

GAHC010140812024



2024:GAU-AS:13053

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

Case No. : Crl.Rev.P./267/2024

SOMER ALI
S/O LATE NILU SHEIKH, VILL- CHALANTAPARA PART-IV, P.S.-JOGIGHOPA,
DIST- BONGAIGAON (ASSAM)

VERSUS

THE STATE OF ASSAM AND ANR
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

2:IMAN ALI
S/O LATE MOHAMMED ALI
VILL- CHALANTAPARA PART-IV
P.S.-JOGIGHOPA
DIST- BONGAIGAON (ASSAM)
PIN-78338

Advocate for the Petitioner : MS. R CHOUDHURY, LD. ADV.

Advocate for the Respondent : MR. D. P. GOSWAMI, LD. PP, ASSAM, MR. D GOGOI, Amicus
Curiae for R.2 .

**BEFORE
HONOURABLE MRS. JUSTICE MITALI THAKURIA**

Date of hearing : 27.11.2024

Date of Judgment : 20.12.2024

JUDGMENT & ORDER (CAV)

Heard Ms. R. Choudhury, learned counsel for the petitioner. Also heard Mr. D. P. Goswami, learned Additional Public Prosecutor representing the State respondent No.1 and Mr. D. Gogoi, learned Amicus Curiae for the respondent No.2.

2. This application is filed under Sections 438/442/401 of the Bharatiya Nagarik Suraksha Sanhita, 2023, challenging the Order dated 10.07.2024 passed by the learned Special Judge, North Salmara, Abhayapuri in Special (P) 31(J)/2020 wherein, the petition filed by the petitioner for recalling P.W 10 and C.W.1 was rejected.

3. The brief facts leading to the filing of this instant criminal revision petition are as follows: the respondent No. 2 lodged an FIR with the Officer-in-Charge of the Jogighopa Police Station, alleging, *inter alia*, that on 15.09.2020 at 12 P.M., while her minor granddaughter, aged about 9 years, was walking in front of the petitioner's house, he called her to his room and raped her by removing her clothes. Upon receipt of the aforesaid FIR, a case was registered vide Jogighopa P.S. Case No. 306/2020 under Section 376 AB of the IPC, *read with* Section 6 of the POCSO Act. In connection with the said FIR, the petitioner was arrested and forwarded to the learned Special Judge, North Salmara, Abhayapuri on 17.09.2020, from where he was sent to judicial custody. However, the petitioner was subsequently released on bail. After the completion of the investigation, the charge-sheet was submitted against the petitioner under Section 376 AB of the IPC, *read with* Section 6 of the POCSO Act. Thereafter, the trial of the proceeding began as Special (P) 31(3) 2020. During the proceedings, the prosecution examined as many as 10 P.Ws, including the I.O as P.W.10. The

learned Trial Court, vide order dated 10.05.2024, closed the prosecution's evidence and fixed 13.05.2024 for the examination of the accused petitioner under Section 313 of the Cr.P.C. However, on 13.05.2024, the learned Trial Court deemed it necessary to examine Ms. Sparsita Garg, the then J.M.F.C., North Salmara, as a court witness, and accordingly, a summons was issued to her, fixing 16.05.2024. On 16.05.2024, Ms. Sparsita Garg was examined, cross-examined, and discharged, and the case was fixed for the statement of defence on 14.06.2024. On 14.06.2024, although the case was fixed for the statement of defence, the petitioner remained absent with steps, and the same was allowed, fixing 05.07.2024 for the statement of defence. The petitioner contended that on 10.07.2024, when the case was still at the stage of the statement of defence, the petitioner filed a petition under Section 348 of the BNSS 2023 for recalling P.W.10 and C.W.1, as some vital questions could not be asked due to oversight. However, the learned Trial Court, vide Order dated 10.07.2024, quite mechanically rejected the petition, holding it to be a tactic to delay the trial.

4. Being highly aggrieved and dissatisfied with the impugned Order dated 10.07.2024, passed by the learned Special Judge, North Salmara, Abhayapuri, in Special (P) 31(J)/2020, the petitioner has preferred the instant criminal revision petition, praying for the setting aside and quashing of the impugned Order dated 10.07.2024.

5. Ms. Choudhury, learned counsel for the petitioner, has submitted that learned Trial Court has not appreciated the necessity of recalling the witnesses, as the questions proposed to be asked have been clearly mentioned in the petition itself. A bare perusal of the proposed questions *prima facie* appears to be decisive for a fair trial of the case. Hence, the impugned Order dated 10.07.2024 is liable to be set aside and quashed. She further submits that the learned Trial Court did not take into consideration that this is a criminal proceeding, which, if the guilt is proven, could result in a conviction. Therefore, the accused should have been granted the opportunity as prayed for. However, the learned Trial Court quite mechanically rejected

the prayer without considering the merits of the case, holding it to be a tactic to delay the trial. Hence, she prays for setting aside and quashing of the impugned Order 10.07.2024 for the interest of justice.

6. In support of his submission, she relies on the decision passed by the Hon'ble Supreme Court in the case of **Godrej Pacific Tech. Ltd. vs. Computer Joint India Ltd.** reported in AIR (SC) 591 and emphasised in paragraph Nos. 8 and 9 of the said judgment wherein it has been held that "*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*". Paragraph Nos. 8 and 9 of the said judgment read as under;

"8. 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, enquiries 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 any 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.

