

IN THE HIGH COURT OF ORISSA AT CUTTACK
CRLMC No. 2851 of 2022

Gobinda Sahu

....

Petitioner

Mr. S.P. Dash, Advocate

Versus

State of Odisha

....

Opposite Party

Mr. D.K. Mohanty, ASC

CORAM:

JUSTICE SAVITRI RATHO

ORDER

28.10.2022

Order No.

01.

(Through hybrid mode)

1. This application under Section 482 Cr.P.C. has been filed by the petitioner challenging the order dated 23.08.2022 passed by the learned Additional Sessions Judge-cum-Special Judge, Sonepur in Special G.R. Case No. 527 of 2015 rejecting the application filed under Section 311 of the Cr.P.C., by the petitioner-accused to recall P.W.5, P.W.8 (mother of the victim girl) and P.W.9 (the victim girl).

2. Mr. S.P. Dash, learned counsel for the petitioner submits that the application under Section 311 of Cr.P.C. had been filed as these witnesses had not been properly cross-examined by the earlier defence lawyer and their cross-examination was necessary to guard the interest of the accused and to bring out the truth of the matter. This application was filed by the newly appointed defence counsel when he examined the

record and found that certain important questions had not been asked to these witnesses.

3. The learned Addl. Standing Counsel submits that the application had been filed with the sole intention of delaying the trial and the victim girl and her mother would be harassed if they were recalled for cross-examination. These witnesses had been extensively cross-examined earlier and that change of counsel cannot be a ground for recalling witnesses for cross-examination. Referring to the objection filed by the special public prosecutor before the learned trial Court, he submits that P.W.5 had been examined on 06.09.2018 and P.Ws.8 and 9 had been examined on 16.03.2020 and the application under Section 311 of Cr.P.C. had been filed only to linger the case. It has been further stated in the objection that P.W.9 is the victim of the case and in view of Section 33 (5) of the Protection of Children from Sexual Offences Act, 2012 (in short the "POCSO Act"), the victim should not be called repeatedly for testifying in the Court and the defence counsel had not furnished the questionnaire containing the questions which would be put to the witnesses.

4. Perusal of the order dated 23.08.2022 reveals that the learned trial Court has discussed that P.W.5 was examined on 06.09.2018 and P.Ws.8 and 9 had been examined on 16.03.2020 and on both dates the accused

was present before the Court and the victim was a vulnerable child of 6 years old who was 10 years old at the time of recording of the evidence and the case was lingering since 2015 and victim and her family members are waiting for justice since then. The learned trial Court dismissed the petition as the witnesses had been cross-examined by the learned counsel engaged by the petitioner and the questions proposed to be put to the witnesses had not been submitted before the Court and change of Advocate was not a valid ground for recalling of witnesses and in sensitive cases the victim and her family members cannot be recalled on the mere asking as it would amount to their harassment. The learned trial Court has relied on the decision of the Apex Court in the case of *AG vs. Shiv Kumar Yadav and Another* reported in *AIR 2015 SC 3501*.

5. The impugned order is a well reasoned and as far as P.Ws.8 and 9 (mother of the victim and victim respectively) are concerned. However, no valid reasons have been cited for rejecting the application to recall P.W.5, other than stating that the questionnaire had not been provided.

6. From the impugned order it is apparent that the Tahasildar and Investigation Officer were yet to be examined in the case and hence the trial is continuing. Therefore no prejudice will be caused to the prosecution if an opportunity is given to the petitioner for filing an

application for recall of P.W.5 along with the questions which will be put to P.W.5. If such an application is filed within a period of two weeks by 14.11.2022 along with the questionnaire containing the questions proposed to be put to P.W.5, the learned trial court shall consider the same in accordance with law without being prejudiced by the earlier order of rejection dated 23.08.2022. It is made clear that the portion of the order rejecting the application of the petitioner under Section 311 of the Cr.P.C. for recall of P.Ws.8 and 9 does not call for any interference.

7. Hence the CRLMC is disposed of permitting the learned counsel for the petitioner to submit another application for recalling of P.W.5 only along with the questionnaire containing the questions which is proposed to be put P.W.5 in cross-examination. As regards P.Ws.8 and 9, the prayer for recalling them to further examination is rejected in view of Section 33 (5) of the Protection of Children from Sexual Offences Act, 2012 and the decision of the Apex Court.

8. Urgent certified copy of this order be granted as per rules.

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(Savitri Ratho)
Judge

puspa