GAHC010207262022

2026:GAU-AS:17265

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

Case No. : Crl.Rev.P./503/2022

IMRAN HUSSAIN
SON OF ABDUL MATIN,
R/O VILL- NO. 5, SUTARGAON, P.S. NAGAON, DIST. NAGAON, ASSAM

VERSUS

THE STATE OF ASSAM AND ANR
TO BE REP. BY THE LEARNED PP, ASSAM

2:MD. ABDUL SAMAD
SON OF ABDUL KASEM
R/O NO. 5 SUTARGAON,
P.S. NAGAON, DIST. NAGAON, ASSAM

Advocate for the Petitioner : MR A W AMAN, MR S A BARBHUYAN,MR. SURAJIT DAS, MR SARFRAZ NAWAZ

Advocate for the Respondent : MS. S H BORA, ADDL. PP, ASSAM, MS. P DAS, AMICUS CURIAE (R-2)

BEFORE
HON'BLE MRS. JUSTICE MITALI THAKURIA

Date on which judgment is reserved : **04.11.2026**

Date of pronouncement of judgment : **23.11.2026**

Whether the pronouncement is of the operative part of the judgment? : N/A.

Whether the full judgment has been pronounced? : Yes.

JUDGMENT & ORDER (CAV)

Heard Mr. S. Nawaz, learned counsel appearing for the accused petitioner. Also heard Ms. S.H. Bora, the learned Addl. P.P., Assam appearing on behalf of the State respondent No.1 as well as Ms. P. Das, learned Amicus Curiae appearing for the informant/respondent No.2.

2. This is an application filed under Section 397/401 read with Section 482 of the CrPC against the impugned order dated 01.09.2022, passed by the learned Addl. Sessions Judge cum Special Judge, POCSO, Nagaon in Special (POCSO) Case No.74/2017.

3. It is submitted by Mr. Nawaz, the learned counsel that an FIR was lodged against the present petitioner with the allegation of penetrative sexual assault on the victim girl who was stated to be minor at the relevant time of incident. The statement of the victim was also accordingly recorded under Section 161 of the CrPC, at the time of investigation wherein she simply stated that bad act has been committed by the accused petitioner on her and after the incident, the neighbor/aunt, namely, Masuda arrived there and thereafter, her father lodged the FIR. But while adducing her evidence, the victim girl as PW.2 had exaggerated the matter and she deposed that she was being raped by the accused petitioner by gagging her mouth and when her paternal aunt Masuda came and saw that she was being raped by the accused petitioner. When said Masuda asked the accused petitioner as to why he had done that, he grabbed her legs and requested her not to speak about the incident to anyone. But when Masuda said that she would inform everything to the father of the victim, the accused petitioner fled away from their house. Then said Masuda raised hue

and cry and the neighbours arrived. Thus contradicting her statement recorded under Section 161 of the CrPC, the victim/PW.2 had improved her case and exaggerated the matter to the extent that she was being raped by the accused petitioner and her aunt also saw the incident while she was being raped by the accused petitioner. But inadvertently, the engaged counsel for the accused petitioner did not cross-examine the victim/PW.2 to the extent that she was raped and the incident was also seen by one Masuda who is stated to be one of the eye witnesses.

4. Mr. Nawaz, the learned counsel further submitted that it was an error on the part of the engaged counsel for the accused petitioner and he did not cross-examine the victim on those relevant points which may cause prejudice to the accused petitioner, if she was not being cross-examined on those particular points. The case proceeded accordingly and recording evidence of the prosecution witnesses also closed and the statement of the accused petitioner was also recorded under Section 313 of the CrPC and the case was fixed for statement defence. Then only a petition was filed under Section 311 of the CrPC, praying for recalling the victim girl who was examined as the PW.2, to cross-examine her only on some particular points. But vide order dated 01.09.2022, the learned Addl. Sessions Judge cum Special Judge, POCSO, Nagaon had rejected the prayer with an observation that the petition was filed at a belated stage and the victim was also cross-examined extensively by the learned engaged counsel for the accused petitioner.

