CGHC010352892026 2026:CGHC:43751

NAFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

CRMP No. 2374 of 2026

Nikesh Tandon S/o Dinesh Tandon Aged About 20 Years R/o Laver Koni, P.S. Masturi District Bilaspur (C.G.)

--- **Petitioner**

versus

State Of Chhattisgarh Through P.S. Sirgitti District Bilaspur, Chhattisgarh

--- **Respondent**

(Cause title is taken from CIS system)

For Petitioner : Mr. Barun Kumar Chakraborty, Advocate

For Respondent/State : Mr. Anant Bajpai, P.L.

Hon'ble Shri Justice Parth Prateem Sahu

Order On Board

08/10/2026

1. Petitioner has filed this petition under Section 528 of Bhartiya Nagrik Suraksha Sanhita, 2023 challenging the order dated 18.08.2026, passed in Special Cr.Case (POCSO Act) No. 133 of 2025, whereby learned Additional Sessions Judge/Second Fast Track Special Court, Bilaspur rejected the application filed by petitioner U/s. 348 of BNSS/311 of Cr.P.C. for recalling the victim/prosecutrix (PW-1) and her father (P.W.-2) for their cross-examination.

2. Learned counsel for petitioner submits that petitioner is facing trial before the Special Court (POCSO), Bilaspur for commission of offence punishable under Section 137 (2), 87, 64 of BNS and Section 4 & 6 of the POCSO Act. He submits that on 08.04.2026, the prosecutrix and her father were present before the trial Court for recording of their

BALRAM PRASAD DEWANGAN
Digitally signed by BALRAM PRASAD DEWANGAN

evidence. When the matter was called Mr. Aman Swai, learned counsel, appeared before the Court and submitted that senior counsel engaged in the matter was held up before the Family Court and, therefore, is unable to appear before the trial and prayed for an adjournment to enable the witnesses to be examined on the next date. However, the trial Court rejected the prayer for adjournment and proceeded to record the examination-in-chief of the prosecutrix and her father. He further submits that when junior counsel expressed his inability to cross-examine the witnesses and sought time, the trial Court rejected the prayer and directed the accused himself to cross-examine the witnesses present. Thereafter, the witnesses were discharged. He further submits that petitioner thereafter filed an application under Section 348 of the BNSS/Section 311 of the Cr.P.C. for recalling the witnesses for cross-examination, which also came to be rejected by the Special Court by the order impugned.

3. Learned counsel for petitioner submits that absence of counsel of the petitioner on the date fixed for recording the evidence of witnesses was bona-fide and not intentional, as he was engaged before the Family Court. He further submits that petitioner should not suffer due to the mistake of his counsel and has a fundamental right to defend himself by cross-examining the prosecution witnesses. He submits that the petitioner is facing trial for a serious offence of rape and, if he is not afforded fair opportunity to cross-examine the victim and her father, who are material witnesses, his defence may be seriously prejudiced. However, the learned trial Court failed to consider this fact and erroneously rejected the application filed by petitioner by the impugned order. Therefore, prayer is made to allow this petition and to

permit the petitioner to cross-examine the prosecutrix (P.W.-1) and her father (P.W.-2) through his counsel.

4. Learned State counsel opposes the submissions made by learned counsel for petitioner and supports the impugned order. He submits that non-presence of the counsel is intentional in order to delay the trial. He submits that in absence of counsel, petitioner was given proper opportunity to cross-examine the witnesses and accordingly, petitioner cross-examined the witnesses present. He submits that the impugned order has been passed after due consideration, which does not warrant any interference by this Court.

5. I have heard learned counsel for parties and perused the documents placed on record.

6. Before considering the rival submissions made by learned counsel for respective parties, it would be apposite to refer to the provisions contained in Section 348 of BNSS which deals with the power of the Court to summon a material witness or recall and re-examine a witness already examined. The said provision reads as under :-

> "**348. Power to summon material witness, or examine person present**. Any Court may, at any stage of any inquiry, trial or other proceeding under this Sanhita, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or re-call and re-examine any person already examined; and the Court shall summon and examine or re-call and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

7. The said provision empowers the Court, at any stage of an inquiry, trial or other proceeding, to summon any person as a witness, examine any person in attendance, though not summoned as a witness, or recall and re-examine a person already examined. The provision further mandates exercise of such power where the evidence of such person appears to the Court to be essential to the just decision of the case.

8. Thus, though the power conferred under Section 348 of the BNSS is wide, the same is required to be exercised judiciously and upon consideration of the facts and circumstances of each case. The object of the provision is to enable the Court to arrive at a just decision and not to provide a party with an opportunity to fill up omissions or lacunae in its case after having availed the opportunity of examining or cross-examining a witness.

9. Hon'ble Supreme Court in case of **Rajendra Prasad v. Narcotic Cell**, reported in **(1999) 6 SCC 110**, while considering the exercise of power under Section 311 of the CrPC, explained the scope and purpose of the said provision and observed thus :-

> "8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal

> court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."
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> "12. We cannot therefore accept the contention of the appellant as a legal proposition that the court cannot exercise power of resummoning any witness if once that power was exercised, nor can the power be whittled down merely on the ground that the prosecution discovered laches only when the defence highlighted them during final arguments. The power of the court is plenary to summon or even recall any witness at any stage of the case if the court considers it necessary for a just decision. The steps which the trial court permitted in this case for resummoning certain witnesses cannot therefore be spurned down or frowned at."

