

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CR.R. No. 482 of 2020

1. Kuleshwar, S/o. Itwari Kurre, aged about 20 years,
2. Amit, S/o. Shiv Lal Kurre, aged about 19 years,
3. Smt. Vijaykeen, W/o. Itwari Kurre, aged about 35 years,

All are R/o. Village Farhada, Police Station - Jarhagaon, District Mungeli Chhattisgarh.

---- Applicants

Versus

State of Chhattisgarh, Through - The Police Station Takhatpur, District Bilaspur Chhattisgarh.

-----Respondent

For Applicants	: Mr. Rajeev Kumar Dubey, Advocate
For Respondent	: Mr. Adil Minhaj, Govt. Advocate

Hon'ble Shri Justice Rajendra Chandra Singh Samant

Order On Board

25/03/2021

1. This criminal revision has been brought challenging the correctness, legality and propriety of the impugned order dated 22.02.2020, passed by the Court of Additional Sessions Judge, Special Judge, POCSO, Bilaspur (C.G.) in S.T. No. 54 of 2019, dismissing the application of the applicant filed under Section 311 of Cr.P.C.
2. It is submitted by the learned counsel for the applicant that the prosecutrix in this case was examined in the trial on 22.01.2020

in camera proceeding, following the procedure under Section 37 of the Protection of Children from Sexual Offences Act, 2012 (in short the Act, 2012). It is submitted that as per Section 273 of Cr.P.C. evidence has to be taken in presence of accused. Section 36 of the Act, 2012 also provides that Special Court shall ensure that the child is not exposed in any way to the accused at the time of recording of the evidence, while at the same time ensuring that the accused is in a position to hear the statement of the child and communicate with his advocate. The applicant was though present, but he was standing outside the room, where the camera proceeding was going on and he was not in a position to hear, the statement that was given by the victim, hence, clearly, the provisions under Section 36 of the Act, 2012 has not been followed.

3. Reliance has been placed on the judgment of Supreme Court in case of **Atma Ram & Ors. Vs. State of Rajasthan**, passed in **Cr.A. No. 656 – 657 of 2019**, decided on 11.04.2019, in which it has been held that compliance of Section 273 of Cr.P.C. is mandatory and it is the valuable right of the accused to hear the witness making deposition. Therefore, the valuable right of the applicant has been violated. The learned trial Court should have allowed the application of the applicant for recall of the prosecutrix for her re-examination and re-cross-examination. Hence, it is prayed that the impugned order by which the application under Section 311 of Cr.P.C. has been dismissed, be

set-aside and relief be granted to the applicant.

4. Counsel for the State opposes the petition and the submissions made in this respect. It is submitted that the application under Section 311 of Cr.P.C. was filed by this applicant with malafide intention only for the purpose of delaying the trial. It is only the applicant No.1, who is in the custody, whereas, the other applicant are on bail. The order-sheets of 22.01.2020 of the case mentioned the presence of the applicant in the Court when the prosecutrix was examined and cross-examined. The counsel for the applicant was present, who has availed the opportunity of cross-examination of the prosecutrix.
5. It is submitted that Section 36 and 37 of the Act, 2012 have been framed with special purpose to safeguard the interest of the accused as provided under Section 273 of Cr.P.C., as well as ensuring that the prosecutrix is not exposed to the accused persons. Hence, looking to the express provision of the Act, 2012 no error has been committed by the learned trial Court in rejecting the application under Section 311 of Cr.P.C. The applicants were represented by counsel, who was present at the time of examination and cross-examination of the prosecutrix. Hence, the requirements have been fulfilled. The revision petition is without any substance, which may be dismissed.
6. I have heard the learned counsel for the parties at length and perused the documents placed on record.

7. On perusal of the order sheet dated 22.01.2020, it is found that on this date of hearing, the prosecutrix and other witnesses were present, who were examined and cross-examined and then discharged by the Court. No objection was raised by the counsel appearing for the accused persons, however, the application under Section 311 of Cr.P.C. was filed on 23.01.2020 the very next day, which has been dismissed by the impugned order.
8. Prior to enactments of the Act, 2012, in the case of **Sakshi Vs. Union of India & Ors**, reported in **2004 (5) SCC 518**, it was observed by the Supreme Court in paragraph No.27 and 28, which are as under :-

“27. The other aspect which has been highlighted and needs consideration relates to providing protection to a victim of sexual abuse at the time of recording this statement in court. The main suggestions made by the petitioner are for incorporating special provisions in child sexual abuse cases to the following effect :

(i) Permitting use of a videotaped interview of the child's statement by the judge (in the presence of a child support person).

(ii) Allow a child to testify via closed circuit television or from behind a screen to obtain a full and candid account of the acts complained of.

(iii) The cross examination of a minor should only be carried out by the judge based on written questions submitted by the defense upon perusal of the testimony of the minor.

