

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Revision No. 588 of 2021**

Sunil Tandi, S/o. Late Basant Tandi, Aged 27 years, R/o. New Rajendra Nagar, Near House of Tara Jagat, Gali No.:2, House of Birbal Pulis Wala, Over-bridge Canal Road, Nahar Para, PS.: Civil Lines, Raipur, Dist.: Raipur (C.G.) (In jail)

---- Applicant**Versus**

State of Chhattisgarh, Through: PS.: Kharora, Dist. : Raipur (C.G.)

----Respondent

For Applicant : Mr. N. Naha Roy, Advocate.
For Respondent/State : Mr. Afroj Khan, Panel Lawyer.

Hon'ble Shri Justice N.K. Chandravanshi**Order On Board****17.09.2021**

(1) With the consent of the parties, the matter is heard finally at the motion stage.

(2) This criminal revision has been filed against the order dated 31.07.2021 passed by the Additional Sessions Judge, 1st Fast Track Special Court, Raipur (henceforth "the trial Court") in Special Criminal Case No. 227/2018 whereby learned trial Court has rejected the application filed under Section 311 of the Code of Criminal Procedure, 1973 (henceforth "the Code") by the applicant for recalling of victim (PW-1) & her mother (PW-2) for their further cross-examination.

(3) The applicant is facing trial before the trial Court for commission of offence under Section 376 of IPC and Sections 4 & 6 of The Protection of

Children from Sexual Offences Act, 2012 (henceforth “the POCSO Act”). Victim & her mother have been examined by both the parties as (PW-1) & (PW-2), respectively on 28.09.2019. The case is still pending on the stage of evidence of prosecution witnesses. Applicant filed an application under Section 311 of the Code to recall the victim/prosecutrix and her mother for their further cross-examination, which was rejected by the trial Court vide its impugned order dated 31.07.2021. Hence, this revision petition.

(4) Learned counsel appearing for the Applicant would submit that the case in question is a case against the applicant under Section 376 IPC and Sections 4 & 6 of POCSO Act. According to him, age of victim/prosecutrix is an important material fact in this case, therefore, cross-examination of victim & her mother in this regard is very vital but earlier counsel of applicant has not adequately cross-examined them on the point of age of victim/prosecutrix, whereas their cross-examination is essential to make reasonable and justifiable defence of applicant, despite that learned court below, without considering the aforesaid serious facts situation, has dismissed the application filed by the applicant under Section 311 of the Code, therefore, impugned order, being illegal, erroneous & unsustainable in law, is liable to be dismissed by allowing the revision petition in the interest of justice.

(5) On the contrary, learned counsel appearing for the State / Respondent would submit that applicant had been afforded full / sufficient opportunity of cross-examination of aforesaid witnesses and mother of the victim i.e. PW-2 has already been cross-examined in paragraph 12 of her cross-examination, relating to birth related question of victim. He would further submit that Section 33(5) of the POCSO Act specifically mentioned that the Special Court should make ensure that the child is not called repeatedly to testify in the court. He would also submit that learned Court below has passed well reasoned order, which does not call for any interference of this Court.

(6) I have heard learned counsel appearing for the parties and perused the

material available on record with utmost circumspection.

(7) Applicant has filed Xerox copies of statement of victim, aged 15 years and her mother, who had been examined as PW-1 & PW-2, respectively. Their cross-examination would show that they have not been cross-examined with regard to date of birth or age of victim/prosecutrix. In paragraph 12 of cross-examination of mother of victim/prosecutrix, a question has been asked regarding making of birth certificate enclosed with the record, except this, nothing has been asked from her.

(8) Criminal case pending before learned trial Court against the applicant is the case relating to offence under Section 376 of the IPC and under Sections 4 & 6 of the POCSO Act also, as has been mentioned in the revision petition, therefore, cross-examination with regard to date of birth / age of victim/prosecutrix is of course very much material fact in the case and without examination in that regard, applicant could not make his justifiable defence.

(9) In the matter of **U.T. of Dadra & Nagar Haveli and another v. Fatehsinh Mohansinh Chauhan**¹, their Lordships of the Supreme Court while considering the scope of Section 311 of the Code and also considering the various pronouncement of judgments has held in paragraph 15, which reads as under:-

“15. A conspectus of authorities referred to above would show that the principle is well settled that the exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof of such facts which lead to a just and correct decision of the case, this being the primary duty of a criminal court. Calling a witness or re-examining a witness already examined for the purpose of finding out the truth in order to enable the Court to arrive at a just decision of the case cannot be dubbed as "filling in a lacuna in prosecution case"

1 (2006) 7 SCC 529

unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused resulting in miscarriage of justice.”

This observation has been made by Hon'ble Apex Court in an application under Section 311 of the Code filed by the prosecution whereas in the instant case, application under Section 311 of the Code has been filed by the applicant/accused but principle with regard to exercise power under Section 311 of the Code held by Hon'ble Supreme Court is applicable for both the parties, so that justice could be done.

(10) In the matter of **Natasha Singh v. CBI (State)**², their Lordships of the Supreme Court has held as under :-

“15. The scope and object of the provision is to enable the Court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 Cr.P.C. must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal

however, must be given to the other party. The power conferred under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection. The very use of words such as 'any Court', 'at any stage', or 'or any enquiry, trial or other proceedings', 'any person' and 'any such person' clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the Court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case."

(11) As has been mentioned above, in the present case victim and her mother have not been properly cross-examined by the previous counsel of the applicant, which is material fact for lawful / proper adjudication of the case. Recalling of aforesaid witnesses cannot be termed as "filling in a lacuna by the defence" as has been held by Hon'ble Supreme in **U.T. of Dadra & Nagar Haveli and another (Supra)**. In view of the aforesaid legal position, provisions contained in Section 33(5) of the POCSO Act also could not come on the way to do lawful adjudication in the case.

(12) Therefore, considering the facts & circumstances of the present case, it would be appropriate in the interest of justice to afford an opportunity to the applicant/accused for recalling the prosecution witnesses i.e. victim (PW-1) & her mother (PW-2) for their further cross-examination in respect of date of birth / age of victim on the date of incident.

(13) Resultantly, the impugned order dated 31.07.2021 is set aside and the application under Section 311 of the Code filed by the applicant on 27.07.2021 is

allowed with a condition that he will pay process fee for recalling victim/prosecution (PW-1) & her mother (PW-2) and also to pay travelling expenses & other requisite expenses as per law to them. It is made clear that if any defect or lapse is found in payment of process fee, the opportunity for recalling of the aforesaid witnesses shall stand cancelled.

(14) The revision is thus allowed to the extent indicated hereinabove.

(15) Needless to mention that after further cross-examination of the aforesaid witnesses, the prosecution be afforded opportunity for re-examination of them in that regard, if required.

Sd/-

(N.K.Chandravanshi)
Judge

D/-

