

Court No. - 86

Case :- APPLICATION U/S 482 No. - 37191 of 2023

Applicant :- Karmraj

Opposite Party :- State Of U.P. And 3 Others

Counsel for Applicant :- Bhaju Ram Pprasad Sharma, Arvind Kumar
Srivastava

Counsel for Opposite Party :- G.A.

Hon'ble Rajiv Gupta, J.

1. Heard learned counsel for the applicant, learned AGA for the State and perused the record.

2. By means of present application u/s 482 Cr.P.C., the applicant has challenged the order dated 25.8.2023 passed by Addl. & District Sessions Judge, (Rape & POCSO Act), Court No. 3, Gorakhpur in S.S.T. No. 12 of 2016, State Vs. Karmraj, arising out of case crime no. 339 of 2015, under sections 354-A, 506, IPC, and 7/8 of POCSO Act. P.S. Campierganj, District Gorakhpur, whereby an application filed under Section 311 Cr.P.C. for re-summoning the victim-P.W.-3 for her further cross examination has been rejected.

3. Brief facts giving rise to this application is that the first information report was lodged against the applicant, which was registered vide case crime no. 0339 of 2015, under Sections 354-A IPC and Section 7/11(i) of POCSO Act, 2012. On the basis of the said first information report, the police thoroughly investigated the matter and submitted charge sheet against the applicant u/s 354-A, 506 IPC and 7/8 POCSO Act. On the basis of said charge sheet, the trial court has taken cognizance and summoned the applicant to face trial.

4. After framing of the charge against the applicant under section 354-A, 506 I.P.C. and 7/8 of POCSO Act., the applicant did not plead guilty and as such he was put to trial and prosecution witnesses were summoned to adduce their evidence. It appears that thereafter the statement of P.W.1, P.W.2, and P.W.3

was recorded. The statement of P.W.3, who is the victim, has been recorded on 14.7.2023 and she was extensively cross examined by the counsel for the applicant and after concluding her evidence, the statement of remaining witnesses was also recorded and they were also extensively cross examined by the counsel for the applicant. After concluding the statement of the prosecution witnesses, the statement of the accused was recorded under section 313 Cr.P.C. and thereafter the case was fixed for defence evidence and argument.

5. At this stage an application dated 19.8.2023 under section 311 Cr.P.C. has been filed by the applicant stating therein that certain important questions (16 in numbers) which are necessary for just decision of the case could not be put to the victim at the time of her cross examination as such she be recalled for further cross examination. The said application was considered by the trial court who after taking into consideration, the questions sought to be put up, rejected the said application by holding that in the garb of further cross examination, the applicant is trying to re-visit the entire evidence recorded earlier and there is every possibility of the fact that the victim has been won over, as such rejected the said application.

6. Being aggrieved and dissatisfied by the said order, the present application has been filed.

7. Learned counsel for the applicant has submitted that P.W.3 who is victim of the case though has already been extensively cross examined yet certain important questions which are necessary for just decision of the case has not been put to her, therefore she be recalled for further cross examination under section 311 Cr.P.C. However, the said application has illegally been rejected by the trial court by the impugned order dated 25.8.2023 which is bad in law and liable to be set-aside.

8. Per contra, learned AGA has supported the impugned order passed by the trial court and has submitted that the trial court has rightly rejected the

said application. From the perusal of the application filed by the applicant under section 311 Cr.P.C. as many as 16 questions have been mentioned to be put to the victim in further cross examination which clearly shows that intention of the applicant is to re-visit the entire testimony of the said victim who is a minor girl. In fact the applicant is only indulging in dilatory tactics to fill up the lacuna left in the earlier cross examination which by any stretch of imagination is not permissible in law.

9. Having considered the rival submission made by the learned counsel for the parties, it would be open to note the provision in Section 311 Cr.P.C. regarding the power to summon earlier witness or examine any person, which provides as under :-

Section 311 CrPC. 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.

10. The Hon'ble Apex Court, while interpreting the said provision under Section 311 CrPC in the case reported in **(2017) 9 SCC 340, Ratanlal Vs. Prahlad Jat**, has held as under :-

"17. In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 311 CrPC are enacted whereunder any court by exercising its discretionary authority at any stage of inquiry, trial or other proceeding can summon any person as witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person, already examined who are expected to be able to throw light upon the matter in dispute.

