A.F.R.

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLREV NO.490 of 2021

(From the order dated 01.11.2011 passed by the learned Ad hoc Additional District and Sessions Judge (FTSC), Jeypore in T.R. Case No.80 of 2018)

Pidika Sambaru .... ***Petitioner***

-versus-

State of Odisha and Anr. .... ***Opp. Parties***

Advocates appeared in the case through Hybrid Mode:

For Petitioner : Mr. Saroj Kumar Padhy, Adv.

-versus-

For Opp. Parties : Mr. M.K. Mohanty, ASC (for O.P. No.1)

CORAM:

MR. JUSTICE S.K. PANIGRAHI

DATE OF HEARING:-03.01.2022
DATE OF JUDGMENT:-04.03.2022

S.K. Panigrahi, J.

1. The Petitioner, who is the accused in T.R. Case No.80 of 2018, arising out of Narayanpatna P.S. Case No.72 of 2018, pending in the court of the learned Ad hoc Additional District and Sessions Judge, (FTSC), Jepore instituted by the Opposite Party No.2 for alleged commission of offences punishable under Sections 376(2)(n)/ 450/ 506 of the Indian Penal Code, 1860

(hereinafter referred to as "the Penal Code" for brevity) read with Section 4 of the Protection of Children from Sexual Offences Act, 2012 ((hereinafter referred to as "POCSO Act" for brevity), has made a prayer in this CRLREV under Section 401 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code" for brevity) to set aside the impugned order dated 01.11.2021 passed by the learned Ad hoc Additional District and Sessions Judge, (FTSC), Jeypore in the aforesaid case rejecting his petition filed on 27.10.2021 under Section 311 of the Code to recall P.Ws.1, 2 and 3 for their cross-examination.

2. Prosecution case in brief is that:

On 15.09.2018 at 05.14 P.M. the opposite party no.2/complainant presented a written report before the Inspector-In-Charge, Narayanpatna Police Station, Narayanpatna alleging that the present petitioner who is resident of his village has committed rape on his daughter seven months ago in his cottage. While his daughter resisted, the present petitioner threatened her to kill. She narrated her daughter's ordeal to the villagers. By that time, her daughter impregnated with about 7 months. The accused also threatened to the complainant and his family members to kill, if they disclose the matter to anybody or report to police. Hence, they remain silent. On 14.09.2018, there was a village panch meeting at their village for amicable

settlement. The village gentries, namely Suba Pidika, Chinaya Pidika, Uttara Tadingi, Narsana Pidika, Kate Pidika, Sasai Pidika, Waralu Huika and others were present in the meeting. They called Sambaru Pidika to the meeting, but he did not attend the meeting. The panch members told him to report the matter at police station. Hence, he made a report before the police on 15.09.2018. Based on which, Narayanpatna P.S. Case No.72 of 2018 was registered for commission of offences under Sections 376(3)/ 450/ 506 of the Penal Code read with Section 4 of the POCSO Act and investigation was initiated. The victim girl was sent to CHC, Narayanpatna for medical examination and subsequently, the Medical Officer, CHC, Narayanpatna referred the victim girl to S.L.N. Medical College and Hospital, Koraput, as there was no lady Medical Officer at CHC, Narayanpatna. After completion of investigation, the Investigating Officer submitted charge-sheet against the present petitioner.

Keeping in view the nature of offences and detention of the accused in custody, the hearing of the case has been started. On 09.01.2020, the trial court examined five persons including the victim girl as P.W.2. On 11.02.2020, the medical officer was also examined by the prosecution, while there was no counsel to cross-examine the prosecution witnesses on behalf of the accused, as the accused-petitioner was in

custody during that period. After released on bail, the petitioner engaged his lawyer and moved an application under Section 311 of the Code on 27.10.2021 to recall P.Ws.1 to 3. Having heard both the parties, the trial court vide order dated 01.11.2021 rejected the application of the petitioner on the ground that the discretion under Section 311 of the Code cannot be exercised as there is bar under Section 33(5) of the POCSO Act under which there is clear prescribed limitations recalling witnesses more particularly the victim of crime. Hence, this revision Application has been filed.

