

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

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CRR No.2796 of 2023
Date of Decision: 31.01.2024

Kulwinder Singh

... Petitioner

Versus

State of Punjab

... Respondent

CORAM: HON'BLE MRS. JUSTICE MANISHA BATRA

Present: Mr. Nikhil Ghai Advocate,
for the petitioner.

Ms. Ruchika Sabherwal, DAG, Punjab.

MANISHA BATRA, J.(Oral)

1. The petitioner is challenging the order dated 04.09.2023 passed by learned Additional Sessions Judge, Tarn Taran in SC No.393 of 2021 titled as *State v. Kulwinder Singh* arising out of FIR No.108 dated 14.10.2021 registered under Section 376 of IPC and Section 4 of Protection of Children from Sexual Offences Act, 2012 (For short “POCSO Act”) at Police Station Verowal, District Tarn Taran, whereby an application as filed by him under Section 311 of Cr.P.C. for recalling the prosecutrix who was examined as PW-1 and her grandmother examined as PW-2, had been dismissed.

2. Shorn of unnecessary details, the facts of the case are that the present petitioner is facing trial for commission of offences punishable under Section 376 of IPC and Section 4 of POCSO Act before the learned trial Court. FIR of this case had been registered on the basis of statement recorded by the grandmother of the prosecutrix alleging therein that on 09.10.2021 at about 12 PM, the petitioner had ravished her six years old granddaughter by taking her in an old room of his house, when she had gone to play with the children of the neighbourhood. The prosecutrix as well as the complainant have since been examined as PW-1 and PW-2 respectively. The petitioner had filed an application under Section 311 of Cr.P.C. making prayer for recalling the prosecutrix and her grandmother for their further cross-examination by submitting that the previous counsel engaged by him had not conducted their proper cross-examination and many questions which were important had been left to be asked from these witnesses. The learned trial Court, however, by passing the impugned order has declined the prayer so made and feeling aggrieved, the present revision petition has been filed.

3. It is submitted in the petition and learned counsel for the petitioner has argued that the impugned order is liable to be set aside as while passing the same, the learned trial Court ignored the fact that the cross-examination of the prosecutrix as well as the complainant had not been conducted on all the material aspects. It also ignored that the previous counsel of the petitioner had not confronted the PW-1 and PW-2 with several contradictions which were found in the statement as

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recorded by the prosecutrix under Section 164 of Cr.P.C. and the statement as recorded before the Court. It is submitted by learned counsel for the petitioner that he is facing a serious charge under Section 376 of IPC and Section 4 of POCSO Act and must be given fair opportunity to defend himself. The previous advocate representing him had not conducted cross-examination of the witnesses and it is only on engaging a new counsel that he has come to know that neither his defence has been properly placed on record nor contradictions have been confronted with the witnesses. He has argued that material improvements on some points had been made by the prosecutrix while recording her sworn deposition in the Court, as it was for the first time that she had deposed that the petitioner had struck a danda on her private parts whereas in her statement recorded under Section 164 of Cr.P.C., it was stated by her that the petitioner after removing her pajama had touched her private parts with something due to which she had pain. It is further submitted by learned counsel for the petitioner that since no effective cross-examination of PW-1 ad PW-2 was conducted by the previous counsel engaged by him, therefore, a great prejudice was going to be caused to the petitioner as he was deprived of the opportunity to confront the witnesses with the contradictions having crept in their respective statements.

4. It has been further argued by learned counsel for the petitioner that he deserved a fair opportunity to defend his case as well as for the just decision thereof. With these broad submissions, it is urged that the

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petition deserves to be allowed, the impugned order is liable to be set aside and the petitioner deserves to be given an opportunity to recall and further cross-examine the prosecutrix and complainant i.e. PW-1 and PW-2. To fortify his argument, learned counsel has placed reliance upon authorities cited as **Jamaluddin Mohd. Shaban Ansari v. State of Maharashtra**, 2018 SCC OnLine Bom 10155 and **Hoffman Andreas v. Inspector of Customs, Amritsar**, (2000) 10 Supreme Court Cases 430.

