



2024:UHC:8346

HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Misc Application No. 765 of 2024

11 November, 2024

Parvez

--Petitioner

Versus

State of Uttarakhand & Anr.

--Respondents

Presence:-

Mr. Mani Kumar, counsel for the petitioner.

Mr. Pratiroop Pandey, learned A.G.A. for the State.

Hon'ble Vivek Bharti Sharma, J.

The present petition under Section 528 of B.N.S.S. is filed by the petitioner/accused to quash the order dated 12.08.2024, whereby the application under Section 311 of Cr.P.C. filed by the petitioner/accused to re-cross-examine the prosecution witnesses i.e. PW1 prosecutrix/victim & PW2 father of the prosecutrix/complainant on additional facts and questions, was dismissed by learned Additional District Judge/F.T.C./Special Judge (POCSO), Rudrapur, District Udham Singh Nagar.

2. The brief facts of the case are that the petitioner/accused was charge-sheeted under Sections 363, 366, 376(2) of IPC and Section 5/6 of the Protection of Children from Sexual Offences Act (*in short* 'POCSO Act'); that, after framing of charges, the petitioner/accused is



facing trial for the offence punishable under Sections 363, 366, 376(2) of IPC and Section 5/6 of the POCSO Act; that, the prosecutrix/victim and her father/complainant were examined in the trial court as PW1 & PW2 respectively; that, an application under Section 311 of Cr.P.C. was moved (*annexed as Annexure No. 4 to the petition*) for recalling the PW1 & PW2 i.e. prosecutrix/victim and her father/complainant respectively on the ground that a number of questions were necessary to be asked to the prosecutrix/victim and her father. However, that application was dismissed vide order dated 12.08.2024. Hence, this petition.

3. Learned counsel for the petitioner/accused would submit that during the cross-examination of the father of the prosecutrix/victim as PW2, it came to the knowledge that the prosecutrix/victim i.e. PW1 is adopted daughter of PW2 and to create the doubt about the age of the prosecutrix/victim, these questions are necessary.

4. Learned State counsel would vehemently oppose the present petition on the ground that the application under Section 311 of Cr.P.C. was moved approximately three years after recording of the statement of the prosecutrix/victim as PW1 in the trial court and that there is caution under sub-section 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*; that, the age of the



prosecutrix/victim has been proved by the prosecution in the trial court by examining the Principal of the school attended by the prosecutrix/victim.

He would further submit that the prosecutrix/victim has been examined in the trial court extensively almost on all the points running into nine pages; that, as per the evidence proved in the trial through the Principal of the school prosecutrix/victim last attended, the date of birth of the prosecutrix/victim is 15.04.2008 and at the time of the alleged incident, the age of the prosecutrix/victim can be at most 13 years; that, in the cross-examination not a single question was asked to the prosecutrix/victim in the trial court which would show her to be major at the time of the alleged incident.

5. Learned State counsel would further submit that the application under Section 311 of Cr.P.C. is nothing but just an attempt to harass the prosecutrix/victim and her father/complainant and to delay the dispensation of justice; that, the trial is already going on for more than three years and it should be decided at the earliest.

6. Having heard learned counsel for the parties and perused the record, this Court finds force in the arguments of the learned State counsel, however, learned counsel for the petitioner/accused would himself fairly concede that in the cross-examination, no suggestion/question was put to



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the prosecutrix/victim i.e. PW1 that she was major at the time of the alleged incident or not; that, as per the school records, the date of birth of the prosecutrix/victim has come as 15.04.2008.

7. It is trite that the powers under Section 528 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.

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

9. Accordingly, the present C-528 petition lacks merit and the same is hereby dismissed *in limine*.

10. Let a copy of this order be sent to the court concerned for information.

(Vivek Bharti Sharma, J.)
11.11.2024

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