GAHC010238992026

2026:GAU-AS:16935

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

Case No. : Crl.Rev.P./551/2026

SADDAM HUSSAIN
S/O-MAMUD ALI VILL- CHAMATA TULSI NAGAR P.S.-SONAPUR DIST.-KAMRUP,ASSAM

VERSUS

THE STATE OF ASSAM AND ANR
TO BE REPRESENTED BY THE PP, ASSAM

2:MIHI PHANGCHO
S/O-LATE KHATON PHANCHO R/O-VILL-BARKASORONG PS-SONAPUR DIST.-KAMRUP(M

Advocate for the Petitioner : MR. A Z AHMED, A.K.SK

Advocate for the Respondent : PP, ASSAM, MR. SARFRAZ NAWAZ, AMICUS CURIAE (R-2)

BEFORE

HON'BLE MRS. JUSTICE SHAMIMA JAHAN

Advocate for the petitioner(s): Mr. S. Banik, Sr. Adv.
Mr. A. Z. Ahmed.

Advocate for the respondent(s): Mr. P. Borthakur, APP
Mr. S. Nawaz.

Date on which judgment was reserved : **NA**

Date of pronouncement of judgment : **17.11.2026**

Whether the pronouncement is of the operative part of the judgment? : **NA**

Whether the full judgment has been pronounced? : **Yes**

JUDGMENT AND ORDER (CAV)

Heard Mr. S Banik, learned Senior Counsel, assisted by Mr. A Z Ahmed, learned counsel for the petitioner and Mr. P Borthakur, learned Additional Public Prosecutor for the State of Assam and Mr. S Nawaz, learned *Amicus Curiae,* representing respondent no. 2.

2. By this application filed under Section 438, read with Section 442 along with Section 528 of BNSS, 2023, the petitioner has challenged the order dated 09.10.2026, passed in Petition No. 1694 of 2026, in connection with Sessions (Special) Case No. 226 of 2025, by which the prayer of the petitioner for recalling the victim (PW-1) for further cross-examination, was rejected.

3. The case of the petitioner is that on 16.10.2025, an FIR was lodged by one Sri Mihi Phangcho, stating *inter alia that* his daughter aged about 16 years was coming back from her school and that she did not reach her house. It was further stated by the informant that he suspects that his daughter was lured away by the petitioner. The petitioner further states that upon completion of the investigation by the Police, a charge sheet was laid, wherein the petitioner was arrayed as the accused person and the charge sheet was submitted against him under Section 87 of the BNS, 2023, read with Section 4 of the POCSO Act.

4. It is the further case of the petitioner that pursuant to the submission of the charge sheet, the trial commenced and the victim was examined as PW-1 on 7th of May, 2026. It is also stated by the petitioner that the victim was also cross-examined on the said date. The petitioner, thereafter, submits that subsequently, the other witnesses were also examined.

5. It is the case of the petitioner that an application was filed before the Court of Additional Sessions Judge-cum Special Judge (POCSO), Kamrup (M), under Section 348 of the BNSS, 2023, to recall PW-1, i.e., the victim for further cross-examination. It is stated in the said application that the case is in evidence stage and that examination of the Investigating Officer has not been done. It was also stated that when the victim was earlier examined and cross-examined, certain material questions were left out, which were necessary for proper adjudication of the case.

6. The learned Court considered the said application and by order dated 09.10.2026, had rejected the same. It was observed in the said order that the victim was examined on 07.05.2026, and she was cross-examined at length on the same day and that the present petition for recalling her, has been filed after 4 months thereof, and also that the petition was not supported by any affidavit. It is also observed that the petitioner while filing the application, had not expressly revealed the questions which were left out during examination of the victim and also that, no questions were specifically mentioned which is required to be put to the victim in the said petition. As such, the Court held that it cannot be denied that the said step taken by the petitioner was to fill up the lacuna.

On these grounds, the petition for recalling the victim for further cross-examination was rejected.

7. Learned Senior Counsel appearing for the petitioner, submits that under Section 348 of the BNSS, 2023, the Court has the ample power to recall any witness for reaching to the just decision of the case. He submits that the observation made by the Trial Court that no questions were mentioned in the application which are required to be put to the victim, is not sustainable, inasmuch, as the same will prejudice the petitioner, which will not result in a just decision of the case. He also submits that since the case is proceeded under Section 4 of the POCSO Act and also under other offence, the petitioner should be given the opportunity to defend his case, in the best possible manner and that he be allowed to cross-examine the victim only for attaining justice.

