

IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH

(117)

CRR-2025-2022(O&M)
Date of Decision: 21.11.2022

Deepak Kumar @ Nepali

--Petitioner

Versus

State of Haryana

--Respondent

CORAM:- HON'BLE MR. JUSTICE RAJESH BHARDWAJ.

Present:- Mr. P.S. Jammu, Advocate for the petitioner.

RAJESH BHARDWAJ.J (Oral)

CRM-36675-2022

Application is allowed as prayed for.

Annexures P-1 to P-4 are taken on record.

Main Case

The present revision petition has been filed impugning the order dated 12.9.2022 passed by the learned Addl. Sessions Judge-cum-Fast Track Court under POCSO Act, Ambala whereby the application filed by the petitioner under Section 311 Cr.P.C for recalling the complainant 'R' (PW-8) and prosecutrix 'J' (PW-9) for their further cross-examination, has been dismissed.

Learned counsel for the petitioner contends that petitioner is being prosecuted in case FIR No.01 dated 3.1.2021 registered under sections 313, 506 IPC and sections 6, 17 of POCSO Act at Police Station, Women Ambala, District Ambala. He submits that the investigating agency submitted the challan under section 173 Cr.P.C and after framing of charge Trial Court started with the examination of prosecution witnesses. The prosecution examined Prosecutrix 'J' as PW-9 and the complainant 'R' as

PW-8. It is submitted that petitioner was behind bars and his counsel during the cross-examination of both these material witnesses failed to cross-examine both the aforementioned witnesses on some material issues and thus did not put the material questions to both these witnesses. He submits that thereafter petitioner changed his counsel and for the just decision of the case both these witnesses deserve to be recalled for their further examination. Hence the new counsel engaged by the petitioner filed an application under section 311 Cr.P.C for recalling of both these witnesses for their further cross-examination, however, the learned Trial Court failed to appreciate the spirit of the law settled and thus drawn a wrong conclusion in declining the same. He further submits that the learned Trial Court did not provide proper opportunity to prove the defence of the petitioner. Counsel further submits that the prosecutrix has now attained the age of majority and thus she is in a position to depose independently with her free will without any undue pressure. Counsel submits that prosecutrix has entered into relationship with another boy namely Ghansham and a similar type of FIR has been lodged against him as well. It is submitted that as both these material witnesses could not be cross-examined on material issues and hence both these witnesses deserve to be recalled for further examination by the new counsel. Counsel has submitted that the power under section 311 Cr.P.C granted to the court is unlimited and the same can be invoked at any time before the pronouncement of the judgement.

I have heard learned counsel for the petitioner at length and have carefully gone through the record of the case.

Evidently the FIR in question was lodged on the statement of the complainant, wherein the petitioner was alleged to have committed penetrative sexual assault. Resultantly the victim got pregnant and she faced miscarriage. The petitioner was prosecuted under sections 313 and 506 IPC and Section 6 & 17 of POCSO Act. A perusal of the record would reveal that the prosecutrix was examined as PW-9 and she was thoroughly cross-examined by the defence counsel. Similarly, mother of the prosecutrix PW-8 was also thoroughly cross-examined on 24.9.2021. After the cross-examination when the trial is at the advance stage the petitioner engaged a new counsel, who filed the application under section 311 Cr.P.C for recalling PW-8 and PW-9.

It is apparent from the record that the earlier counsel thoroughly examined the complainant (PW-8) and prosecutrix (PW-9) at length. Trial of the case is at advance stage. The case in hand pertains to the aggravated penetrative sexual assault against the minor victim. The relevant provision i.e. Section 33(5) of POCSO Act specifically enumerates that the Special Court shall ensure that the child is not recalled repeatedly to testify in the court. Besides this, for the appreciation of the issue involved in the case, Section 311 Cr.P.C is reproduced hereunder:-

“311. Power to summon material witness, or examine person present. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or. recall and re- examine any person already examined; and the Court shall summon and examine or recall and re- examine any such person if his evidence appears to it to be essential to the just decision of the case.”

There is no dispute to the fact that the provisions of section 311 Cr.P.C are to be used liberally, however, the court has to be cautious in invoking its power under Section 311 Cr.P.C and examine if the application under Section 311 Cr.P.C has been filed to delay the trial. Besides this, Section 311 Cr.P.C can be invoked if it appears to be essential to the just decision of the case and not for plugging the loopholes in the case. There is no gainsaying that the court has been granted ample power under Section 311 Cr.P.C to prevent the injustice. However, in view of the law settled, it is apparent that the Hon'ble Supreme Court has laid down that the power under Section 311 Cr.P.C should be invoked only to meet the ends of justice. The power should be exercised for strong and valid reasons and it should be exercised with great caution and circumspection. Reliance in this regard can be placed in case of ***Swapan Kumar Chatterjee Vs. Central Bureau of Investigation 2019(14) SCC 328.***

The precise emphasis of learned counsel for the petitioner is that the counsel was changed and hence that necessitates the recalling of the witnesses. The changing of the counsel would itself be no ground for recalling the witnesses if the defence has already availed the opportunity of cross-examination to its satisfaction. The case in hand pertains to the offence under section 6 of POCSO Act and the prosecutrix should not be compelled to be summoned to the court time and again when she already stands thoroughly cross-examined earlier. The trial of the case is virtually at the advanced stage and this court finds that recalling of the aforementioned two witnesses is not necessary.

Taking into consideration the arguments raised by counsel for the petitioner on the anvil of the law settled, this Court is of the opinion that the impugned order dated 12.9.2022, passed by learned Trial Court suffers from no illegality and resultantly the present petition is hereby dismissed.

(RAJESH BHARDWAJ)
JUDGE

21.11.2022

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Whether speaking/reasoned:	Yes/No
Whether Reportable:	Yes/No