3. Learned counsel for the petitioner contended that both P.Ws.1 and 2 are material witnesses. P.W.3 is the victim girl. Unless the petitioner-accused is afforded an opportunity to cross-examine the aforesaid witnesses, he shall be highly prejudiced in his defense. He placed reliance in the case of ***Dharam Pal vs. State of Haryana***[1] and contended that the fundamental right of an accused is for a fair trial presupposes a fair investigation and in absence of fair investigation, there cannot be fair trial. But, in this case the investigation has not been done properly and in the absence of proper investigation, the materials relied on by the prosecution are not sufficient to frame charge. But the, case in hand, is different as here further cross-

[1] (2016) 4 SCC 160

examination has been denied to the petitioner for examining the prosecution witnesses.

4. Learned Additional Standing Counsel for the State vehemently opposed the present petition and contended that the learned trial court has rightly rejected the application of the petitioner. He further contended that opportunity was given to the Petitioner to cross examine P.Ws.1 to 3. Moreover, the application for recall of the 14 years minor girl/victim is negating to Section 33 (5) of the POCSO Act which mandates that the child should not be repeatedly called to testify in a Court.

5. Section 311 of the Code provides:

> "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."

On the other hand, Section 33 (5) of the POCSO Act reads as under:

> "Procedure and powers of Special Court:
> (5) The Special Court shall ensure that the child is not called repeatedly to testify in the Court."

6. It is also contended that the intention behind enacting Section 33 (5) of the POCSO is only to ensure that in a genuine case the child victim is not harassed, but cannot be used as a shield by the trial Court to deprive the accused of a right of proper cross examination and therefore a right of fair trial.

7. It is mandatory for a Court to recall witness for further cross-examination if his evidence appears to be essential for just decision of the case. There is no bar for a court to recall a witness for further cross-examination. In **Godrej Pacific Tech. Ltd. –v-Computer Joint India Ltd.**[2], which has rightly by referring to Section 311 of the Code, the Hon'ble Apex Court has held:

> "The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequence, the first part gives purely discretionary authority to a criminal court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon anyone as a witness, or (b) to examine any person present in the court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the court the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls

[2] (2008) 11 SCC 108

> for no limitation, either with regard to the stage at which the powers of the court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts."

8. In ***Vimal Khanna vs. State***[3] the Court has held that denial of opportunity to cross examine the witnesses violates the Constitutional guarantee to an accused and vitiates the trial. ***Vimal Khanna*** (Supra) has been followed in ***Mohd. Gulzar v. The State (GNCTD)***[4], wherein after recording that the counsel for the accused was not present on three consecutive dates to cross examine the witness, the Court held that since the right of cross examination is a valuable right, the child's right under Section 33 (5) of POCSO Act has to be balanced with the aforesaid rights of the accused and thus permitted one more opportunity to the accused to cross examine the alleged victim. In **B. C. *Deva @ Dyava vs. State Of Karnataka the***

[3] 2018 SCC Online Del 11796 (DHC)
[4] 2018(4) JCC 2291 (DHC)

Court[5] was clearly of the view that the power to recall a witness at the instance of either party to ensure justice is done is greater than the provisions set out in Section 33 POCSO Act. The provisions of Section 33 laid down a general principle which must guide the trial Court and is similar to Section 309 Cr.P.C, being in the nature of laws to ensure speedy trial. However, by virtue of Sections 4 and 5 of Cr.P.C, Section 311 Cr.P.C shall prevail as no specific procedure is provided under POCSO Act for recall of a witness. Section 42A of POCSO Act clarifies that the Act is not in derogation of any other Law.

9. In that view of the aforesaid, this Court is of the view that cross-examination of the prosecution witnesses being an essential right of the accused, it is evident that non-cross-examination of the said witnesses will put the petitioner to prejudice. In such circumstances, it is not unjust to afford an opportunity to the petitioner to cross-examine P.Ws.1 to 3 by recalling them.

10. In view of the peculiar facts and circumstances of the instant case, the CRLREV is disposed of directing that the learned Additional District and Sessions Judge (FTSC), Jeypore shall recall P.Ws.1 to 3 and the department shall make all endeavours to produce P.Ws.1 to 3 as early as possible for cross-examination

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[5] C. A. (Crl.) No.205 of 2001 (S.C.)

by the petitioner preferably within a period of one month from the date of production of certified copy of this order. After giving the petitioner an opportunity to cross-examine P.Ws.1 to 3, the trial court shall proceed for expeditious disposal of the case. It is further clarified that the Court shall take steps to recall the child witness at one go without disturbing him/her again and again.

11. Accordingly, this CRLREV is disposed of.

(S.K. Panigrahi)
Judge

Orissa High Court, Cuttack,
Dated the 4th March., 2022/B. Jhankar