

HIGH COURT OF CHHATTISGARH, BILASPUR**CRMP No. 1187 of 2021**

- Sohan Kumar Meher @ Sonu, S/o Chhotelal Meher, Aged About 23 Years, R/o Muthumuda, Hira Nagar Ward No. 35, Police Chowky Jute Mill, Raigarh, District Raigarh Chhattisgarh.

---- **Petitioner**

Versus

- State of Chhattisgarh Through S.H.O., Police Station Bemetara, District Bemetara Chhattisgarh.

---- **Respondent**

For Petitioner : Mr. Vaibhav A. Goverdhan, Advocate.

For Respondent/State : Ms. Ishwari Ghritlahare, P.L.

Hon'ble Smt. Justice Rajani Dubey, Judge

Order on Board

23/11/2021

1. Being aggrieved by the order dated 08.10.2021 passed by the learned Additional Sessions judge, Fast Track Special Court (POCSO) Act, Bemetara, District- Bemetara (C.G.) passed in Special Case No. 49/2019 whereby learned appellate court has rejected the application filed under Section 311 of Criminal Procedure Code 1973 by the petitioner for re-examination of prosecutrix and her father.
2. Brief facts of the case are that the petitioner is facing trial under Sections 363, 366 and 376 of IPC and section 4, 5, 6 of The Protection of Children from Sexual Offences (POCSO) Act, 2012.

During trial on 03.03.2020, the statement of the father of the prosecutrix was recorded as PW-1 and the prosecutrix was examined as PW-2. Earlier petitioner has engaged Shri K.K. Sharma as arguing counsel on his behalf but unfortunately, the original counsel has expired during the pendency of the case and, subsequently, the petitioner engaged another arguing counsel and it was revealed that during cross-examination of the witnesses, some relevant questions could not be put up before the witnesses regarding age of the prosecutrix, therefore the petitioner filed an application under Section 311 of Code of Criminal Procedure, 1973, for re-examination of the prosecutrix and her father and specific reasons were assigned in the application filed as Annexure P/3 but learned trial Court vide its order dated 08.10.2021 has rejected the application on the ground that as per Section 33 (5) of the POCSO Act, the Court shall ensure that the child is not called repeatedly to testify in the Court. Hence, the present petition filed by the petitioner.

3. Learned counsel for the petitioner submits that impugned order passed by the trial court is illegal, erroneous and contrary to law and same deserves to be set aside. The learned trial court has deprived the petitioner of his valuable right to fair trial. The question which is to be asked to the root of the matter but the learned trial court dismissed the application of the petitioner. The learned trial Court ought to have appreciated that the defence has not properly examined the witnesses on the point of the age of the prosecutrix and mere asking a question with regard to the

age is not sufficient and, therefore, the application may be allowed. The petitioner is seeking only one opportunity to cross-examine to PW-1 and PW-2 and he is ready to bear the cost.

4. On the other hand, learned State counsel supported the impugned order and submits that it is clear from the deposition sheets of both the witnesses that the defence has cross-examined both the witnesses in detail. Present case before the Fast Track Court and accused is trying to linger on the proceedings. Thus, the petition is liable to be dismissed.
5. Heard counsel for the parties and perused the material available on record.
6. Reliance has been placed upon the judgment of the Hon'ble Supreme Court in the case of **Manju Devi v. State of Rajasthan** reported in **AIR 2019 SC 1976** has held in para 15 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](#) CrPC 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](#) CrPC 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.”

7. Hon'ble Supreme Court in the matter of **Natasha Singh V. CBI (State)** reported in **2013 AIR SCW 3554** has held in para 9 as under:-

“Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right.”

8. Prosecutrix has stated in para 11 of her cross-examination that, “It is true that I have given my date of birth on the basis of school records.” but in cross-examination of her father (PW-1), defence did not ask specific question about the date of birth of the prosecutrix. In the instant case further cross-examination of prosecutrix is not required only her father (PW-1) is permitted for the same.
9. The application under Section 311 of Cr.P.C. filed by the petitioner is partly allowed and he is permitted to cross-examine Devendra Kumar Sharma (PW-1) which must be related to age of the prosecutrix.
10. Accordingly, the petition is partly allowed. The learned trial Court

is directed to fix a date for additional cross-examination of Devendra Kumar Sharma (PW-1) and petitioner/accused shall bear the cost of the witness which would be fixed by the learned trial court.

11. Learned trial court shall take all necessary measures ensuring the cross-examination of the witness Devendra Kumar Sharma (PW-1) by issuing summons/ bailable warrant etc. and shall also ensure expeditious proceedings so as to conclude the matter at the earliest.

Sd/-
(Rajani Dubey)
Judge

Ruchi/-