5. On being aggrieved, the present petition is filed seeking quashing of the order dated 01.09.2022 and allowing the accused petitioner to cross-examine the victim/PW.2 on some vital issues/points. The learned counsel further

submitted that before the learned Trial Court below, the accused petitioner also gave the points on which the PW.2 was to be confronted and to seek clarification on her previous statement before the investigating officer. The accused petitioner raised the following points for cross-examination of the PW.2 as follows:

> *(i) She stated about "bad things being done by the accused" but did not mention about being raped;*
>
> *(ii) She omitted to state that her aunt Masuda had seen her being raped;*
>
> *(iii) She omitted to state how her mother arrived after hearing her shouts; and*
>
> *(iv) She also omitted to state how she had called her father who later lodged the ejahar.*

6. Mr. Nawaz, the learned counsel further submitted that those omissions made by the PW.2 are vital for proving the lack of any sexual assault on the part of the accused petitioner and during oral submission, those were placed before the learned Trial Court below but the learned Trial Court below took a subjective and pedantic approach without realizing that prove of such contradictions would have helped the learned Trial Court below to arrive at a just decision. The learned counsel further submitted that it was purely an oversight or the mistake on the part of the conducting counsel who failed to put the relevant questions during the cross-examination of the victim and such error cannot be understood as a lacuna and it can be corrected by the Trial Court by taking resort to the inherent power conferred under Section 311 of the CrPC. To that extent, the learned counsel relied on a decision of the Hon'ble Apex Court in the case of ***Rajendra Prasad vs. Narcotic Cell through its Officer In Charge, Delhi*** reported in

(1999) 6 SCC 110 and basically emphasized on para 7 & 8 of the said judgment, wherein it is observed by the Apex Court that no party in a trial can be foreclosed from correcting errors and the advantage should generally go to the accused in the trial of the case. Para 7 & 8 of the said judgment read as under:

> "*7. It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act by saying that the Court could not fill the lacuna in the prosecution case'. A lacuna in prosecution is not to be equated with the fallout of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage `to err is human' is the recognition-of the possibility of making mistakes to which humans are proved. A corollary of any such latches or mistakes during the conducting Of a case cannot be understood as the lacuna which a court cannot fill up.*
> *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 parry in a trial can before-closed 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.".*

7. The learned counsel further submitted that it is the settled position of law that while exercising the power conferred under Section 311 of the CrPC, the Court should be resorted to only with the object of finding out the truth or obtaining proper truth for such facts which leads to a just and correct decision of the case. The prayer under Section 311 of the CrPC can be allowed at any stage by the Court on an application by either of the party or *sou moto*. In support of his submission, Mr. Nawas, the learned counsel relied on a decision of the Hon'ble Apex Court in the case of ***Rajaram Prasad Yadav vs. State of Bihar and another*** reported in ***(2013) 14 SCC 461*** and basically emphasized on para 17 of the said judgment, which reads as under:

> "*17. From a conspectus consideration of the above decisions, while dealing with an*

application under Section 311 Cr.P.C. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

17.1. Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?

17.2. The exercise of the widest discretionary power under Section 311 Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive 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 Cr.P.C. 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 Cr.P.C. 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 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 safe guard, 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 Cr.P.C. 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".

8. Mr. Nawaz, the learned counsel also submitted that as per Section 33(5) of the Act, the Special Court had to ensure that the child is not called repeatedly to testify in the Court. Thus under Section 33(5) of the Act, the intention behind the enactment of the Act is that the victim is not to be harassed by calling repeatedly before the Court for his/her examination. But here in the instant case, it is seen that at the time of her examination, the victim was about 24 years of age and thus, the rigor of Section 33(5) of the Act gets diluted which has been observed by the High Court of Karnataka, in the case of ***Mahammad Ali Akbar vs. State of Karnataka*** reported in ***2022 SCC OnLine Kar 1048*** has been observed in para 18 & 19 of the said judgment, which read as under:

"*18. In terms of Section 33(5) of the Act the Special Court has to ensure that the child is not called repeatedly to testify in the Court. A reading of Section 33(5) of the Act would clearly indicate the intention behind such enactment that in genuine cases the child-victim is not harassed. That would not mean that the accused can be deprived of his right to cross-examination in a trial, particularly, where offence punishable is beyond ten years. The mandatory nature to recall the witness for cross- examination, if the evidence appears to be essential, is always necessary for a just decision in a case, save in cases where repeated applications under Section 311 of the Cr.P.C. are filed on frivolous reasons.*

