

GAHC010152432024



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

Case No. : Crl.Pet./893/2024

SUBRATA SARKAR @ PANKAJ SARKAR
S/O NANDALAL SARKAR
R/O KONABARI
P.S. JAGIROAD,
PIN- 782417

VERSUS

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

2:SMTI. LAKHI DAS
D/O LATE MADAN DAS
R/O VILL- KISHOR CLUB

P.S. JAGIROAD

DIST. MORIGAON
ASSAM

Advocate for the Petitioner : MR. M ALAM, S A CHOWDHURY, MR B M DEKA, MR. Z H BORA, MR. A ALAM

Advocate for the Respondent : PP, ASSAM, MS. P. AGARWAL, AMICUS CURIAE (R-2)

**BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI**

ORDER

Date : 16.09.2024

Heard Mr. B.M. Deka, learned counsel for the petitioner. Also heard Mr. D.P. Goswami, learned Additional Public Prosecutor as well as Ms. P. Agarwal, learned Amicus Curie representing the respondent No.2.

2. The petitioner being the accused in POCSO Case no. 55/2019 in the court of Special Judge, POCSO, Morigaon, filed this application u/s 528 of BNSS, 2023, against the impugned order dated 02/04/2024, whereby the learned Special Judge rejected the petition u/s 311 Cr.P.C. for re-examination of the victim, P.W.-1.

3. Learned counsel for the petitioner submits that 10 nos. of prosecution witnesses were examined in POCSO Case No. 55/2019 including the victim as P.W.1. During the examination though P.W.1 stated that the police had collected her school certificate from her mother where the date of birth of the victim was mentioned but the said school certificate was neither produced nor exhibited by the prosecution during trial. It is further submitted that in the cross examination of P.W.1, the age of the victim could not be ascertained or verified by any documents. Thereafter, the petitioner filed a petition before the trial court u/s 311 Cr.P.C. for re-examination of P.W.1, the victim.

4. After hearing both sides, the learned trial court rejected the petition which reads as follows –

“.....PW1 who is the victim had been examined as PW1 and

discharged after cross on 08/12/2021. The grounds cited in today's petition will amount to filing of lacuna by the defense side, if the petition is allowed and the same is not considered necessary for just decision of the case. The petition is accordingly rejected....."

5. Against the aforesaid order, the petitioner has preferred this revision petition. The submission of the learned counsel for the petitioner has encircled on the point that no birth certificate or any certificate ascertaining the age of the victim was either produced or exhibited at the time of deposition of P.W.1. Therefore, it was not possible for the petitioner, to bring the facts regarding the admission in school in the cross examination of P.W.1. It transpires that the learned counsel for the petitioner has stressed his argument on the point that the prosecution has failed to prove the age of the victim, which is required in POCSO case.

6. The learned Additional P.P. on the other hand submits that the trial court has rightly rejected the petition filed by the petitioner u/s 311 Cr.P.C. It is the part of the prosecution to prove the age of the victim during trial. It is not the headache of the defense that the age of the victim has not been proved for which recalling of P.W.1 is necessary. According to the learned Additional Public Prosecutor, if the prosecution fails to prove the age of the victim, the trial court will decide the matter at the time of delivery of Judgment.

7. Having heard the learned counsel for the parties, it reveals that the victim was examined before the trial court in the year 2021. After three years, the accused/ petitioner has filed the application u/s 311 Cr.P.C. without showing any just grounds for recalling P.W.1.

8. Section 311 Cr.P.C. is very clear that the court shall summon, examine, recall and re-examine any such person if his/ her evidence appears to be essential to the just decision of the case. In the instant case, the grounds shown by the petitioner cannot be considered to be relevant to the just decision of the case.

9. Apart from that, section 33 (5) of POCSO Act states that the special court shall ensure that the child is not called repeatedly to testify in the court.

10. In view of the submission of the learned counsel for the parties as well as the provision enumerated in the POCSO Act, this court is of the view that the revision petition filed by the petitioner is devoid of any merit and hence, rejected.

11. The criminal petition is disposed of accordingly.

JUDGE

Comparing Assistant