The object of the provision as a whole is to do justice

not only from the point of view of the accused and the prosecution but also from the point of view of an orderly society. This power is to be exercised only for strong and valid reasons and it should be exercised with caution and circumspection. Recall is not a matter of course and the discretion given to the court has to be exercised judicially to prevent failure of justice. Therefore, the reasons for exercising this power should be spelt out in the order."

11. Further, in ***State (NCT of Delhi) Vs. Shiv Kumar Yadav reported in (2016) 2 SCC 402***, it was held that "Certainly, recall could be permitted if essential for the just decision, but not on such consideration as has been adopted in the present case. Mere observation that recall was necessary "for ensuring fair trial" is not enough unless there are tangible reasons to show how the fair trial suffered without recall.

Recall is not a matter of course and the discretion given to the court has to be exercised judiciously to prevent failure of justice and not arbitrarily. While the party is even permitted to correct its bona fide error and may be entitled to further opportunity even when such opportunity may be sought without any fault on the part of the opposite party, plea for recall for advancing justice has to be bona fide and has to be balanced carefully with the other relevant considerations including uncalled for hardship to the witnesses and uncalled for delay in the trial. Having regard to these considerations, there is no ground to justify the recall of witnesses already examined."

21. The delay in filing the application is one of the important factors, which has to be explained in the application. In ***Umar Mohammad v. State of Rajasthan [Umar Mohammad v. State of Rajasthan, (2007) 14 SCC 711 : (2009) 3 SCC (Cri) 244]***, this Court has held as under: (SCC p. 719, para 38)

"38. Before parting, however, we may notice that a contention has been raised by the learned counsel for the appellant that PW 1 who was examined in

Court on 5-7-1994 purported to have filed an application on 1-5-1995 stating that five accused persons named therein were innocent. An application filed by him purported to be under Section 311 of the Code of Criminal Procedure was rejected by the learned trial Judge by order dated 13-5-1995. A revision petition was filed thereagainst and the High Court also rejected the said contention.

It is not a case where *stricto sensu* the provisions of Section 311 of the Code of Criminal Procedure could have been invoked. The very fact that such an application was got filed by PW-1 nine months after his deposition is itself a pointer to the fact that he had been won over. It is absurd to contend that he, after a period of four years and that too after his examination-in- chief and cross-examination was complete, would file an application on his own will and volition. The said application was, therefore, rightly dismissed."

12. Having considered the aforesaid decision, it is evident that power under section 311 Cr.P.C. should be exercised consciously and not in a routine and casual manner so as to extend any benefit to the accused person which is evident in the instant case. The statement of the victim was recorded on 14.7.2023 and she was extensively cross examined by the counsel for the applicant. However, subsequently after entire prosecution evidence has been recorded and after recording the statement of accused u/s 313 Cr.P.C., an application under section 311 Cr.P.C. has been filed stating therein 16 questions which are to be put to the victim in further cross examination which clearly shows that in fact the applicant wants to re-visit the entire evidence adduced by the victim so that he may take advantage of various statements of the prosecutrix and to fill up the lacuna left in the earlier cross examination. Moreover, section 33 (5) of The Protection of Children from Sexual Offences Act, 2012 clearly provides that the special court shall ensure that the child is not called repeatedly to testify in the court which may cause serious prejudice to the principle of fair trial. It is well settled

principle of law that power conferred under section 311 Cr.P.C. should be invoked by the court only to meet ends of justice. The court has wide power under this section even to recall the witness for further cross examination in the interest of justice but the same has been exercised after taking into consideration the facts of the each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of process of the court.

13. Thus, in the backdrop of the said facts and circumstances and in view of the settled law laid down by the Hon'ble Apex Court and in view of the provision contained in section 33(5) of the POCSO Act., I am of the considered view that the impugned order do not suffer from any illegality, impropriety or jurisdictional error and do not call for any interference by his Court at this stage.

14. The present application under section 482 Cr.P.C. is devoid of merit and is accordingly dismissed.

Order Date :- 27.10.2023

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