, the direction was made to the P.I. and the prayer of the accused/petitioner to discuss with his engaged counsel was allowed by the learned Court below and he was also allowed to take food if needed.

13. It is further submitted by the learned Public Prosecutor that the Court

cannot provide special infrastructure or the Court ambiance cannot be changed only for the accused/petitioner to discuss with his engaged counsel. However, the Court had already directed the P.I. and the accused/petitioner was also at liberty to discuss with his engaged counsel before starting of the proceeding. Thus, the learned Court below had provided reasonable opportunity to the accused/petitioner to discuss with his engaged counsel and to file his list of defence witness to whom he wanted to be examined. However, at present, the issues raised in the present petition had already become infructuous after release of the accused/petitioner from the jail and accordingly, at present, he is at liberty to discuss the case with his engaged counsel as per his own choice. In the same time, the Court also allowed the list of witnesses to be examined as the defence witnesses.

14. In regards to the cross-examination of P.W.-49, it is submitted by the learned Public Prosecutor that though the accused could not be personally present on 11.04.2023 for cross-examination of P.W.-49, who is an FSL expert, but his engaged counsel, Mr. D. Nandi, had earlier cross-examined the other witnesses by representing the accused/petitioner and hence, considering this aspect of the case, the learned Trial Court rightly passed the order rejecting the prayer for adjournment for cross-examination of P.W.-49 and that apart, it is already seen that she was duly cross-examined by Mr. D. Nandi, learned counsel for the accused/petitioner, and the other engaged counsel for the other accused persons had also cross-examined the P.W.-49. Accordingly, it is submitted by the learned Public Prosecutor that no irregularity or mistake has been committed by the learned Court below while passing the order by rejecting the prayer for adjournment of the cross-examination of P.W.-49. In the same time, it is also seen that the accused was already allowed/given opportunity to discuss with his

engaged counsel and also to adduce the evidence by furnishing the list of witnesses. More so, after release of the accused/petitioner, the petition has already become infructuous in respect of the prayer for setting aside and quashing of the relevant portion of the order dated 16.11.2023 *inter alia* allowing 15 minutes time to the petitioner for preparation of defence and also providing of necessary infrastructure in the Trial Court to hold a discussion with the engaged counsel etc. Accordingly, it is submitted that in view of above, the present petition may be dismissed.

15. After hearing the submissions made by the learned counsels for both sides, it is seen that the issue raised in the present petition is that the present accused/petitioner was not given reasonable opportunity to discuss about the case with his engaged counsel and the order of 15 minutes time, which was given by the learned Special judge vide order dated 16.11.2022, is not at all sufficient to discuss the case with his engaged counsel considering the nature of offence alleged against the present accused/petitioner. Further, the issue raised by the petitioner is that in the present Court ambiance and infrastructure, it was not possible on the part of the accused/ petitioner to discuss about his defence in an open space by sitting on a wooden bench with the engaged counsel. These issues have already become infructuous as the accused has already been enlarged on bail and thus, the question of discussion about the case inside the Court Room with poor infrastructure or ambiance as well as providing 15 minutes time for discussion does not arise.

16. It is the further prayer of the petitioner that all the cross-examination of witnesses during the period from 26.09.2022 till 27.03.2023 should be expunged and he should be permitted to cross-examine the witnesses afresh. It is also the

contention of the accused/petitioner that he did not get the reasonable opportunity to discuss the case with his engaged counsel and thus, the witnesses could not be cross-examined in detail, which may cause prejudice to the accused/petitioner. But, from the record, it is seen that his engaged counsel had duly cross-examined all the witnesses and even in absence of the accused/petitioner, the P.Ws. were cross-examined by his engaged counsel and thus, at this stage, the prayer for expunging of cross-examination of all the witnesses, who were cross-examined during the period from 26.09.2022 till 27.03.2023, cannot be allowed.

17. Coming to the examination of P.W.-49, it is seen that the prosecution took several dates for her examination-in-chief and the defence also took 3-4 dates for completion of her cross-examination. It is a fact that on 11.04.2023, a petition was moved before the learned Special Judge, Assam for adjournment of the cross-examination of P.W.-49 stating that the accused/petitioner had already been admitted in the Nemcare Hospital for his ailments. The learned Court below, while rejecting the prayer for adjournment, made an observation that his engaged counsel, Mr. Nandi, had already cross-examined several witnesses even in absence of the accused/petitioner for his medical ground and also duly cross-examined the P.W.-49. Further it is seen that on 12.04.2023 also, another date was fixed for further cross-examination of P.W.-49, on which date also, the accused/petitioner was represented by his engaged counsel, but no further prayer was made by his engaged counsel for further examination of P.W.-49. Accordingly, her examination was closed and she was discharged on 14.04.2023. So, it is seen that on 11.04.2023, even in absence of the accused/petitioner, P.W.-49 was duly cross-examined by his engaged counsel.

And, there was no further prayer for cross-examination of P.W.-49 by his engaged counsel on the subsequent dates and for which, the cross-examination for P.W.-49 was closed. Thus, considering all facts and circumstances of the case, the detailed order was passed by the learned Special Judge, Assam.

18. It is seen that reasonable opportunities were also given to the present accused/petitioner to defend himself and also allowed him to have discussion with his engaged counsel. Further it is seen that necessary directions were also given to the P.I. to provide food, if necessary, as the accused/petitioner is a diabetic person, and also gave necessary instructions/directions to the P.I. to bring the accused/petitioner to the Court Premises 15 minutes before the commencement of the Court proceeding so that he can have discussion with his engaged counsel while he was in custody. However, the Court was not in a position to provide separate infrastructural facility to the accused/petitioner to have discussion with his engaged counsel and hence, the order was accordingly passed to have a discussion in the Court Room/Premises itself with his engaged counsel. Further, as discussed above, it is seen that P.W.-49 was duly cross-examined by his engaged counsel, Mr. Nandi, and prayer for further cross-examination of P.W.-49 seems to be not justified. More so, the prayer for expunging of cross-examination of the P.W. examined in between 26.09.2022 till 27.03.2023 also has no justification.

19. In view of discussions made above and also considering all above aspects of the case, I find that the learned Special Judge, Assam has committed no illegality or mistake to make any interference of this Court in the Orders dated

16.11.2022, 11.04.2023 & 25.04.2022, in Special Case No. 05/2021. Resultantly, I do not find any merit in this petition and accordingly the same stands dismissed.

20. The criminal petition stands disposed of in terms of above.

JUDGE

Comparing Assistant