

**IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

**PRESENT:
THE HON'BLE JUSTICE BIVAS PATTANAYAK**

**CRR No. 130 of 2024
CRAN 1 of 2024
Md. Abbas
versus
The State of West Bengal & Anr.**

For the Petitioner	: Mr. Subham Ghosh, Advocate Mr. Mayank Roy, Advocate
For the State	: Mr. Aditi Shankar Chakraborty, Ld. APP Mr. Sourav Ganguly, Advocate
For the Opposite Party No.2/De facto Complainant	: Mr. Arjun Chowdhury, Advocate Ms. Pratusha Dutta Chowdhury, Advocate
Heard on	: 10.06.2024, 12.06.2024, 14.06.2024
Judgment on	: 20.06.2024

Bivas Pattanayak, J. :-

1. This revisional application has been preferred by the petitioner-accused challenging the impugned order dated 20th March, 2024 passed by learned Special Judge, POCSO, Siliguri in Special POCSO Case No. 58 of 2023 (arising out of Matigara Police Station Case No. 682 of 2023 dated 21st August, 2023) under Sections 363, 366, 302, 376A of the Indian Penal Code, 1860 (In short, IPC) read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the 'POCSO Act'), rejecting the prayer of the petitioner-accused under Section 311 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Code') for further cross-examination of prosecution witnesses on recall.

2. The brief fact of the case is that the opposite party no.2-*defacto* complainant lodged a written complaint at the local Matigara Police Station to the effect that his 16 years old daughter, who left for the school on 21st August, 2023 at 9:30 hours, did not return home. Subsequent thereto at about 17:35 hours the dead body of his daughter was found at an isolated place near Motajote Rabindrapallinagar. On the basis of the aforesaid complaint, FIR was registered being Matigara Police Station Case No. 682 of 2023 dated 21st August, 2023 under Section 302 of the IPC. Upon completion of investigation, charge-sheet was submitted on 19th October, 2023 against the petitioner-accused under Sections 363, 366, 302, 376A of the IPC read with Section 6 of the POCSO Act. On 1st December, 2023, supplementary charge sheet was also filed. The cognizance of the offences was taken on the basis of the materials placed before the learned Trial Court. On 14th December, 2023, the sum and substance of charges under Section Sections 363, 366, 302, 376A of the IPC read with Section 6 of the POCSO Act were read out, to which the petitioner-accused pleaded '*not guilty*'. Charges under the aforesaid offences were framed and dates were fixed in the month of January, 2024 for examination of prosecution witnesses, which was accordingly done. At the stage of cross-examination of P.W.21, on 21st February, 2024, the petitioner-accused filed an application under Section 311 of the Code for further cross-examination of P.W.1, Dr. Jagadish Biswas, P.W.6, S.I. Arun Roy, P.W.12, Neha Modak, P.W.13, Minoti Modak, P.W.14, Puspajit Barman and P.W.16, Sri Samuel Bag. The learned Trial Court on 20th March, 2024, after closure of examination of prosecution witnesses, considered the application of the

petitioner-accused under Section 311 of the Code and rejected the same. Being aggrieved by and dissatisfied with the impugned order of the learned Trial Court, the petitioner-accused has preferred the present revisional application.

3. Mr. Subham Ghosh, learned advocate for the petitioner submitted that fair trial is an essence of criminal justice system. It is inherent in concept of due process of law that condemnation should be rendered only after trial in which hearing is real one, not sham or a mere farce or pretence. Hasty trial in which proper and sufficient opportunity not provided to the accused to defend himself or herself would vitiate trial as being meaningless and stage-managed. In the present case at hand, the learned Trial Court has taken up examination of substantial numbers of prosecution witnesses within a span of 16 days in a hurried manner without affording sufficient opportunity for the defence to prepare itself and cross-examine the prosecution witnesses. The prosecution witnesses were not produced as per the schedule and additional witnesses were produced on the date fixed. The learned defence counsel was compelled to cross-examine the witnesses which has affected the right of the petitioner-accused to have a fair opportunity to defend himself. There was also non-compliance Section 207 of the Code in supplying documents namely, digital photographs and copy of certificates under Section 65B of the Evidence Act which were exhibited without due supply of copies. Due to such hurried trial, certain important questions and suggestions, which were relevant for just adjudication of the case, were mistakenly, out of inadvertence, left out during cross-examination of the witnesses by the

