

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Revision No. 653 of 2021**

- Pintu Yadav S/o Manoj Yadav Aged About 22 Years R/o Behind Ali Garg, Thagda Nahar Padmanabhpur, Tahsil And District - Durg (Chhattisgarh)

---- Applicant**Versus**

- State Of Chhattisgarh Through The Police Station City Kotwali, Durg, District - Durg (Chhattisgarh)

---- Respondent

For applicant : Shri Tarendra Kumar Jha, Advocate
 For respondent/State : Shri Afroj Khan, Panel Lawyer

Hon'ble Shri Justice N.K. Chandravanshi**Order On Board****05.10.2021.**

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

2. This criminal revision has been preferred against order dated 15.9.2021 passed by Additional Sessions Judge, 3rd Fast Track Special Court, Durg Distt. Durg (CG) in Criminal Case No.SCCPOCSO/103/2018, whereby the learned trial Court has rejected the application filed by the applicant under Section 311 of the Code of Criminal Procedure, 1973 (for short 'the Code') for recalling the victim/prosecutrix (PW-1) for her further cross-examination.

3. The applicant is facing trial before the Additional Sessions Judge, 3rd Fast Track Special Court, Durg for commission of offence under Sections 376 and 506 of the Indian Penal Code and under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act'). The victim/ prosecutrix has been examined by both the parties on

12.4.2019. Other witnesses have also been examined and case was fixed for final arguments. On 15.9.2021, the applicant filed an application under Section 311 of the Code to recall the victim for her further cross examination, which was rejected by the trial Court vide its impugned order dated 15.9.2021. Hence, this revision petition.

4. Learned counsel for the applicant submits that the case is pending against the applicant under heinous offence, i.e. Sections 376 & 506 IPC and Section 6 of the POCSO Act, and age of the victim on the date of incident, is a very important fact in this case, therefore, her cross examination in this regard is very vital for proper defence of the applicant. He also submits that the victim/prosecutrix has been examined as PW-1, but in the cross-examination, earlier counsel of the applicant has not even rebutted her statement regarding rape, threatening which she had been stated in her examination-in-chief. Therefore, further cross-examination of the victim/prosecutrix, is necessary to make reasonable and justifiable defence of the applicant, but the learned court below without considering the aforesaid serious facts, has dismissed the application filed by the applicant under Section 311 of the Code. Therefore, impugned order being illegal, erroneous and not sustainable under the law is liable to be dismissed by allowing this revision petition in the interest of justice.

5. Per contra, learned counsel for the State submits that the applicant had been afforded full opportunity of cross-examination of the victim and she has been cross-examined regarding her age and date of birth also. Therefore, impugned order does not call for any interference of this Court, that too, when the case is at the stage of final arguments.

6. I have heard learned counsel for the parties, perused the material available on record including the impugned order.

7. Learned counsel for the applicant has filed photo copy of the statement of the victim who has been examined as PW-1 and order sheet dated 10.8.2021 of the Court below. This is a case pertaining to offence under Section 376 IPC and Section 6 of the POCSO Act and the victim/prosecutrix has stated about rape committed by the applicant with her and she has also stated that the applicant had repeatedly committed the act of rape with her after threatening her, but in the cross examination even rebuttal suggestion has not been raised to her by the defence counsel. Counsel for the applicant has also stated that she has not been properly cross-examined regarding her age. Thus, looking to the gravity of the case, it seems that the victim has not been appropriately cross-examined regarding material facts of the case.

8. The principles related to the exercise of the power under Section 311 of the Code have been well settled by the Hon'ble Supreme Court in **Vijay Kumar Vs. State of Uttar Pradesh and Another** [2011 (8) SCC 136], which reads as below:-

“17. Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of the Code and the principles of criminal law. The discretionary power conferred under Section 311 has to be exercised judicially for reasons stated by the court and not arbitrarily or capriciously. Before directing the learned Special Judge to examine Smt. Ruchi Saxena as a court witness, the High Court did not examine the reasons assigned by the learned Special Judge as to why it was not necessary to examine her as a court witness and has given the impugned direction without assigning any reason.”

9. This principle has been further reiterated in ***Mannan Shaikh and others vs. State of West Bengal and Another* 2014 (13) SCC 59** and thereafter in ***Ratanlal vs. Prahlad Jat and Others* 2017(9) SCC 340** and ***Swapan Kumar Chatterjee vs. Central Bureau of Investigation* 2019(14) SCC 328**.

10. Section 311 of the Code is one of many such provision which strengthen the arms of the Court in its effort to unearth the truth by procedure sanctioned by law. At the same time, the discretionary power vested under 311 of the Code has to be exercised judiciously for strong and valid reason and with caution and circumspection to meet the ends of justice.

11. In the present case, as has been mentioned above, the victim/prosecutrix has not been properly cross-examined by the counsel who was representing the applicant during that time, which would be material facts for lawful/proper adjudication of the case. Looking to the cross-examination of the victim/prosecutrix, recalling of her for further cross-examination cannot be termed as “filling in a lacuna by the defence” as has been held by the Hon’ble Supreme Court in the case of ***U.T. of Dadra & Nagar Haveli and another v. Fatehsinh Moahansinh Chauhan* (2006) 7 SCC 529**. In view of the aforesaid legal position, provision contained in Section 33(5) of the POCSO Act also could not come into the way of lawful adjudication in the case. 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 applicant/accused for recalling victim/prosecutrix who has been examined as PW-1 for her further cross-

examination in respect of her age and offence of rape committed with her by threatening her.

12. In view of the above, impugned order dated 15.9.2021 is set aside and the application under Section 311 of the Code filed by the applicant on 15.9.2021 is allowed with a condition that he will pay process fee for recalling the victim/prosecutrix (PW-1) and also to pay traveling expenses and other requisite expenses as per law to her. It is made clear that if any defects or lapse found in payment of process fee, the opportunity for recalling the aforesaid witnesses shall stand cancelled.

13. The revision is thus, allowed to the extend indicated hereinabove.

14. Needless to mention that after cross-examination of the victim, the prosecution be afforded opportunity for re-examination of her in that regard, if required.

Sd/-
(N.K. Chandravanshi)
JUDGE