19. The other factor that is necessary to be noticed is, the current age of the victim. The learned counsel for the petitioner has placed on record Ex.P9, the study certificate issued by the school in which the victim had studied. As on 18-01-2019 the victim was about 15 years of age as her date of birth was 02.01.2004. As on date of filing of the application by the petitioner under Section 311 Cr.P.C. which was on 28-03-2022 the victim had crossed 18 years of age. Once the victim crosses 18 years of age, the rigor of Section 33(5) of the Act gets diluted, as it

is the child-victim who shall not be called for cross- examination or re-examination repeatedly. The word 'child' is defined under Section 2(1)(d) of the Act, to mean a person below 18 years of age. On the child attaining 18 years of age, the rigor under Section 33(5) of the Act gets diluted and sequentially, will not become a bar for seeking further cross-examination of the victim under Section 311 of the Cr.P.C. It is more so in cases where the accused is alleged to have committed offences punishable under the Act as there is presumption under Section 29 of the Act against the accused. To bring in evidence contrary to the presumption is a heavy burden cast upon the accused for offences punishable under the Act. Therefore, to rebut such presumption, as also, peculiar reasons in the case at hand, the victim ought to have been permitted to be cross-examined by accepting the application seeking to recall the witness. This would be imperative to see that the trial does not result in miscarriage of justice in any manner and such miscarriage is prevented at any point of spell and juncture.".

9. Mr. Nawaz, the learned counsel for the accused petitioner further submitted that any order passed under Section 311 of the CrPC is considered to be a interlocutory order and revision may not lie in that case. However the present petition is filed not only under Section 397/401 of the CrPC but the same is also filed under Section 482 of the CrPC, which may be considered as an alternative prayer. In that context also, the learned counsel for the accused petitioner relied on the decision of the Hon'ble Apex Court in the case of ***Akanksha Arora vs. Tanay Maben*** reported in ***2024 SCC OnLine SC 3688*** wherein the Court had observed that nomenclature of a petitioner is immaterial and for doing substantive justice, the High Court can always convert a petition under Section 482 of the CrPC to a revision under Section 397 of the CrPC and *vice versa.* Further, it is observed that the approach of the High Court in dismissing such petition on hyper technical approach cannot be appreciated. Para 7 & 8 of the said judgment reads as under:

"*7. This Court has, in a catena of decisions, provided that nomenclature of a petition is immaterial and for doing substantive justice, the High Court can always convert a petition under Section 482 CrPC to a revision under Section 397 CrPC and vice versa. The approach of the High Court in dismissing the petition filed by the appellant under Section 482 CrPC on the hyper technical ground that she had to avail the remedy of revision cannot be appreciated because the same has unnecessarily compelled the appellant to approach this Court by way of this appeal filed under Article 136 of the Constitution of India.*

8. In Madhu Limaye v. The State of Maharashtra1, this Court held that the label of a petition

filed by an aggrieved party is immaterial. The High Court can always examine the controversy in an appropriate case in exercise of its inherent powers.".

10. Mr. Nawaz, the learned counsel accordingly submitted that under the POCSO Act, there is a presumption under Section 29 of the said Act and under Section 4 of the POCSO Act, the minimum sentence is 10 years and hence, the accused petitioner should get an opportunity to cross-examine the victim/PW.2 on those vital points and in default, he may be prejudiced and in terms of Section 311 of the CrPC, the Trial Court at any stage or enquiry or trial or other proceedings, can recall a witness for re-examination or cross-examination, if his/her evidence appears to be essential for a just decision on the case. The learned counsel also submitted that the accused petitioner may be given a chance to cross-examine the PW.2 only on those relevant points and accordingly, prayed for recalling the order dated 01.09.2022, with a direction the learned Addl. Sessions Judge cum Special Judge, POCSO, Nagaon to allow the accused petitioner to cross-examine the PW.2.

