



2024:UHC:8977

HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Misc Application No. 332 of 2024

03 December, 2024

Pravesh Kumar Alias Mota

--Petitioner

Versus

State of Uttarakhand & Another

--Respondents

Presence:-

Ms. Prabha Naithani, counsel for the petitioner/accused.

Mr. Deepak Bisht, learned D.A.,G. assisted by Mr. Vikash Uniyal,
learned Brief Holder for the State.

Hon'ble Vivek Bharti Sharma, J.

This criminal misc. application is filed under Section 528 of B.N.S.S. by the petitioner/accused for quashing of the impugned order dated 29.07.2024 passed by learned FTSC/Additional Sessions Judge, Roorkee, District Haridwar in Special Sessions Trial No. 20 of 2022 (FIR No. 1186 of 2021) 'State vs. Pravesh Kumar' for the offence punishable under Sections 363, 366(A), 376(2)(N), 376(3), 506 of IPC and under Sections 3(A)/4(ii), 5(1)/6 of Protection of Children from Sexual Offences Act, 2012, P.S. Kotwali Manglore, District Haridwar and to stay the further proceedings



of the aforesaid special sessions trial number.

2. Learned State counsel would submit that he does not want to file counter affidavit as the facts are quite evident from the impugned order under challenged by the petitioner/accused.

3. Learned counsel for the petitioner/accused would submit that by the impugned order, the trial court dismissed the application moved under Section 311 of Cr.P.C. by the petitioner/accused (*Annexed as Annexure No. 3 to the C-528 petition*) with a prayer to recall the PW1 & PW2 for further cross-examination.

4. She would further submit that the statements of the PW1 victim and PW2 mother of the victim were recorded before the trial court but the counsel appearing on behalf of the petitioner/accused could not ask some important questions especially on the points related to the incident, age of the victim and the medical examination of the victim.

5. Per contra, learned State counsel vehemently opposed the petition on the ground that no application under Section 311 Cr.P.C. can be allowed merely on the basis of incompetency of



previous counsel or his failure to ask the certain questions; that, summoning the victim for re-examining will tantamount to making the prosecutrix/victim relive the horror faced by her, which also against the mandate of law under subsection 5 of Section 33 of the POCSO Act that *the Special Court shall ensure that the child is not called repeatedly to testify in the court.*

6. He would further submit that the opportunity to cross-examine the PW 1 & PW 2 was given to the petitioner/accused thrice but no one was present on his behalf even in the revised call repeatedly.

7. Having heard the learned counsel for the parties and perused the record, this Court finds force in the arguments of the learned State counsel and is of the considered view that in **State (NCT of Delhi) v. Shiv Kumar Yadav, (2016) 2 SCC 402: (2016) 1 SCC (Cri) 510** it has been held by the Hon'ble Supreme Court that mere incompetence or change of counsel cannot be ground for recall of witness under Section 311 Cr.P.C., and that it is not only matter of delay but also harassment for witnesses to be



recalled which could not be justified.

8. Further, there appears no reason that summoning the victim for re-examination will be essential to the just decision of the case. Rather, it would be violation of Section 33(5) of the POCSO Act, 2012.

9. In **State (NCT of Delhi) v. Shiv Kumar Yadav and Anr., (2016) 2 SCC 402**, it has been observed 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 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."



2024:UHC:8977

10. It is trite that the powers under Section 528 of B.N.S.S. have to be exercised sparingly, carefully and with caution and only to prevent abuse of process of any Court or otherwise to secure ends of justice.

11. In the considered view of this Court, this is not a fit case in which, the powers under Section 528 of B.N.S.S. should be exercised.

12. Accordingly, the present C-528 petition lacks merit and the same is hereby dismissed.

13. Let a copy of this order be sent to the court concerned for necessary compliance.

(Vivek Bharti Sharma, J.)
03.12.2024

Akash

AKASH