learned defence counsel. On such ground, the petitioner-accused submitted an application before the learned Trial Court for recalling of P.W.1, Dr. Jagadish Biswas, P.W.6, S.I. Arun Roy, P.W.12, Neha Modak, P.W.13, Minoti Modak, P.W.14, Puspajit Barman and P.W.16, Sri Samuel Bag for further cross-examination pertaining to questions annexed to the petition which is an innocuous prayer for proper adjudication and fair trial. Therefore, such hurried trial in a criminal case of serious nature ought not have been undertaken by the learned Trial Court in the manner it has proceeded which is not in consonance with the principles of administration of criminal justice system. It is the consistent view of the Hon'ble Supreme Court that there should be fair trial providing proper and sufficient opportunity to the accused otherwise it would vitiate trial. To buttress his contentions, he relied on the following decisions of the Hon'ble Supreme Court:

- i. ***Bashira versus State of U.P.*¹**
- ii. ***Anokhilal versus State of Madhya Pradesh*²**
- iii. ***Naveen @ Ajay versus The State of Madhya Pradesh*³**

He further submitted that no party in a trial can be foreclosed from correcting errors. When proper evidence was not adduced or relevant materials was not placed on record due to any inadvertence, the Court should be magnanimous in permitting the mistake to be rectified. After all, the function of the Criminal Court is administration of criminal justice and not to count the errors committed by the parties. In support of his

¹ **1968 AIR (SC) 1313**

² **Criminal Appeal Nos. 62-63 of 2014**

³ **2023 AIR (SC) 5254**

contention he relied on the decision of Hon'ble Madras High Court passed in ***K. Ravichandran versus Inspector of Police, TMCH Police Station, Thanjavur***⁴.

Moreover, he submitted that the evidence of P.W.15, P.W.16, P.W.17, P.W.18, P.W.19 and P.W.20 and P.W.21 (in part) has been recorded by a Judge (in-charge) of the POCSO court due to absence of regular Presiding Officer, which is not permissible under law as the POCSO Court is a Special Court. For such reason the trial is also vitiated.

In light of his aforesaid submissions, he prayed for setting aside of the impugned order of the learned Trial Court rejecting the application of the petitioner under Section 311 of the Code and directing for further cross-examination of P.W.1, Dr. Jagadish Biswas, P.W.6, S.I. Arun Roy, P.W.12, Neha Modak, P.W.13, Minoti Modak, P.W.14, Puspajit Barman and P.W.16, Sri Samuel Bag upon recall.

4. In reply to the contentions raised on behalf of the petitioner-accused, Mr. Arjun Chowdhury, learned advocate for *defacto*-complainant submitted that after framing of the charge on 14th December, 2023, examination of witnesses were scheduled to commence from 3rd January, 2024 which is after a period of almost 20 days. On 3rd January, 2024, the witnesses were present as per the schedule and additionally the P.M doctor was also present. All the witnesses were examined and cross-examined in full without there being any objection raised from the side of the defence. On the said date, the prosecution filed a petition for examination of some important witnesses, namely, the S.I. Arun Roy, Hritik Roy, Golak Barui

⁴ **2019 CriJL 144**

and Uttam Singh who were not listed in the charge-sheet. The defence did not raise any objection and such petition of the prosecution was accordingly allowed. On subsequent dates, the prosecution produced witnesses which were examined and cross-examined in full. On none of the dates, the defence raised any objection to cross-examine the witness due to its predicament or unpreparedness. It would be evident from the order sheets that whenever the defence counsel has approached the Court on the ground of her predicament, the cross-examination of the witnesses has been deferred by the learned Trial Court, therefore, it cannot be said that the defence was not given opportunity to prepare and cross-examine the witness. The grounds on which the recall of witnesses have been sought for is precisely of mistake out of inadvertence to put certain important questions and suggestions. Although in a criminal proceedings *bona fide* errors can be corrected by the order of the Court but the magnanimity of the Court in permitting correction of inadvertent mistakes does not mean to convey individual generosity or magnanimity founded on any kind of fanciful notion. It has to be applied on the basis of judicially established and accepted principles. The approach may be liberal but that does not necessarily mean "*the liberal approach*" shall be the rule and all other parameters shall become exception. Section 311 of the Code can be sought to be invoked either by the prosecution or by the accused persons or by the Court itself. But that should be invoked in order to meet the ends of justice for strong and valid reasons and not otherwise. In support of his contentions, he relied on the decision of the Hon'ble Supreme Court