8. On the other hand, Mr. P Borthakur, learned APP submits that there is no infirmity in the order of the Trial Court, which is backed by sufficient reasons. He submits that the victim was examined and cross-examined at length by the counsel appearing for the petitioner and as such, there is no requirement to further cross-examine the victim.

9. Mr. S Nawaz, learned Amicus Curiae for the respondent No. 2, submits that it is provided under the POCSO Act, that the victim should not be called to the Court every now and then, and that she should not be subjected to harassment. He further submits that although no specific questions may be required to be mentioned in the petition praying for recalling the victim, but the circumstances and the overall picture on the basis of which, questions will be put to the victim

should be mentioned in the petition, so that the Court can reach to a finding that the same is required for just decision of the case.

10. I have heard the learned counsels appearing for the parties and I have also perused the record.

11. In this context, reference may be made to Section 348 of the BNS, 2023, which reads as follows:-

> "***348. Power to summon material witness, or examine person present.***
>
> ***Any Court may, at any stage of any inquiry, trial or other proceeding under this Sanhita, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or re-call and re-examine any person already examined; and the Court shall summon and examine or re-call and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."***

A bare perusal of the aforesaid provision makes it crystal clear that the Section is in two parts. The first part gives discretionary power to a criminal Court and enables it, at any stage of an enquiry, trial or proceeding, to summon anyone as a witness, to examine any person present in the Court or to recall and re-examine any person whose evidence has already been recorded. Whereas the second part is mandatory and compels the Court to exercise the aforesaid power, if it appears to be essential for the just decision of the case. The said exercise of discretionary power and to exercise the same mandatorily,

can be discerned from the words used in the said provision, i.e., the word 'may' in the first part and 'shall' in the second part. On a simple examination of the said provision, it is seen that the same is couched in widest possible term with regard to the stage as well as with regard to the manner in which the power should be exercised. The Hon'ble Apex Court had, time and again held that it is the duty cast upon the Court to arrive at the truth by all lawful means and the present provision is meant for the said purpose.

12. The object underlying Section 348 of the BNSS, 2023, is that there shall not be failure of justice on account of mistake of either party in bringing the relevant evidence on record, or for removing any doubt in the facts of the case or in the statement of the witnesses. The only factor that needs to be seen is that the exercise should be undertaken only for the just decision of the case. In one of the judgments of the Hon'ble Supreme Court, it is also held that in peculiar circumstances, change of counsel defending the accused can also be a ground for recalling the concerned witness, although in normal circumstances, the same is not allowed.

13. In the instant case, it is seen that in the application filed by the petitioner, change of counsel was also stated to be a reason, but along with the same, it was stated that some material questions were left out, which is required for proper adjudication of the case. It is also noticed that by order dated 09.10.2026, the learned Court had stated that in the application, no questions were mentioned which is required to be put to the victim, and as such, this was considered to be an attempt to fill up the lacuna. It is, however, cannot be lost sight of the fact that if all the questions which will be put to the witness are

stated in the petition, then there will be every possibility of not getting the real answers to them from the concerned witness. However, it is also required that the Trial Court, in order to reach to the finding that re-examination of the witness is required for the just decision of the case, should at least, be apprised of, as to what is the necessity to examine the said witness, which again depends upon the facts of the case. As such, it is in the fitness of the case that the circumstances or on which particular facts or law, questions will be put to the witness, should be mentioned in the petition, filed under Section 348 of the BNSS, 2023.

14. Further, since the object of Section 348 of BNSS, 2023, is to bring on record, the best possible evidence not only from the point of view of the prosecution but also from the point of view of the accused and furthermore also, from the point of view of the orderly society. In the instant case, it is stated that many questions were left out to be put to the victim by the defence counsel and as such, this Court permits the petitioner to file a fresh application before the Trial Court, stating therein the circumstances as well as the relevant facts of the case, for which questions are required to be put to the victim, so as to bring out the real facts without, however, specifying the exact questions. It is further directed that the learned Trial Court, upon examination of the said application should consider the same, by taking into account the said circumstances and the reasons projected by the petitioner, for the just decision of the case, as per Section 348 of the BNSS, 2023. Accordingly, the case is remanded back to the learned Trial Court for a fresh adjudication on the said subject. The order dated 09.10.2026, passed by the learned Trial Court, i.e., Additional Sessions Judge -cum- Special Judge, (POCSO) Kamrup (M), passed in

Sessions (Spl.) Case No. 226 of 2025, is as such set aside and quashed.

15. With the aforesaid observations and directions, this criminal petition stands disposed of.

JUDGE

Comparing Assistant