

Court No. - 90

Case :- APPLICATION U/S 482 No. - 42744 of 2023

Applicant :- Mohit Mishra

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Syed Mohammed Jafer Husain

Counsel for Opposite Party :- G.A.

Hon'ble Dinesh Pathak, J.

1. Heard learned counsel for the applicant, learned A.G.A. and perused the record on Board.

2. The applicant has invoked the inherent jurisdiction of this Court under Section 482 Cr.P.C. assailing the order dated 27.10.2023 passed by the Additional Sessions Judge/Special Judge (Rape & POCSO Act), Court No.1, Fatehpur in Special Sessions Trial No.126 of 2017 (State vs. Mohit Mishra and Others) arising out of Case Crime No.89 of 2017, under Section 376-D, 120-B, 506 I.P.C. & 5(I/6 of POCSO Act, Police Station Khakhreru, District Fatehpur.

3. Facts culled out from the record are that respondent no.2 has lodged an F.I.R. against the three accused including the present applicant levelling allegations of criminal conspiracy and forceful sexual assault on his minor daughter. After due investigation, the Investigating Officer (in brevity 'I.O.') has arraigned all the accused in the charge-sheet for offence under Section 376-D, 120-B & 506 I.P.C. and 3/4 Protection of Children from Sexual Offences Act, 2012 (in brevity 'POCSO Act'), accordingly, charges have been framed. After completion of prosecution evidence, an application (paper no.45 Ba) has been moved on behalf of the prosecution through public prosecutor under Section 216 Cr.P.C. to alter the charges,. Learned trial court, vide order dated 19.10.2023, has deleted the charge under Section 3/4 POCSO Act and in its place charge under Section 5/6 POCSO Act has been framed. After alteration of charges, the accused (applicant herein) with one co-accused Harish Chandra Agrahari has moved an application dated 27.10.2023 (paper no.46 Ba) under Section 217(a) Cr.P.C. to recall PW-2 (victim) and PW-7 (I.O.). Learned trial court, vide order dated 27.10.2023, has rejected the said application which is under challenge before this Court.

4. Having considered the rival submissions advanced by learned counsel for the applicant as well as learned A.G.A. and perusal of record, it is manifested that the police case has been lodged levelling allegations of forceful sexual assault on a girl child and, accordingly, charges were framed for offence under Section 376-D read with 120-B and 506 I.P.C. and under Section 3/4 POCSO Act. At later stage, learned trial court, vide order dated 19.10.2023, has altered the charges, on the application moved by public prosecutor, and in place of 3/4 POCSO Act new charge under Section 5/6 POCSO Act has been framed.

5. Learned counsel for the applicant emphasized that it is a right of the present applicant (accused) to re-examine the witnesses who are relevant for the purposes to prove his innocence in offence under which the present applicant has been indicted in the present case after alteration of charges under Section 5/6 POCSO Act. Learned trial court has rejected the applicant on the ground that genesis of the crime is not affected due to alteration of charges whereby allegation of gang rape is already there which has initially been levelled against the accused. learned trial court has treated the application moved on behalf of the accused as a clue to protract the litigation inasmuch as there is no need to recall the witnesses who have already been cross-examined by the accused qua charge of forceful sexual assault.

6. Having given careful consideration to the given circumstances of the present case, wherein minor is subjected to forceful sexual assault, I am of the considered view that there is no justification to recall or re-summon PW-2 (victim), who has already narrated her ordeals in examination-in-chief and she has been cross-examine by the accused to the extent of defence to prove their innocence. At this juncture, after alteration of charges, no justifiable ground is made out to secure the ends of justice so as to re-summon the victim.

7. So far as recall/re-summon of PW-7 (I.O.) is concerned, I found substance in the submission of learned counsel for the applicant (accused). Initially, the applicant has been arraigned in the charge-sheet for the offense under Section 3/4 POCSO Act, however, at later stage, after completion of the prosecution witnesses, new charge under Section 5/6 POCSO Act has been formulated in place of previous charge under Section 3/4 POCSO Act. To elaborate the difference between these two provisions, intending to prove the innocence of the present applicant (accused), in my opinion, one opportunity should be given to the present applicant to re-examine PW-7 (I.O.). It is no more res integra that proper opportunity for

fair trial is a fundamental right guaranteed under the Constitution of India, therefore, mere on the ground of delay, without assigning any convincing reason, the applicant (accused) cannot be deprived of his right to cross-examine the prosecution witnesses intending to prove his innocence. Lack of opportunity to cross-examine PW-7 (I.O.) might affect the merit of defence which may result into the guilt of the accused.

8. In this conspectus, as above, instant application under Section 482 Cr.P.C., in order to secure the ends of justice, is liable to be allowed in part so that opportunity of fair trial may be afforded to the present applicant (accused) to prove his innocence. As such, instant application is allowed in part and the order impugned dated 27.10.2023 passed by the Additional Sessions Judge/Special Judge (Rape & POCSO Act), Court No.1, Fatehpur in Special Sessions Trial No.126 of 2017 (State vs. Mohit Mishra and Others) arising out of Case Crime No.89 of 2017, under Section 376-D, 120-B, 506 I.P.C. & 5(I)/6 of POCSO Act, Police Station Khakhreru, District Fatehpur, is partly quashed and application dated 27.10.2023 (paper no.46 Ba) under Section 217(a) moved on behalf of the present applicant along with co-accused is hereby partly allowed only with respect to PW-7 (I.O.). Learned trial court is hereby directed to recall/re-summon PW-7 (I.O.) fixing a particular date and make an endeavour to complete the cross-examination of PW-7 (I.O.) on the said date fixed, meaning thereby only one chance is given to the applicant to cross-examine PW-7 (I.O.). In case, on the presence of PW-7 (I.O.), the accused is failed to cross-examine him, no next date shall be fixed for the said purpose, in pursuance of order of the date. Learned trial court concerned is hereby further directed that he shall look into the order dated 27.10.2023 & 19.10.2023 and clarify as to under which of Sections of POCSO Act i.e. 5/6 or 5(1)/6 or 5(G)/6, after alteration of charges, new charges are framed and, accordingly, pass an appropriate order.

Order Date :- 13.12.2023

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