

GAHC010165152024



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

Case No. : Crl.Pet./1001/2024

LEKHESWAR DAS
S/O SRI JOGEN CHANDRA DAS
R/O VILL- ARANYA NAGAR, P.O. CHANDRAPUR,
P.S. PRAGJYOTISHPUR, PIN-781150, DIST. KAMRUP (M), ASSAM

VERSUS

THE STATE OF ASSAM
REPRESENTED BY THE PP, ASSAM

Advocate for the Petitioner : MR. A M BORA, MR. V A CHOWDHURY, MR. B BHAGAWATI

Advocate for the Respondent : PP, ASSAM,

BEFORE
HONOURABLE MR. JUSTICE PARTHIVJYOTI SAIKIA

ORDER

Date : 19.08.2024

Heard Mr. A. M. Bora, learned Senior Counsel assisted by Mr. B. Bhagwati, learned counsel for the petitioner.

2. This application has been filed under Section 528 read with Section 442 of the Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023 challenging the order dated 04.06.2024 passed by the learned Special Judge, Assam in Special Case No.21/2022.

3. The petitioner has been facing trial in the aforesaid Case. After examination of PW-1, the petitioner engaged a new counsel and this new counsel noticed that the earlier counsel

did not ask many important questions to the witness. According to the present petitioner, if he is not allowed to ask some vital questions to the PW-1, he will be prejudiced.

4. The learned Trial Court rejected his prayer under Section 311 of the Cr.PC on the ground that it will be never ending procedure if the petitioner changes his lawyers frequently.

5. I have considered the submissions made by learned counsel for both sides.

6. It is a settled position of law that the procedures are handmaid of justice. At this stage Paragraph Nos. 43 and 44 of the Judgments passed by the Hon'ble Supreme Court in ***Zahira Habibulla H. Sheikh & Anr vs. State of Gujarat and Ors reported in (2004) 4SCC 158*** are important.

They are quoted as under:

“(43). The courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on presiding officers of court to elicit all necessary materials by playing an active role in the evidence-collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that the ultimate objective i.e. truth is arrived at. This becomes more necessary where the court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

(44). The power of the court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e.: (a). giving a discretion to the court to examine the witness at any stage, and (b). the mandatory portion which compels the court to examine a witness if his evidence appears to be essential to the just decision of the court. Though the discretion given to the court is very

wide, the very width requires a corresponding caution. In ***Mohanlal v. Union of India*** this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the words such as, “any person” and “any stage”, or “any enquiry or trial or other proceedings”, “any person” and “any such person” clearly spells out that the section has expressed in the widest-possible terms and do not limit the discretion of the court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The Second part of the section does not allow any discretion but obligates and binds the court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case, “essential” to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the section is to enable the court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. it is done with an object of getting the evidence in aid of a just decision and uphold the truth.”

7. The law about the subject is very clear. Therefore no further deliberation is required on this point. The impugned order dated 04.06.2024 passed by the learned Special Judge, Assam in Special Case No.21/2022 is set aside.

8. The learned Special Judge shall provide opportunity to the petitioner to further cross-examine the PW-1, Sahabul Islam.

9. With the aforesaid direction the criminal petition stands disposed of.

JUDGE

Comparing Assistant