passed in ***State of Haryana versus Ram Mehar and Others Etc Etc***⁵ and another the decision of this Court passed in ***Mani Majumdar versus State of West Bengal and Anr***⁶. Further in the present case at hand, all the witnesses have been substantially cross-examined and nothing is left to be asked to the witnesses. Though a set of questions has been annexed to the application under Section 311 of the Code, but those are only to fill up the lacuna in the cross-examination. He informs the Court that in the trial examination of prosecution witnesses as well as the examination of the defence witness is complete and the learned Trial Court is in seisin with the hearing of argument. Therefore, the prayer for further examination on recall should not be allowed since the entire process of examination of witnesses is complete and would lead to filling up of lacuna. In support of his contention, he relied on the decision of Hon'ble Gujarat High Court passed in ***Imran Karimbhai Madam versus State of Gujarat***⁷. He further indicates that the examination of witnesses have commenced from 3rd January, 2024 and was concluded on 20th March, 2024 which goes to show that the examination of the witnesses were not just completed within a span of 16 days, rather it went on for more than 2½ months, therefore, the argument of hurried trial is not acceptable. In light of his aforesaid submissions, he prayed for dismissal of the revision application.

5. Mr. Aditi Shankar Chakraborty, learned Additional Public Prosecutor for the State submitted that on the dates fixed for examination of the

⁵ (2016) 8 SCC 762

⁶ 2019 CRILJ 173

⁷ R/Criminal Revision Application No. 1232 of 2022

prosecution witnesses, the learned defence counsel has cross-examined the witnesses sufficiently. No such plea was raised before the learned Trial Court at the time of cross-examination by the learned defence counsel of being not prepared or of not getting ample opportunity to cross-examine the witnesses or of any compulsion. The prosecution in support of its case has examined 22 witnesses and about 401 questions, in all, were put to the different witnesses for the prosecution. Moreover, as and when the learned defence counsel has prayed for accommodation to cross-examine, the learned Trial Court has afforded opportunity to the learned defence counsel, deferring further cross-examination of such prosecution witnesses. On the date of further cross-examination of P.W.21, Subhas Chandra Roy, on 21st February, 2024 at the fag end of the examination of the prosecution witnesses, the petitioner-accused filed an application for recall of certain witnesses for further cross-examination which is in a way of filling up of lacuna. It is a settled law that under Section 311 of the Code since the power is wide its exercise has to be with circumspection. The exercise of this power cannot be untrammelled and arbitrary but must only be guided by the object of arriving at a just decision of the case. It should not be permitted to fill up the lacuna. The learned Trial Court has upon due consideration came to a finding that the application of the petitioner-accused under Section 311 of the Code for recall is nothing but to fill up of lacuna and that it would lead to *denovo* trial which is not permissible under law. Section 35 of the POCSO Act provides for conclusion of trial within a period of one year from the date of taking cognizance of the offence. Already seven months have elapsed and,

therefore, the prosecution is under statutory duty to take appropriate measures so that the intention of the legislature is given effect to and as such, the trial proceeded before the learned Trial Court cannot be said to a hasty trial. The expeditious trial undertaken by the learned Trial Court is within the mandate of law. Further he indicates that all the necessary documents including the digital photographs and certificates under Section 65B of the Evidence Act as well as the pen-drive were earlier supplied to the learned advocate to the accused-petitioner under Section 207 of the Code. The learned Prosecutor before the learned Trial Court during hearing of application filed by accused-petitioner for supply of those documents, willingly consented to supply those documents once again despite there being supply of such copies earlier as per the Code. Thus the plea that the documents were not supplied in terms of Section 207 of the Code is uncalled for. In light of his aforesaid submissions, he also prayed for dismissal of the revision application.

6. Having heard the learned advocate for respective parties the only issue which is to be decided in the present revision is whether the learned Trial Court was justified in rejecting the prayer of the petitioner-accused under section 311 of the Code for recall of some of the prosecution witnesses.

7. The petitioner-accused in the present application has pressed into service his prayer for recall in respect of P.W.1, Dr. Jagadish Biswas, P.W.6, S.I. Arun Roy, P.W.12, Neha Modak, P.W.13, Minoti Modak, P.W.14, Puspajit Barman and P.W.16, Sri Samuel Bag on the following grounds:

- (i) Hasty trial led to insufficiency of opportunity to the defence.