11. Ms. S.H. Bora, the learned Addl. P.P., Assam appearing for the State respondent No.1 submitted that at the time of filing the petition under Section 311 of the CrPC, the statement of the accused under Section 313 of the CrPC was also recorded and at the very belated stage, the petition was filed only to delay in disposal of the case. Thus, the learned Trial Court below had rightly passed the order considering all circumstances of the case and it is also seen that the PW.2/victim was extensively cross-examined by the petitioner and hence, further cross-examination of the PW.2 is not justified. She further submitted that there is no illegality or irregularity in the order passed by the learned Addl. Sessions Judge cum Special Judge, POCSO, Nagaon and hence, interference of this Court and recalling the said order is not at all necessary.

12. Ms. P. Das, the learned Amicus Curiae representing the informant/respondent No.2 also submitted that the learned Trial Court had rightly passed the order dismissing the prayer for recalling the PW.2. She also submitted that ample opportunity was given to cross-examine not only the PW.2 but all the other prosecution witnesses were also extensively cross-examined by the defence. She further submitted that there is no new circumstance to cross-examine the PW.2/victim who was already cross-examined covering all the points of the defence. She further submitted that further cross-examination of the PW.2 may also change the nature and character of the case and in any circumstance, the prayer made under Section 311 of the CrPC may not be considered. Accordingly, she submitted that the prayer for re-examination of the PW.2, under Section 311 of the CrPC is rightly rejected by the learned Trial Court below.

13. Hearing the submissions made by leaned counsel for both sides, I have also perused the case record.

14. It is the case of the petitioner that after cross-examination of the PW.2/victim of the case, it has come to light that some points were left to be examined or clarified by the PW.2, while examining her, which is the error on the part of the engaged defence counsel. Accordingly, a petition under Section 311 of the CrPC was filed before the learned Addl. Sessions Judge cum Special Judge, POCSO, Nagaon for further cross-examination of the PW.2/victim, only on the points which have been mentioned in the petition itself. It is the further case of the petitioner that if the PW.2 is not cross-examined on those relevant points, there is every chance of causing prejudice to the petitioner as the case fall under Section 4 of the POCSO Act, wherein there is stringent provision of

punishment and under Section 29 of the POCSO Act also may be applicable in such nature of case, wherein Court can take the presumption of guilt under it is rebutted.

15. On the other hand, it is the case of the respondents that ample opportunities were provided to the petitioner side for cross-examining the PW.2/victim of the case and she was cross-examined at a length and hence, only to delay the case, the petition under Section 311 of the CrPC was filed at the belated stage, wherein the statement of the petitioner was also recorded under Section 313 of the CrPC. More so, it was the observation of the learned Addl. Sessions Judge cum Special Judge, POCSO that the petition was filed at the belated stage, wherein the victim was extensively cross-examined by the engaged counsel and hence, the petition filed under Section 311 of the CrPC was accordingly rejected by the learned Addl. Sessions Judge cum Special Judge, POCSO.

16. It is an admitted fact that the petition for further cross-examination of the PW.2/victim was filed by the petitioner, after recording his statement under Section 313 of the CrPC. But from the submission made by Mr. Nawaz, the learned counsel for the petitioner as well as from the statement in the petition, it is seen that at the time of recording her statement under Section 161 of the CrPC, the victim never uttered the name of the eye witness, namely, one Masuda who claimed to be the aunt and the eye witness of the prosecution case and even the petitioner met said Masuda when he left the premises of the PW.2. At the same time, in the statement of the PW.2/victim which was made under Section 161 of the CrPC alleged that the accused petitioner committed some bad acts with her, without further explanation as to whether she was subjected

to penetrative sexual assault to attract Section 4 of the POCSO Act. But while adducing her evidence before the learned Special Judge, POCSO, she had clarified those points and it is the case of the victim that she was being raped by the petitioner, which was even witnessed by her aunt Masuda, who also met the accused petitioner at the relevant time of incident. So, on those points, the victim had adduced her evidence, clarifying as to how she was subjected to penetrative assault by the petitioner. But admittedly she was not cross-examined on those relevant points by the engaged counsel for the defence.