5. Per contra, learned State counsel who has advance notice of the petition has argued that the full opportunity to cross-examine the prosecutrix and the complainant had been granted to the petitioner through his counsel. If some lacuna had been left in their cross-examination due to non cross-examination on some points on the part of their counsel, even then the petitioner could not be allowed to fill up that lacuna. She submitted that the recall of these witnesses especially the victim who is only a child of tender age of six years only would rather amount to torturing her by subjecting her to further cross-examination and should not be allowed. It is further argued that there is nothing on record to suggest that recall of PW-1 and PW-2 is essential for just decision of the case. Hence, it is urged by her that the petition does not deserve to be allowed. To fortify her argument, learned State counsel has placed reliance upon **Vijay Kumar vs. State of U.P.**, (2011) 8 SCC 136, **Bhag Singh vs. Madan Lal Walia**, 1998 (3) Civil Court Cases 597(1) (P&H) and **Joginder Singh vs. Devinder Kumar**, 1999(1) Civil Court Cases 202(P&H).

6. I have heard learned counsel for both the parties at considerable length and have gone through the record carefully.

7. The prosecutrix is only a seven years old child who is alleged to have subjected to act of penetrative sexual assault by the petitioner. Copy of her statement has been placed on record which shows that she was examined in chief on 24.03.2022 and her cross-examination was conducted on 31.03.2022 and due opportunity to conduct effective cross-examination is shown to have given to the counsel who was representing the petitioner. It is well settled principle of law that victims in cases of sexual assault cannot be subjected to ordeal of repeated cross-examination where sufficient opportunity has already been granted to the accused at appropriate stage to cross examine the witnesses. Reliance in this regard can be placed upon observations made by High Court of Madras in **Krishnaraj @ Thangaraj v. Inspector of Police (High Court of Judicature at Madras)** CRL. O.P. No.211 of 2021 & Crl. M.P. No.93 of 2021 decided on 08.01.2021, wherein it was observed that the recall of witness on the ground that there is a new counsel who has been engaged by the petitioner and he found that certain vital questions have not been put to the witnesses, is not a good ground. Even in **Jamaluddin Mohd. Shaban Ansari's** case (Supra), which has been cited by learned counsel for the petitioner himself, a Bench of High Court of Bombay had declined to recall child witness of the same age in a case wherein the accused was facing charge under Section 302 of IPC. Then so far as PW-2 i.e. complainant is concerned, it is revealed that she too was examined

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in chief on 24.03.2022 and after seeking opportunity to engage a counsel to cross-examine her, her cross-examination was conducted on 31.03.2022 in detailed manner. The lacuna in the case of the petitioner cannot be allowed to be filled up in the garb of the application as filed by the petitioner. In this regard, I rely upon **Mohanlal Shamji Soni v. Union of India and another**, AIR 1991 SC 1346, wherein the Hon'ble Supreme Court while cautioning against filling up lacuna, had observed that the criminal Court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed but the jurisdiction of the Court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only requirement of justice command this examination of any person would depend upon the facts and circumstances of each case. It is well settled proposition of law that an application under section 311 Cr.P.C must not be allowed only to fill up lacunas in the case of the prosecution, or of the defence or to give an unfair advantage to the opposite party. In **Swapan Kumar Chatterjee vs. Central Bureau of Investigation**, 2019 (2) Scale 654, Hon'ble Supreme Court has held that the power conferred under Section 311 Cr.P.C. should be invoked by the court only to meet the ends of justice and for strong and valid reasons and it should be exercised with great caution and circumspection. The discretion as conferred under Section 311 of Cr.P.C. upon the Court is to be invoked only for the ends of justice and it should be exercised consistently with the provisions of the Code

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and principles of criminal law i.e. judicially for the reasons stated by the Court and not arbitrarily and capriciously.

8. On applying the aforementioned well established position of law to the peculiar facts and circumstances of the present case, I am of the considered opinion that the petition does not deserve to be allowed and no case has been made out for exercising powers under Section 311 of Cr.P.C. It is accordingly held that the learned trial Court had rightly observed that merely because a new counsel had been engaged, no right ipso facto was created in favour of the petitioner to recall PW-1 and PW-2 for further cross-examination as that would result in travesty of justice. Keeping in view the discussions as made above, I am of the considered opinion that the impugned order does not warrant any interference. Accordingly, the same is upheld.

9. The petition stands dismissed.

(MANISHA BATRA)
JUDGE

31.01.2024
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Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No