(ii) Inadvertent mistake by the learned defence counsel in not putting certain questions and suggestions to the aforesaid witnesses due to such hurried trial.

8. In order to appreciate the arguments of hasty trial leading to denial of fair trial and insufficiency of opportunity, it would be profitable to reproduce the gist of order sheets recorded by the learned Trial Court from 19th October, 2023 till 20th March, 2024:

- a) On 19th October, 2023, charge-sheet was filed, cognizance was taken and copies of relevant documents were supplied to the accused.
- b) On 1st December, 2023, supplementary charge-sheet was filed, cognizance was taken and copy was supplied.
- c) 14th December, 2023, charges were framed in presence of learned advocates for prosecution as well as defence. Later on as per submissions of the accused, Chairman, SDLSC, Siliguri was requested to appoint an advocate to defend the accused from Legal Aid Panel. Schedule of examinations of charge-sheeted witnesses was fixed.
- d) On 3rd January, 2024, the trial commenced. On the said date the prosecution examined four witnesses namely P.W.1, Dr Jagadish Biswas, P.W.2, Dr Divyakar Chettri, P.W.3, Dr Sandip Ghosh and P.W.4, Dr Chitrakshaya Sarkar. All the witnesses were examined and cross-examined in full and discharged.
- e) On 6th January, 2024 the prosecution examined six witnesses namely P.W.5, Sudipta Chatterjee, P.W.6, PSI Arun Roy, P.W.7,

Anil Kumar Pradhan, P.W.8, Prabhat Barman, P.W.9, Ashutosh Singha and P.W.10, Ruben Ekka. P.W.5 to P.W.9 were examined and cross-examined in full and discharged. The cross-examination of P.W.10 was done in part and was deferred on the prayer of the learned defence counsel for the accused.

- f) On 8th January, 2024, the cross-examination of P.W.10 was concluded. On the selfsame date, the prosecution examined 4 witnesses namely P.W.11, Nilam Pradhan, P.W.12, Neha Modak, P.W.13, Minati Modak and P.W.14, Pushpajit Barman. All the witnesses were examined and cross-examined in full and discharged.
- g) On 17th January, 2024, the prosecution examined five witnesses namely P.W.15, Sri Sanjib Pradhan, P.W.16, Sri Samuel Bagh, P.W.17, Sri Prabir Roy, P.W.18, Smt Ganga Pradhan and P.W.19, Uttam Singha. P.W.15 to P.W.18 were examined and cross-examined in full and discharged. The cross-examination of P.W.19 was deferred on the prayer of the learned defence counsel for the accused.
- h) On 18th January, 2024, the cross-examination of P.W.19 was concluded. On the same date, the prosecution examined two witnesses namely P.W.20, Sri Hritik Roy and P.W.21, Sri Subhash Chandra Roy. The cross-examination of P.W.21 was deferred on the prayer of the learned defence counsel for the accused.
- i) On 21st February, 2024, P.W.21 was cross-examined in full and discharged.

- j) On 22nd February, 2024, the P.W.22 was examined, however, due to paucity of time, the cross-examination of the witness was deferred and 18th March, 2024 and 19th March, 2024 was fixed for further cross-examination of P.W.22 with the consent of the respective parties.
- k) On 18th March, 2024 and 19th March 2024, P.W.22 was cross-examined in part.
- l) On 20th March, 2024, the cross-examination of P.W.22 was completed.

9. It is the principle contention of the petitioner-accused that his counsel was not given sufficient time to prepare for cross-examination of witnesses. From the aforesaid chronology of dates it appears that the charge in the present case was framed on 14th December 2023 and the first date for examination of prosecution witnesses as per the schedule for examination of witnesses was 3rd January, 2024, which is after a period of almost 20 days. It is a fact that on the date of framing of charge i.e 14th December, 2023 the accused was represented by learned defence advocate of his choice, however, on a later submissions of accused, Chairman, SDLSC, Siliguri was requested to appoint an advocate to defend the accused from the Legal Aid Panel. It is informed that the learned defence counsel from the Legal Aid Panel was appointed on 21st December, 2023 by the SDLSC, Siliguri and as such the learned defence counsel could not make scrutiny of the documents and prepare accordingly. Now it is to be seen whether appointment at a later date has really caused predicament to the learned defence counsel in cross-examining the witnesses thereby

affecting the right of the accused to fair trial. The learned Additional Public Prosecutor has submitted a tabular statement giving details of number of questions put to different prosecution witnesses on the dates fixed for their examination, which has not been disputed by the learned advocate for the petitioner. From the gist of tabular statement of such numbers of questions put to prosecution witnesses and tallying it with the compilation of evidence of prosecution witnesses submitted by the learned advocate for the petitioner-accused, it goes without saying that all the prosecution witnesses have been substantially cross-examined at length as per requirement.