17. It is the settled position of law that the Court can exercise the power under Section 311 of the CrPC, only with the object of finding out the truth and only for the just and correction decision of the case. Such nature of petition or prayer can be allowed at any stage of proceeding, if the Court finds that the examination of any witness is required by the prosecution or by the defence for just decision of the case to find out the actual truth.

18. In the case of ***Rajaram Prasad Yadav (Supra),*** as relied by the learned counsel for the petitioner, it is observed by the Hon'ble Apex Court that "no party in a trial can be foreclosed for correcting errors and advantage should generally go to the accused in the trial of the case". In the instant case also, it is the basic contention of the petitioner that in spite of getting opportunity, the learned engaged counsel for the defence did not cross-examine the victim on those relevant points, which were most essential to arrive at a just and proper decision as well as to finding the truth of the case. It is an admitted fact that due to oversight or mistake on the part of the engaged counsel for the defence, the victim/PW.2 was not cross-examined on those most relevant points, wherein she adduced her evidence that she was being raped by the accused/petitioner in

presence of the eye witness.

19. In the same time, as the case is under the POCSO Act, there is the provision of presumption under Section 29 of the said Act and under Section 4 of the POCSO Act, the minimum sentence is 10 years. Thus, if the accused petitioner is not given the chance to cross-examine on those relevant/vital points, the Court can take the presumption under Section 29 of the POCSO Act and in that case, the prejudice may be caused to the petitioner.

20. As per Section 33(5) of the Act, it is the provision under the POCSO Act that a child should not be called repeatedly to testify before the Court. In the instant case also, it is seen that the victim girl was examined and cross-examined by the prosecution and the defence and after closure of her evidence only, the present petition is filed. But admittedly while adducing her evidence before the Court, the PW.2/victim attained her majority and hence, Section 33(5) of the Act may not be applicable in the present case and in that context, the High Court of Karnataka had observed that the rigor of Section 33(5) of the Act gets diluted if the victim attained her majority at the time of recording her evidence. It the present case also, it is the admitted position that at the time of adducing evidence, the victim had already attained her majority and only to extract the truth, her cross-examination is also found essential for the just and proper decision of this Court.

21. So considering all these aspects of the case, it is the opinion of this Court even at the belated stage of the proceeding, a petition under Section 311 of the CrPC, made either by the prosecution or by the defence can be allowed for just and proper decision of this case and if the same is essential to find out the

truth. In the same time, it is also the fact that such nature of petition cannot be allowed only to fill up the lacuna but in all cases, it cannot be held that the petition or the prayer was made only to fill up the lacuna and here, in the instant case, it is also seen that it is the case of the accused petitioner that due to error or mistake by the engaged counsel, the victim was not cross-examined at those relevant and vital points of this case, which she had already narrated while her evidence was recorded before the Court.

22. Under the given facts and circumstances on record and also in view of the law laid down by the Hon'ble Supreme Court, the present petition is allowed and the impugned order dated 01.09.2022, passed by the learned Addl. Sessions Judge cum Special Judge, POCSO, Nagaon in Special (POCSO) Case No.74/2017 is hereby set aside and quashed.

23. Accordingly, the learned Addl. Sessions Judge cum Special Judge, POCSO, Nagaon is hereby asked to fix a date for further cross-examination of the victim/PW.2 and both the parties are hereby directed to proceed with the cross-examination of the victim/PW.2 on the date, to be fixed by the learned Trial Court below. Further, after cross-examination of the victim/PW.2, the learned Trial Court below shall make endeavour to dispose of the matter within a reasonable period of time.

24. With the above observation and direction, this petition stands disposed of.

JUDGE

Comparing Assistant

Manoranjan Barman

Digitally signed by Manoranjan Barman
DN: c=IN, o=Personal, postalCode=781353, l=Nalbari, st=Assam, street=12/190 GOPALBAZAR, Sandheli, Pachim Nalbari Assam India 781353 NEAR GOPAL THAN, title=2306, 2.5.4.20=29db4acf51a76f18a8b02da116d99d9a830067d0e1ee9ade3211eba147de7638, serialNumber=f62c6d212ff0a19bb91eb2be0de18d2d5675f8515740ee4f44960ef8782671 38, email=barmanm1974@gmail.com, cn=Manoranjan Barman
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