10. In case of **Rajaram Prasad Yadav v. State of Bihar**, reported in **(2013) 14 SCC 461**, Hon'ble Supreme Court after referring to Section 311 CrPC and Section 138 of the Evidence Act observed that Section 311 CrPC vest widest powers in the court when it comes to the issue of summoning a witness or to recall or re-examine any witness already examined. Analysing further with regard to "trial", "proceeding", "person already examined", the Court ruled that invocation of Section 311 CrPC and its application in a particular case can be ordered by the court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case. The Court observed that the power vested under the said provision is made available to any court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even

though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined is concerned, the court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the court to be essential for the just decision of the case. It is further held that the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. It was also stated that while such a widest power is invested with the court, exercise of such power should be made judicially and also with extreme care and caution.

11. In **P. Sanjeeva Rao v. State of A.P.,** reported in **(2012) 7 SCC 56**, the Hon'ble Supreme Court elaborated upon the scope and ambit of Section 311 of the CrPC and emphasised the importance of affording the accused a fair and effective opportunity to put forth his defence and observed thus :

> "20. Grant of fairest opportunity to the accused to prove his innocence is the object of every fair trial, observed this Court in Hoffman Andreas v. Inspector of Customs [(2000) 10 SCC 430 : 2001 SCC (Cri) 1488] . The following passage is in this regard apposite: (SCC p. 432, para 6)
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> > "6. … In such circumstances, if the new counsel thought to have the material witnesses further examined the court could adopt latitude and a liberal view in the interest of justice, particularly when the court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and

courts should afford the opportunity to them in the fairest manner possible."

(emphasis supplied)

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23. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined-in-chief about an incident that is nearly seven years old. Delay takes a heavy toll on the human memory apart from breeding cynicism about the efficacy of the judicial system to decide cases within a reasonably foreseeable time period. To that extent the apprehension expressed by Mr Raval, that the prosecution may suffer prejudice on account of a belated recall, may not be wholly without any basis. Having said that, we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to the prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself.

12. The above legal principles make it clear that the Court should use its power under Section 311 of the Cr.P.C./Section 348 of the BNSS only when it is necessary in the interest of justice and for valid reasons. The Court must exercise this power carefully and ensure a fair trial by giving a proper opportunity to both the accused and the victim. A fair trial is not only a legal requirement but also a constitutional right and a recognised human right.

13. Reverting back to the case at hand, petitioner is facing trial for offence U/s. 137 (2), 87, 64 (1) of BNS and Section 3, 4 (1) of POCSO Act. Perusal of the order sheet annexed along with this petition would show on 04.08.2026, case was fixed for prosecution evidence, and victim and her father were present. Initially when the case was called, neither petitioner/accused nor his counsel was present. Thereafter, at 12:22 p.m., Mr. Aman Swai, Advocate, appeared and submitted that the senior counsel engaged in the case is held up before the Family Court, therefore, he is unable to present and sought an adjournment. The learned Special Court rejected the prayer and proceeded to record examination-in-chief of the witnesses. Perusal of the order sheet would further show when junior counsel present before the Court expressed his inability to cross-examine witnesses, the trial Court directed petitioner/accused to cross-examine the witnesses himself, and thereafter, the witnesses were discharged.

14. In the present case, wherein the petitioner is facing trial for the offences punishable under Sections 137(2), 87 and 64(1) of the BNS and Sections 3 and 4(1) of the POCSO Act, the victim and her father are material witnesses and their cross-examination have important bearing on the determination of the charges levelled against the petitioner. If petitioner is not allowed to recall these witnesses for further cross-examination through his counsel, his defence may be seriously prejudiced, thereby affecting his right to a fair trial.

15. The reason for non-appearance of counsel on the date fixed for recording of evidence and in the application filed under Section 348 of BNSS, was specifically mentioned that senior counsel engaged in the

case was held up before the Family Court, therefore, he was not able to present before the Special Court and on this ground adjournment was sought.

16. The main object of a criminal trial is to ensure a fair trial by giving both parties a proper opportunity to present their case. The accused must be given an effective opportunity to cross-examine the witnesses, as fairness is an essential part of justice.

17. In view of the aforesaid discussion, this Court is of the considered opinion that the power under Section 348 of the BNSS/Section 311 of the Cr.P.C. is required to be exercised in the present case in furtherance of a fair and effective trial. The petitioner ought not to be deprived of an effective opportunity to cross-examine material prosecution witnesses merely on account of the inability of his counsel to conduct the cross-examination on the date fixed, particularly when such denial is likely to cause prejudice to his defence. The recall of the victim/prosecutrix and her father, who are material witnesses, would enable the Court to arrive at a just decision on the basis of a complete and effective examination of the evidence, without causing any undue prejudice to the prosecution.

18. Accordingly, the present petition is hereby **allowed**. The order dated 18.08.2026, passed in Special Cr.Case (POCSO Act) No. 133 of 2025, by Additional Sessions Judge/Second Fast Track Special Court, Bilaspur is hereby set aside. Consequently, the application filed by the petitioner under Section 348 of BNSS/311 of Cr.P.C. is also allowed.

19. As a last indulgence, petitioner/accused is allowed to recall the prosecutrix (P.W.-1) and her father (P.W.-2) for their cross-examination

on a date to be given by the learned Special Court. It is for the petitioner to get those witnesses examined on the date when (P.W.-1) and (P.W.-2) appears before their cross-examination.

Sd/-
(Parth Prateem Sahu)
Judge

Balram