10. The extent of cross-examination and the volume of questions put to the prosecution witnesses by the learned defence counsel leave no manner of doubt that the learned defence counsel was well prepared to cross-examine the witnesses. On the first date of examination of witnesses i.e. 3rd January, 2024 and 6th January, 2024 all the witnesses were examined and cross-examined in full and discharged excepting P.W.10 whose cross-examination was deferred on the prayer of the learned defence counsel. Neither any submission was made before the learned Trial Court by the learned defence counsel of her lack of preparation nor any petition was filed to the effect that the learned defence counsel was not prepared to cross-examine the witnesses. Though on 8th January, 2024 a petition was filed by learned defence counsel for re-scheduling the examination of witnesses on the ground of unpreparedness, however, the said application was never pressed into service and needless to mention the learned defence counsel on such date concluded the cross-examination of P.W.10.

It is also relevant to note that on the selfsame date the witnesses namely P.W.11, Nilam Pradhan, P.W.12, Neha Modak, P.W.13, Minati Modak and P.W.14, Pushpajit Barman produced by the prosecution were all cross-examined in full and discharged. Upon going through the cross-examination of the witnesses as above, it reveals that they have been cross-examined at length as required. On all the subsequent dates of examination of witnesses i.e. on 17th January, 2024, 18th January, 2024, 21st February, 2024, 22nd February, 2024, 18th March, 2024, 19th March, 2024, 20th March, 2024 the learned defence counsel has substantially cross-examined the prosecution witnesses. No such ground of unpreparedness of the learned defence counsel on the said dates was pressed before the learned Trial Court by her. It is pertinent to note that the cross-examination of P.W.10, P.W.19, P.W.21, were deferred on the prayer of the learned defence counsel for the accused. Thus from the aforesaid facts it manifest that from the date of framing of charge the accused got 20 days period and the learned defence counsel got almost two weeks time to prepare after her appointment. The volume of questions put to different prosecution witness in cross-examination does not show that the learned counsel was not prepared. Further as and when the learned defence counsel has sought for deferring the cross-examination of prosecution witnesses, the learned Trial Court has accommodated and granted her time to further cross-examine the witnesses. Therefore, the materials clearly manifest that learned defence counsel got ample opportunity to substantially cross-examine the prosecution witnesses. It has been strenuously argued that the learned defence counsel was

compelled to cross-examine the witness. However, from the order-sheets there is no revelation of any such fact being brought to the notice of the learned Trial Court. Section 35 (2) of the POCSO Act provides that the Special Court shall complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offence. It would also be appropriate to reproduce Section 309 (1) of the Code as hereunder

“309. Power to postpone or adjourn proceedings.– (1) In every inquiry or trial the proceedings shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded:

Provided that when the inquiry or trial relates to an offence under section 376, section 376A, section 376AB , section 376B, section 376C, section 376D, section 376DA, or section 376DB of the Indian Penal Code, the inquiry or trial shall be completed within a period of two months from the date of filing of the charge sheet.”

The petitioner-accused is prosecuted for offences under Sections 363, 366, 302, 376A of the IPC read with Section 6 of the POCSO Act Needless to mention that the examination of prosecution witnesses have stretched for a period of almost 2½ months. Bearing in mind the aforesaid provisions it cannot be said that the trial has been undertaken by the learned Trial Court in a hurried and hasty manner. Rather in view of the statutory mandate, the learned Trial Court has proceeded with reasonable expedition which cannot be termed to be a denial of fair trial to the accused.

