

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLREV No.285 of 2022

Jitendra Sahu* *Petitioner

Mr. P.S. Nayak, Advocate

-versus-

State of Odisha* *Opp. Party

Mr. Arupananda Das
Addl. Government Advocate

**CORAM:
JUSTICE S.K. SAHOO**

**ORDER
19.07.2022**

Order No.

01. This matter is taken up through Hybrid arrangement (video conferencing/physical mode).

This revision petition has been filed by the petitioner Jitendra Sahu challenging order dated 09.06.2022 passed by the Ad-hoc Addl. Sessions Judge (FTSC), Angul in Special (POCSO) Case No. 54 of 2017 in rejecting the petition under section 311 of Cr.P.C. filed by the petitioner to recall P.W.1 and P.W.2 for their cross-examination.

The petitioner is facing trial for commission under section 376 of Indian Penal Code and section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereafter 'POCSO Act'). The victim was examined as P.W.1 on 29.08.2018 and on the same

day, her mother was examined as P.W.2 and after completion of examination in-chief, learned defence counsel declined to cross-examine both P.W.1 and P.W.2. From the impugned order, it appears that in the trial Court, sixteen witnesses have already been examined including the Investigating Officer and the date was fixed to 15.07.2022 for examination of the remaining charge sheet witnesses and accordingly summons were issued to those witnesses.

The petition under section 311 Cr.P.C. was filed on 07.05.2022 by the learned counsel for the petitioner for recalling P.W.1 and P.W.2 for cross-examination. It is stated in the petition that since the aforesaid two witnesses are very material, if the defence is not allowed to cross-examine them, the petitioner would be seriously prejudiced.

The learned Special Public Prosecutor opposed to such prayer made for recalling the witness.

The learned trial Court in the impugned order dated 09.06.2022 has been pleased to hold that since P.W.1 and P.W.2 have been examined long back and after about four years the recall petition has been filed without mentioning the reason as to why they were not cross-examined on the date of their examination and that the case is under the Special Act i.e. POCSO Act, 2012 and there is a specific provision in the Act as to how the child witness should be dealt by the trial

Court and that the Special Court shall not call the child witness repeatedly to testify in the Court, the learned trial Court rejected the petition for recall.

The learned counsel for the petitioner contended that the petitioner engaged a new counsel who after going through the case record found that two vital witnesses i.e. P.W.1 and P.W.2 have not been cross-examined at all and therefore, he immediately took steps in filing the recall petition under section 311 of Cr.P.C. It is further submitted that unless the defence is given a chance to cross-examine P.W.1 and P.W.2 who are the vital witnesses, the petitioner will be seriously prejudiced. It is further submitted by the learned counsel for the petitioner that the petitioner is ready and willing to bear the cost for ensuring the attendance of the P.W.1 and P.W.2 in the trial Court for their cross-examination.

Section 35 of the POCSO Act deals with the period for recording the evidence of the child and disposal of the case and it states that the evidence of the child should be recorded within the period of thirty days of the Special Court taking cognizance of the offence and reasons for delay, if any, shall be recorded by the Special Court and the Special Court shall complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offence. Section 33(5) of the POCSO Act states

that the Special Court shall ensure that the child is not called repeatedly to testify in the Court.

In view of such provision, it cannot be said that there is no laches on the part of the defence in not cross-examining both P.W.1 and P.W.2 on the date of their examination and declining for cross-examination. If there was any genuine difficulty on the part of the learned defence counsel for cross-examination of the aforesaid two witnesses, time seeking petition ought to have been filed before the learned trial Court assigning good reasons for taking up of the case on another date for cross-examination, which would have been dealt with by the learned trial Court in accordance with law. The recall petition should have been filed immediately giving reasons for non cross-examination of the aforesaid two witnesses. The same has not been done in this case rather the recall petition was filed on 07.05.2022.

On perusal of the evidence of the aforesaid two witnesses i.e. P.W.1 and P.W.2, there is no doubt that they are very material witnesses on behalf of the prosecution and if the accused-petitioner is not given an opportunity of cross-examination, then it would be difficult on his part to dislodge the charges. The submission of the learned counsel for the petitioner that in such contingency, the petitioner will be seriously prejudiced, has got some force.

Law well settled that the power under section 311 Cr.P.C. can be exercised at any stage of the trial to summon any person as a witness, to recall or re-examine any person already examined, if the evidence of such person appears to be essential for the just decision of the case. The very usages of the words such as 'any Court', 'at any stage', or any enquiry, trial or other proceedings', 'any person' and 'any such person' clearly spell out that this section expressed in the widest possible terms and do not limit the discretion of the Court in any way. Law is also well settled that mere delay in filing the recall application for summoning the witness cannot be the sole ground for its rejection. The trial in a criminal proceeding comes to an end or reaches in its finality when the judgment is pronounced and until then the Court has power to use this section.

Since the evidence of the prosecution is still incomplete even though the first witness for the prosecution was examined on 29.08.2018 and this Court felt after perusing the evidence of P.W.1 and P.W.2 that there is necessity of cross-examination of both witnesses and the learned counsel for the petitioner is ready and willing to deposit the cost for summoning the aforesaid two witnesses, while setting aside the impugned order dated 09.06.2022, the learned trial Court is directed to fix one date for cross-

examination of both P.W.1 and P.W.2, subject to deposit of cost of Rs.15,000/-(rupees fifteen thousand) by the petitioner in advance before the learned trial Court. Out of the said amount, Rs.10,000/-(rupees ten thousand) shall be disbursed in favour of P.W.1 and Rs.5,000/-(rupees five thousand) to be disbursed in favour of P.W.2. The evidence of both the witnesses shall be through virtual mode in the VWDC (Vulnerable Witness Deposition Centre). The learned trial Court shall make every endeavour to conclude the cross-examination of the witnesses on the date fixed and no adjournment shall be granted to the learned defence counsel on any plea for cross-examination of the aforesaid two witnesses. If the cross-examination is not completed on that day, the case is to be posted on day to day basis till the cross-examination is completed and the accused shall continue to deposit of cost for the witnesses/witness for every day as aforesaid in advance to be disbursed to them/her.

With the aforesaid observation and direction, the Revision Petition stands disposed of.

Issue urgent certified copy as per Rules.

Let the order be communicated to the Court concerned forthwith.

(S.K. Sahoo)
Judge

