

IN THE HIGH COURT OF ORISSA AT CUTTACK

AFR

CRLMC No.2037 of 2022

Mantu Kisku

....

Petitioner

Mr. P.C. Jena, Advocate

-Versus-

State of Orissa

....

Opposite Party

Mr. Pradip Kumar Rout, AGA

CORAM:

JUSTICE R.K. PATTANAİK

DATE OF JUDGMENT:11.11.2022

1. Instant petition under Section 482 Cr.P.C is filed by the petitioner assailing the impugned order dated 30th April, 2022 under Annexre-2 passed in Special Case No.6 of 2019 by the learned Adhoc Additional Sessions Judge (FTSC), Balasore whereby recall of the victim for her cross-examination was declined on the ground that she is a vulnerable witness being subjected to sexual assault on the ground that such decision is not tenable in law and hence, liable to be set aside.

2. The petitioner is the accused, who is facing trial before the Special Court in the aforesaid case corresponding to Berhampur P.S. Case No.1 of 2019 during which he moved an application under Section 311 Cr.P.C. to recall the victim already examined as P.W.1 and two other witnesses, namely, P.Ws. 2 & 3 on the ground that their cross-examination is essential. The prayer for recall was allowed in part by the learned Special Court, inasmuch as, the request for cross-examination of P.Ws. 2 & 3 was acceded to subject to cost payable to P.W.2, whereas, it was refused vis-à-vis

P.W.1, she being the victim and a vulnerable witness and while denying it, the learned court below referred to a decision of the Apex Court in the case of **Vinod Kumar Vrs. State of Punjab (2015) 3SCC 220**.

3. Heard Mr. P.C. Jena, learned counsel for the petitioner and Mr. P.K. Rout, learned AGA appearing for the State.

4. Mr. Jena submits that P.W.1 was never cross-examined which is evident from her deposition dated 28th January, 2020. A copy of the deposition of P.W.1 has been produced before this Court to suggest that P.W.1 was discharged without being cross-examined which is stated to have been declined by the defence. The other two witnesses, namely, P.Ws 2&3 not being vulnerable were allowed to be recalled denying a similar opportunity in respect of P.W.1 which according to Mr. Jena was unjustified and therefore, the impugned order under Annexrue-2 should be set aside to that extent. While advancing such an argument that despite delay, recall of P.W.1 for cross-examination should have been allowed, Mr. Jena cited a decision of this Court in the case of **Pidika Sambaru Vrs. State of Odisha and another 2022 LiveLaw (Ori) 21**. Mr. Rout, learned AGA, however, justified the decision of the learned court below considering the delay and the fact that such recall is related to a minor, who is a victim of sexual mischief.

5. Admittedly, P.W.1 has not been cross-examined at all. It is made to appear that the defence declined to cross-examine P.W.1 when it was fixed to 10th January, 2020 for reasons best known which is evident from the order dated 28th January, 2020. What was the difficulty on the part of the defence in not cross-examining P.W.1 on the date fixed is clearly not discernable and may could possibly be due to absence of the engaged counsel. The learned court below on the ground that P.W.1 to be a vulnerable witness and victim of

the crime and as there has been delay in applying for her recall for cross-examination, relying on the decision in **Vinod Kumar** (supra), refused the prayer of the defence. In fact, the aforesaid decision highlighted upon the delay factor during trial which is required to be accomplished as promptly as possible and thus held and observed that any such unnecessary adjournments in the cross-examination of witnesses deferred for a long time would be an anathema to the concept of proper and fair trial. In the humble opinion of the Court, such is not the case here that the cross-examination was deferred unnecessarily, rather, the victim was examined but was discharged without being cross-examined and of course, after about two years, recall was applied for by the defence. Mr. Jena, learned counsel for the petitioner submits that such recall could not be moved due to COVID-19 pandemic situation and hence was the delay. In any view of the matter, notwithstanding that P.W.1 is a vulnerable witness and a victim as well, that by itself cannot be a justifiable ground to deny the defence an opportunity to cross-examine her. This Court in the decision of **Pidika Sambaru** (supra) while referring to the following authorities in **Godrej Pacific Tech. Ltd. Vrs. Computer Joint India Ltd.** (2008) 11 SCC 108; **Vimal Khanna Vrs. State** 2018 SCC online Delhi 11796 (DHC); **Mohd. Gulzar Vrs, The State (GNCTD)** 2018 (4) JCC 2291 (DHC) concluded that such a vulnerable right of the accused cannot be taken away and as such, Section 33(5) of the POCSO Act cannot stand as a bar. It has been concluded therein that Section 33 of the POCSO Act lays down a general principle to guide a trial court and a provision akin to Section 309 Cr.P.C. the purpose being to ensure speedy trial. Under the above circumstances peculiar to the case and being alive to the rights of the petitioner which is constitutionally guaranteed and in order to provide a fair opportunity to defend, the Court is of the conclusion that recall of P.W.1 for cross-examination should have been

allowed by the learned court below and the reason shown while refusing it cannot really be countenanced.

6. Accordingly, it is ordered.

7. In the result, the petition stands allowed. As a necessary corollary, impugned order dated 30th April, 2022 under Annexre-2 passed in Special Case No.6 of 2019 by the learned Adhoc Additional Sessions Judge (FTSC), Balasore is hereby set aside. Consequently, for the reasons stated herein before, recall and cross-examination of P.W.1 is allowed with a direction that it shall be accomplished by the court below on the date of her examination itself without any adjournment allowed for the said purpose.

(R.K. Pattanaik)
Judge

TUDU