10.1. It has also been argued on behalf of the petitioner that there was non-compliance of provisions of Section 207 of the Code in supplying documents and only after the accused filed an application for supply of digital photographs and certificate under section 65B of evidence Act, the

prosecution supplied those relevant copies. On going through the order-sheets of the learned Trial Court, it is found that the copies of the documents were supplied to the accused on 19th October, 2023 upon his endorsement. The copy of supplementary charge-sheet was supplied to the accused on 1st December, 2023. During the course of trial learned defence counsel on 21st February, 2024 filed an application for supply of digital photographs and certificate under Section 65B of the Evidence Act. The endorsement of the learned Public Prosecutor on the said application shows that those were already supplied and the learned Public Prosecutor during hearing of the application on 22nd February, 2024 also submitted before the Learned Trial Court that those documents have already been served. However, the learned Public Prosecutor once again supplied the aforesaid copies along with a pen-drive to learned defence counsel. Therefore the argument advanced by learned advocate for the petitioner-accused with regard to non compliance of provisions of Section 207 of the Code does not stand to reason.

10.2. Mr. Ghosh, learned advocate for the petitioner has vociferously argued that the evidence of P.W.15, P.W.16, P.W.17, P.W.18, P.W.19 and P.W.20 and P.W.21 (in part) has been recorded by a Judge (in-charge) of the POCSO court due to absence of regular Presiding Officer, which is not permissible under law as the POCSO Court is a Special Court. From the order-sheet it is found that the regular Presiding Officer went on medical leave due knee injury. No such provisions of law, rule or any authority has been shown by the learned advocate for the petitioner which prohibits a

Judge (in-charge) from recording evidence in a trial under the POCSO Act. Thus such argument falls short of merit.

10.3. Now the occasion has arrived to deal with the decisions cited on behalf of the petitioner.

(i) In *Bashira (supra)* as soon as the counsel was appointed, charge was read out to the accused and after his plea had been recorded, examination of witnesses began. In such backdrop, the Hon'ble Court observed that the rule cast upon the Court itself to grant sufficient time to the counsel for such purpose of preparing defence. The facts of the cited decision are distinguishable since a considerable period of two weeks was available to the learned defence counsel after her appointment to prepare. Hence the ratio laid down does not apply to the facts of the case at hand.

(ii) In *Anokhilal (supra)*, the *Amicus Curiae* was appointed on 19th February, 2013 and on the same date the counsel was called upon to defend the accused at the stage of framing of charges. The *Amicus Curiae* was not provided with sufficient time and before he could have grip of the matter, charges were framed. Not only were the charges framed on the same date but the trial itself was concluded within a fortnight thereafter. The examination of accused under Section 313 of the Code was done even before complete evidence was led by the prosecution and not waiting for the DNA and FSL reports. The facts involved in the cited decision is quite dissimilar with the case at hand inasmuch as the copies of the relevant documents were supplied on 19th October, 2023 and charges ultimately was framed on 14th December, 2023 and as such there was enough time for the counsel of the accused to go through the documents. The present

the case is still pending before the learned Trial Court at the stage of hearing argument. It is not the case that trial has been concluded within a fortnight. Therefore, the ratio of the cited decision does not apply to facts of the case at hand.

(iii) In *Naveen @ Ajay (supra)*, the accused was not provided an opportunity to engage a counsel of his choice and instead his submission was recorded that he desires to be defended by a counsel appointed through legal aid. All the witnesses examined by the prosecution were produced without issuing summons. The accused was in jail and was not defended by counsel of his choice but a legal aid counsel. He was not in a position to present the witness himself. The order-sheet did not record that the copies of statement of witnesses were supplied. Whereas in the case at hand it is not in dispute that upon submission of the accused learned defence counsel from Legal Aid Panel was appointed. Further there is no case that the witnesses were produced without issuance of summons. Admittedly, the accused has examined defence witnesses (DWs). Moreover, the relevant copies of documents have been duly supplied to the accused upon his endorsement. During trial as well the required documents were once again supplied along with pen drive with regard to petition of the accused dated 21st February, 2024 for supply of digital photographs and copies of certificate under Section 65B of the Evidence Act. Thus the facts of the cited decision are quite dissimilar from the case at hand and as such the ratio does not apply to the present case.

10.4. In light of the above discussion, the argument that there was hurried and hasty trial and the petitioner-accused was deprived of fair trial for want of adequate opportunity fall short of merits.

11. Now coming to the application under Section 311 of the Code for recall of P.W.1, P.W.6, P.W.12, P.W.13, P.W.14 and P.W.16 for further cross-examination, it is found that the only ground taken for recalling is that due to hurried trial there has occasion inadvertent mistake of learned defence counsel in not putting certain questions and suggestions to the aforesaid witnesses. The learned Trial Court has rejected such petition on the ground that the application has been filed for filling up of lacuna and such exercise shall lead to *denovo* trial.

