

NAFR**HIGH COURT OF CHHATTISGARH, BILASPUR****CRR No. 466 of 2019**Order reserved on : 22.07.2019Order delivered on : 30.08.2019

- Rupendra Kumar S/o Bhagat Ram Yadav, aged about 23 years, R/o Saragaon, P.S. Kharora, District Raipur (C.G.)

----Petitioner**Versus**

- State of Chhattisgarh Through : P.S. Kharora, District Raipur (C.G.)

---- Respondent

For Petitioner	:	Shri N. Naha Roy, Adv.
For Respondent/State	:	Shri Wasim Miyan, P.L.

Hon'ble Smt. Justice Rajani Dubey**C A V ORDER****30/08/2019**

01. With the consent of the parties, the matter is heard finally at the motion state.

02. This revision has been filed against the order dated 02.03.2019 passed by the learned 7th Additional Sessions Judge, Raipur in Special Criminal Case No.124/2017, whereby the learned trial Court has rejected the application filed under Section 311 of Cr.P.C. by the applicant for recalling the prosecution witnesses.

03. Before the trial Court, the accused/applicant is facing trial for the offence under Sections 363, 366, 376 IPC and Sections 3 and 4 of Prevention of Children from Sexual Offences Act, (for short 'POCSO Act'), and his second application filed under Section 311 of Cr.P.C. for recalling witnesses PW/1, PW/2 and prosecutrix PW/3 for their further examination was rejected on 02.03.2019. Hence this revision.

04. Learned counsel for the applicant submits that the impugned order of the learned trial Court is arbitrary and illegal which denied the opportunity to defend oneself against the charge imposed and the same is not sustainable even for a moment. He further submits that the learned trial Court has rejected the application on the ground that cross-examination has been conducted at length to the satisfaction of the erstwhile counsel for defense, but the requirement of law was whether their evidence made it required to get them examined further in order to reach to a just decision of the case. He also submits that the learned trial Court did not appreciate this aspect that in absence of testing of the statements recorded in examination-in-chief in their cross-examination, the veracity of the same remained unquestioned, which could never be the aim of a fair trial. It is next submitted that the earlier application filed under Section 311 of Cr.P.C. and the present one is not one and same for the reason that present application mentions specifically as to how the prosecutrix is left to be tested with respect to age

claimed by her on the basis of progress report card, whereas no such reason was clearly assigned in the earlier application, meaning thereby that this was altogether a new ground for recalling the witnesses. It has been further submitted that in absence of testing of the statements recorded in examination-in-chief in their cross-examination, the applicant failed to avail a proper opportunity of defense for the fault of his erstwhile counsel for which he could not be made to suffer as settled by Hon'ble the Apex Court.

05. On the other hand, learned State counsel supporting the impugned order submits that the earlier application of the applicant was rejected by the trial Court on 04.08.2018 and again new application that too on the same ground is not maintainable. Thus, the order impugned is just and proper and does not call for any interference by this Court.

06. I have heard the learned counsel for the parties and perused the record.

07. The record goes to show that the accused/applicant had moved an application under Section 311 of Cr.P.c. on 16.04.2018, which was rejected by the learned trial Court on 04.08.2018 on the ground that further cross-examination does not seem to be bonafide, against which, the applicant filed CRR No. 1086/2018 and the same was withdrawn by the applicant on 06.10.2018 with liberty to file a fresh application before the Trial Court, if required on any other ground. On 26.11.2018, the accused/applicant filed another application

under Section 311 Cr.P.C. on the ground that previous defence counsel did not ask relevant and essential questions with regard to age and progress report of the prosecutrix. The learned trial Court rejected second application on 02.03.2019 on the ground that previous application filed by the applicant rejected on 04.08.2018 and the main thrust in both the applications was that the previous counsel has not adequately cross-examined the witnesses on the point of age. Merely that the word 'progress report card' was not mentioned in the previous application and it is not sufficient for creating any other ground in favour of the applicant.

08. The accused/applicant has filed deposition sheet of PW/1, PW/2 and PW/3, mother, father and prosecutrix respectively, which demonstrate that effective cross-examination with regard to age of the prosecutrix was not carried out, and even no question with respect to progress card of the prosecutrix was asked. Therefore, considering the facts and circumstances of the present case, it would be appropriate in the interest of justice to afford an opportunity to the accused/applicant for recalling the prosecution witnesses (PW/1, PW/2 and PW/3).

09. In the result, the impugned order dated 02.03.2019 is set aside and the application dated 26.11.2018 of the applicant is allowed with a condition that he will pay process fee for recalling PW/1, PW/2 and PW/3 and also to pay travelling expenses to them. It is made clear that if any defect or lapse is found in the process fee, the opportunity for

recalling the witnesses shall stands cancelled.

10. The revision is thus allowed to the extent indicated above.

Sd/-

(Rajani Dubey)
JUDGE

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