9. As indicated above, the section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: it is, that the court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the court. [Sections 60, 64](#) and [91](#) of the Evidence Act, 1872 (in short "the [Evidence Act](#)") are based on this rule. 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 side. This must be left to the parties. But in weighing the evidence, the court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge."

7. She further relies on another decision passed by the Co-ordinate Bench in the case of **Jon Sing Engti S/o Joy Sing Engti Kathar vs. The State of Assam & Anr.**, reported in 2023 0 Supreme (Gau) 1009, wherein also the prayer under Section 311 of Cr. P.C. was allowed with a view that the petition cannot be ignored just because the case is at the stage of the end of trial.

8. Citing the above judgments, it is submitted by the Ms. Choudhury, learned counsel for the petitioner that recalling the P.W.10 and C.W.1 are necessary for proper appreciation of the case and also to ascertain the actual fact of the case. She further submitted that no prejudice will be cause to the respondent side by allowing the petitioner to call P.W.10 and C.W.1. She also submits that the cross examination of said P.W.10 and C.W.1 are highly relevant for just decision of the case.

9. On the other hand, Mr. Gogoi, learned Amicus Curiae for respondent No. 2, has submitted that the Court is empowered to summon or re-examine witnesses at any stage before the pronouncement of judgment, if it appears to the Court to be essential for a just decision of the case by getting at the truth through all lawful means. However, he submits that the case is at the stage of argument and the instant petition has been filed only to delay the proceedings by recalling P.W.10 and C.W.1 for further examination. Accordingly, he submits that the learned Trial Court had rightly passed the order dated 10.07.2024 whereby, rejecting the prayer for reexamination of

witnesses filed by the present petitioner.

10. In addition to his submission, he relies on the decision passed by the Hon'ble Supreme Court in the case of **State vs. N. Seenivasagan**, reported in (2021) 14 SCC 1, and emphasizes paragraph Nos. 12, which read as follows:

"12. In our view, having due regard to the nature and ambit of [Section 311](#) of the Cr.PC, it was appropriate and proper that the applications filed by the prosecution ought to have been allowed. Section 311 provides that any Court may, at any stage of any inquiry, trial or other proceedings under the [Cr.P.C.](#), 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". The true test, therefore, is whether it appears to the Court that the evidence of such person who is sought to be recalled is essential to the just decision of the case."

11. In this regard, Mr. Goswami, the learned Additional Public Prosecutor, has submitted that the learned Trial Court rightly passed the order rejecting the prayer for recalling the witnesses. He further submitted that the bona fide mistake of the counsel cannot be grounds for recalling the witnesses and, thus, the petition is filed only to fill up the lacuna. Moreover, he submitted that the case is at the stage of argument, and hence, if the prayer for recalling the witnesses is allowed at this stage, there will be a delay in the disposal of the matter, as the case falls under the POCSO Act.

12. After hearing the submissions made by the learned counsels for both sides, I have perused the case record and the annexures filed along with the petition. It is a fact that the petitioner filed a petition praying for recalling P.W.10 and C.W.1 after the closure of the evidence of the P.Ws, when the case was at the stage of Section 313 of the Cr.P.C. However, as per Section 311 of the Cr.P.C., the petition can be allowed for recalling or re-examining witnesses at any stage, if it is found essential for the just decision of the case. Further, it is noted that while filing the petition for recalling the witnesses, the petitioner also mentioned the questions to be put to P.W.10 and C.W.1.

However, it appears that the learned Court below, without discussing the questions in detail, passed the order with the observation that the petition was filed only to delay the disposal of the case. Nevertheless, it cannot be denied that a petition under Section 311 cannot be allowed solely to fill up the lacuna of the prosecution. In rejecting such a prayer, it must be examined whether there is any inherent weakness or latent gap in the prosecution's case. No party in trial can close the case before correcting errors.

13. The Hon'ble Apex Court in the case of **Rajendra Prasad vs. Narcotic Cell**, reported in (1999) 6 SCC 110, has held in paragraphs 8 and 9 as under:

"8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trail of the case, but an over sight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can before-close from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.

9. The very same decision **Mohanlal Shamiji Soni v. Union of India**, (supra) which cautioned against filling up lacuna has also laid down the ratio thus :

"It is therefore clear that the Criminal Court has ample power to summon any person as a witness or recall and re-examined any such person even if the evidence on both sides is closed and the jurisdiction of the Court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case."

14. In the case of **Zahira Habibullah Sheikh & Anr. vs. The State of Gujrat & others**, reported in (2006) 3 SCC 374, the same view was also expressed the same view, in paragraph 27, which read as follows:

"Para-27; 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 for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers 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."

15. In the instant case, it is seen that the questions mentioned in the petition are found to be relevant, as which were left to be asked to P.W.10 during the cross-examination by the petitioner. However, the questions intended to put to C.W.1 are not found to be as relevant. Accordingly, the petitioner's prayer cannot be regarded solely as an attempt to fill up the lacuna.

16. In view of the above discussion, I find it appropriate to reexamine only P.W.10, as the reexamination of C.W.1 is not relevant and is therefore not allowed. Accordingly, I find sufficient merit in this petition, which warrants the interference of this Court in the order dated 10.07.2024 passed by the learned Special Judge, North Salmara, Abhayapuri, in Special (P) 31(J)/2020. The same is hereby set aside. Consequently, the petitioner is directed to appear before the learned Court below

along with a petition for the re-examination of P.W.10, and the learned Trial Court shall give the petitioner an opportunity to re-examine P.W.10 and shall fix a dated accordingly.

17. With above observation this petition stands disposed of.

JUDGE

Comparing Assistant