12. Now it is to be seen whether the learned Trial Court erred in dismissing the application of the petitioner under Section 311 of the Code for recall of witnesses. In order to appreciate the above issue, it would be appropriate to reproduce Section 311 of the Code which provides for the power of the Court to summon material witness or examination of the person present which reads as follows:

“311. Power to summon material witness, or examine person present.—Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, 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.”

12.1. The first part of this Section, which is permissive, gives purely discretionary authority to the Criminal Court and enables it at any stage of inquiry, trial or other proceedings under the Code to act in one of the three

ways, namely, (i) to summon any person as a witness; or (ii) to examine any person in attendance, though not summoned as a witness; or (iii) to recall and re-examine any person already examined. The second party, which is mandatory, imposes an obligation on the Court (i) to summon and examine or (ii) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.

12.2. The principle to be borne in mind while exercising power under Section 311 of the Code has been laid down in the judgment of the Hon'ble Supreme Court rendered in ***Rajaram Prasad Yadav versus State of Bihar and Another***⁸ which is reproduced as under:

“17.2. The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.

17.3. If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.

17.4. The exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

17.5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

17.6. The wide discretionary power should be exercised judiciously and not arbitrarily.

17.7. The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

17.8. The object of Section 311 CrPC simultaneously imposes a duty on the court to determine the truth and to render a just decision.

17.9. The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to

⁸ (2013) 14 SCC 461

pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

17.10. *Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that 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.*

17.11. *The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.*

17.12. *The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.*

17.13. *The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.*

17.14. *The power under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.”*

12.3. In **Swapan Kumar Chatterjee versus Central Bureau of Investigation**⁹, the Hon’ble Supreme Court observed as follows:

“11. *It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has vide power under this section to even recall witnesses for reexamination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power*

⁹ (2019) 14 SCC 328

under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law.”

Bearing in mind the provisions embodied under Section 311 of the Code and the proposition laid down by the Hon’ble Supreme Court, now this Court proceeds to consider the prayer of the petitioner for recall of prosecution witnesses for further cross-examination.

Mr. Ghosh, learned advocate for the petitioner relying on *K. Ravichandran (supra)* argued that no party in a trial can be foreclosed from correcting errors. When proper evidence was not adduced or relevant materials was not placed on record due to any inadvertence, the Court should be magnanimous in permitting the mistake to be rectified. After all, the function of the Criminal Court is administration of criminal justice and not to count the errors committed by the parties. At this juncture, the question which crops up is whether the magnanimity in permitting mistake to be rectified by way of recall can be made generously without applying judicial principles. To find an answer to the above query, it would be profitable to refer to the observation of Hon’ble Supreme Court in *Ram Meher (supra)* as hereunder.

“39. *There is a definite purpose in referring to the aforesaid authorities. We are absolutely conscious about the factual matrix in the said cases. The observations were made in the context where examination-in-chief was deferred for quite a long time and the procrastination ruled as the Monarch. Our reference to the said authorities should not be construed to mean that Section 311 CrPC should not be allowed to have its full play. But, a prominent one, the courts cannot ignore the factual score. Recalling of witnesses as envisaged under the said statutory provision on the grounds that accused persons are in custody, the prosecution was allowed to recall some of its witnesses earlier, the counsel was ill and magnanimity commands fairness should be shown, we are inclined*

to think, are not acceptable in the obtaining factual matrix. The decisions which have used the words that the court should be magnanimous, needless to give special emphasis, did not mean to convey individual generosity or magnanimity which is founded on any kind of fanciful notion. It has to be applied on the basis of judicially established and accepted principles. The approach may be liberal but that does not necessarily mean "the liberal approach" shall be the rule and all other parameters shall become exceptions. Recall of some witnesses by the prosecution at one point of time, can never be ground to entertain a petition by the defence though no acceptable ground is made out. It is not an arithmetical distribution. This kind of reasoning can be dangerous.