(iv) Whenever a child is required to give testimony, sufficient breaks should be given as and when required by the child.

28. The Law Commission, in its response, did not accept the said request in view of Section 273 Cr.P.C. as in its opinion the principle of the said Section which is founded upon natural justice, cannot be done away in trials and inquiries concerning sexual offences. The Commission, however, observed that in an appropriate case it may be open to the prosecution to request the Court to provide a screen in such a manner that the victim does not see the accused while at the same time provide an opportunity to the accused to listen to the testimony of the victim and give appropriate instructions to his counsel for an effective cross-examination. The Law Commission suggested that with a view to allay any apprehensions on this score, a proviso can be placed above the Explanation to Section 273 of the Criminal Procedure Code to the following effect :

"Provided that where the evidence of a person below sixteen years who is alleged to have been subjected to sexual assault or any other sexual offence, is to be recorded, the Court may, take appropriate measures to ensure that such person is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused".

9. Subsequent to this judgment, the Act, 2012 was enacted and the statement of objects and reasons it is mentioned, that the enactment is for safeguarding the interest and well being of the child at every age of judicial process by incorporating child

friendly mechanisms for reporting, recording of evidence, investigation and for establishment of special Court for speedy trial of such offences. It is also mentioned in the preamble of the Act, that it is necessary for the proper development of the child, that his or her right to privacy and confidentiality be protected and respected by every persons by all means and through all stages of a judicial process involving the child. In view of this statement of object and preamble of the Act, 2012, special provisions have been framed in the year 2012 in which firstly comes provisions under Section 33, which is as follows :-

“33 - Procedure and powers of Special Court.– (1)

A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts.

(2) The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child.

(3) The Special Court may, if it considers necessary, permit frequent breaks for the child during the trial.

(4) The Special Court shall create a child- friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court.

(5) The Special Court shall ensure that the child is not called repeatedly to testify in the court.

(6) The Special Court shall not permit aggressive questioning or character assassination of the child and ensure that dignity of the child is maintained at all times during the trial.

(7) The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial:

Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

Explanation. – For the purposes of this subsection, the identity of the child shall include the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed.

(8) In appropriate cases, the Special Court may, in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child.

(9) Subject to the provisions of this Act, a Special Court shall, for the purpose of the trial of any offence under this Act, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session, and as far as may be, in accordance with the procedure specified in the Code of Criminal Procedure, 1973 (2 of 1974) for trial before a Court of Session.

10. Section 33 of the Act, 2012 specifically provides that trial has to be conducted in camera. Section 36 provides that child is not to

be exposed to the accused in any way at the time of recording of evidence, while at the same time ensuring that the accused is in a position to hear the statement of the child and communicate with his advocate.

11. Sub-section 9 of Section 33 provides that Special Court shall have the power of a Court of Session and shall try such offence as if it were a Court of Session, and as far as may be, in accordance with the procedure specified in the Code of Criminal Procedure.
12. In the application under Section 311 of Cr.P.C. it is stated that the applicant No.1 was not called from custody in the Court and nothing was ensured, that the applicant No.1 could have heard what was the statement being made by the prosecutrix. This statement is contrary to the order-sheet dated 22.01.2020, in which it is mentioned that the applicant No.1 was present in the Court in custody. Neither the applicant No.1 nor his counsel made any objection on that day, that the statement of the prosecutrix was not audible to the applicant No.1. The prosecutrix has been cross-examined at length by the counsel representing applicant No.1 and others, therefore, there is ground raised by the applicant No.1 subsequently that he was unable to hear the statement of the prosecutrix after conclusion of the examination of the prosecutrix on another day, can not be entertained.

13. The order sheet of the Court is of sacrosanct value, therefore, whatever i.e. mentioned in the order-sheet has to be taken as it is and believed, therefore, it can be believed that the applicant No.1 and other accused persons were present when the prosecutrix was examined and cross-examined in the Court.

14. Section 273 of Cr.P.C. is as follows :-

“273. Evidence to be taken in presence of accused. – Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader.

Provided that where the evidence of a woman below the age of eighteen years who is alleged to have been subjected to rape or any other sexual offence, is to be recorded, the court may take appropriate measures to ensure that such woman is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused.

Explanation — In this section “accused” includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code.”

15. Section 33 (9) of the Act, 2012 speaks of applicability of Criminal Procedure Code. Therefore, presence of counsel for the accused at the time of recording of evidence is sufficient to show that the applicants have been provided with the opportunity of their defence. Further for the reason that objection has been raised at

a later stage, hence, it can also be regarded as an after thought, therefore, I do not find the application filed under Section 311 of Cr.P.C. bonafide. The learned trial Court has not committed error in rejecting the application by the impugned order.

16. Hence, this revision petition is without any substance, which is dismissed accordingly.

Sd/-
(Rajendra Chandra Singh Samant)
Judge

Balram