40. *In the case at hand, the prosecution had examined all the witnesses. The statements of all the accused persons, that is, 148 in number, had been recorded under Section 313 CrPC. The defence had examined 15 witnesses. The foundation for recall, as is evincible from the applications filed, does not even remotely make out a case that such recalling is necessary for just decision of the case or to arrive at the truth. The singular ground which prominently comes to surface is that the earlier counsel who was engaged by the defence had not put some questions and failed to put some questions and give certain suggestions. It has come on record that number of lawyers were engaged by the defence. The accused persons had engaged counsel of their choice. In such a situation recalling of witnesses indubitably cannot form the foundation. If it is accepted as a ground, there would be possibility of a retrial. There may be an occasion when such a ground may weigh with the court, but definitely the instant case does not arouse the judicial conscience within the established norms of Section 311 CrPC for exercise of such jurisdiction."*

12.4. In view of the decision in *Rajaram Prasad Yadav (supra)*, there can be no quarrel on the issue that while exercising the discretion under Section 311 of the Code, exigency of the situation, fair play and good sense should be the safeguard and it should be borne in mind that no party in a trial can be foreclosed from correcting errors. When proper evidence was not adduced or relevant materials was not placed on record due to any inadvertence, the Court should be magnanimous in permitting the mistake to be rectified. Be that as it may, the decision in *Ram Meher (supra)* has

taken note of the aforesaid principles and observed that the magnanimity in permitting correction of mistakes should be applied on the basis of judicially established and accepted principles. The approach may be liberal but that does not mean that “liberal approach” shall be the rule and all parameters shall become exception. The aforesaid decision clearly lays down that the decisions which have used the words that the court should be magnanimous, needless to give special emphasis, did not mean to convey individual generosity or magnanimity which is founded on any kind of fanciful notion.

12.5. In the case at hand the petitioner-accused has annexed a schedule of question to the said petition which shows that it intends to put 4 questions to P.W.1, 15 questions to P.W.6, 26 questions to P.W.12, 10 questions to P.W.13, 8 questions to P.W.14 and 14 questions to P.W.16. From the discussion in the foregoing paragraph it is found that the learned defence counsel was given ample opportunity to cross-examine the witness and at no point of time she has raised the issue that she is unable to cross-examine the witness on the dates fixed under the schedule due some predicament. Save and except stating that the questions and suggestions appended to the petition is essential for just decision of the case nothing has been stated nor argued and shown during hearing as to how those questions and suggestions are relevant for just decision of the case. It is pertinent to note that all the witnesses sought to be recalled has been cross-examined at length. The learned Trial Court upon consideration has found that the some of proposed questions have already been covered in depth cross-examination.

12.6. The prosecution in trial has examined 22 witnesses in all. All witnesses of the prosecution have been cross-examined at length. The defence had also examined defence witnesses. The foundation for recall, as is demonstrable from the applications filed, does not even remotely make out a case that such recalling is necessary for just decision of the case or to arrive at the truth. The singular ground which prominently comes to surface is that the counsel who was engaged by the defence failed to put some questions and give certain suggestions. In such a situation recalling of witnesses undoubtedly cannot form the foundation. If it is accepted as a ground, there would be possibility of a retrial and filling up of lacuna as has been rightly held by the learned Trial Court. Therefore, the instant case does not arouse the judicial conscience within the established norms of Section 311 of the Code for exercise of such jurisdiction. This Court finds substance in the submission of Mr. Chowdhury, learned advocate for *defacto*-complainant relying on *Imran Karimbhai Madam (supra)*.

12.7. It is a settled law that under Section 311 of the Code since the power is wide its exercise has to be with circumspection. The exercise of this power cannot be untrammelled and arbitrary but must only be guided by the object of arriving at a just decision case. It should not be permitted to fill up the lacuna as held by this Court in *Mani Majumdar (supra)*. 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 evidence adduced. The determinative factor is whether it is essential for the just decision of the

case. In the case at hand the ground for recall of prosecution witnesses for further cross-examination fails to pass such test.

12.8. In view of the above discussion, the instant revisional application falls short of merit.

13. Accordingly, the revisional application being **CRR No. 130 of 2024** is hereby dismissed. The impugned order dated 20th March, 2024 passed by learned Special Judge, POCSO, Siliguri in Special POCSO Case No. 58 of 2023 rejecting the prayer of the petitioner-accused under Section 311 of the Code for further cross-examination of prosecution witnesses on recall is affirmed.

14. There shall be no order as to costs.

15. All connected applications, if any, stand dismissed.

16. Interim order, if any, stands vacated.

17. Urgent photostat certified copy of this judgment, if applied for, be given to the parties upon compliance of necessary legal formalities.

(Bivas Pattanayak, J.)