

**Court No. - 85****Case :-** APPLICATION U/S 482 No. - 17844 of 2021**Applicant :-** Jeeshan @ Jeeshan Ansari**Opposite Party :-** State of U.P. and Another**Counsel for Applicant :-** Mohammad Waseem**Counsel for Opposite Party :-** G.A.**Hon'ble Dr. Yogendra Kumar Srivastava,J.**

1. Heard Sri M.P. Singh Yadav, holding brief of Sri Mohammad Waseem, learned counsel for the applicant and Sri Vinod Kant, learned Additional Advocate General along with Sri Arvind Kumar, learned Additional Government Advocate appearing for the State-opposite party.

2. The present application under Section 482 Cr.P.C. has been filed seeking to quash the order dated 12.08.2021 passed by the Additional Sessions Judge/Special Judge (POCSO Act) Court No.1, District Bareilly in Special Case No. 10 of 2020, arising out of Case Crime No. 154 of 2018 (State vs. Jeeshan) under Sections 363, 366, 376 (2) N IPC and Section 3/4 of Protection of Children from Sexual Offences Act, 2012<sup>1</sup>, Police Station Hafizganj, District Bareilly on the application filed by the applicant under Section 311 Cr.P.C. dated 10.08.2021 and also to direct the court below to re-consider the application filed by the applicant under Section 311 Cr.P.C. dated 10.08.2021.

3. The order dated 12.08.2021 dismissing the application filed by the applicant herein under Section 311 Cr.P.C. has taken notice of the fact that the examination-in-chief of PW-2 (victim) was recorded on 21.01.2021 and on the same date the counsel for the accused-applicant had cross-examined her. The court has also recorded that the accused-applicant has sought recall of the witness who has been already examined on the earlier date as PW-2. It has also been taken note that the cross-examination of the other witnesses is continuing and

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1 POCSO Act

information regarding the questions which are sought to be put to PW-2, can be elicited from the other witnesses. Considering that the matter is pending since the year 2018 an inference has been drawn that the application filed under Section 311 Cr.P.C. is only to delay the proceedings. The court below further taking note that the trial is under POCSO Act which contains a provision for concluding the proceedings expeditiously, has concluded that there was no reason to allow the application under Section 311 Cr.P.C. seeking recall of the witness and accordingly the same has been rejected.

4. Learned Additional Advocate General supporting the order passed by the court below has pointed out that the testimony of the PW-2 having already been recorded long back and no plausible ground having been made out by the accused-applicant for recall of the witness, the application under Section 311 Cr.P.C. has rightly been turned down. Learned Additional Advocate General also points out that the POCSO Act is a special Act which contains a specific provision for expeditious disposal of trial.

5. On the scope of powers to be exercised under Section 311 Cr.P.C., reliance has been placed on the decision of this Court in **Ajmer vs. State of U.P.**<sup>2</sup>, and also a recent decision dated 22.11.2021 in **Manish vs. State of U.P. and another**<sup>3</sup>.

6. The facts as noticed by the court below in the order dated 12.08.2021 whereunder the application under Section 311 has been rejected, indicate that the examination-in-chief of the victim PW-2 was recorded on 29.01.2021 and her cross-examination was also completed by the counsel for the accused-applicant on the same date. The court below has also noticed that the questions which are proposed to put to the

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2 2021 (115) ACC 409

3 Application U/S 482 No. 23428 of 2021, decided on 22.11.2021

aforesaid witness, as stated in the application under Section 311, have already been put to the witness earlier on behalf of the defence counsel. Further, the fact that the cross-examination of the other witnesses was still continuing and that the information with regard to the age of the brothers and sisters and other family members of the victim could be elicited from them, has also been taken into consideration to draw a conclusion that the application under Section 311 had been filed only with a view to delay the proceedings.

7. Another fact which has been taken note of is that the matter is pending since the year 2018 and the proceedings being under the POCSO Act, the same were required to be concluded expeditiously.

8. In this regard, it would be relevant to take notice of the fact that the POCSO Act has been enacted as a self contained comprehensive legislation inter alia to provide for protection of children from the offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well being of the child at every stage of the judicial process, incorporating child-friendly procedures for reporting, recording of evidence, investigation and trial of offences and provision for establishment of Special Court for speedy trial of such offences.

9. The relevant provisions of the POCSO Act, which shall shortly be referred to, are being extracted below:-

**“28. Designation of Special Courts.-(1) For the purposes of providing a speedy trial,** the State Government shall in consultation with the Chief Justice of the High Court, by notification in the Official Gazette, designate for each district, a Court of Session to be a Special Court to try the offences under the Act:

Provided that if a Court of Session is notified as a children's court under the Commissions for Protection of Child Rights Act, 2005 or a Special Court designated for similar purposes under any other law for the time being in force, then, such court shall be deemed to be a Special Court under this section.

(2) While trying an offence under this Act, a Special Court shall also try an offence other than the offence referred to in sub-section (1)], with which the accused may, under the Code of Criminal Procedure, 1973, be charged at the same trial.

(3) The Special Court constituted under this Act, notwithstanding anything in the Information Technology Act, 2000 (21 of 2000), shall have jurisdiction to try offences under section 67-B of that Act in so far as it relates to publication or transmission of sexually explicit material depicting children in any act, or conduct or manner or facilitates abuse of children online.

**33. Procedure and powers of Special Court.-** (1) **A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts.**

(2) The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child.

(3) The Special Court may, if it considers necessary, permit frequent breaks for the child during the trial.

(4) The Special Court shall create a child-friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court.

(5) The Special Court shall ensure that the child is not called repeatedly to testify in the court.

(6) The Special Court shall not permit aggressive questioning or character assassination of the child and ensure that dignity of the child is maintained at all times during the trial.

(7) The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial:

Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

Explanation.- For the purposes of this sub-section, the identity of the child shall include the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed.

(8) In appropriate cases, the Special Court may, in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child.

(9) Subject to the provisions of this Act, a Special Court shall, for the purpose of the trial of any offence under this Act, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session, and as far as may be, in accordance with the procedure specified in the Code of Criminal Procedure, 1973(2 of 1974) for trial before a Court of Session.

**35. Period for recording of evidence of child and disposal of case.-** (1) **The evidence of the child shall be recorded within a**

**period of thirty days of the Special Court taking cognizance of the offence and reasons for delay, if any, shall be recorded by the Special Court.**

**(2) The Special Court shall complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offence."**

(emphasis supplied)

10. The POCSO Act, which is a special enactment, contains provisions for designation of Special Courts under Chapter VII, and sub-section (1) of Section 28 provides for designation of a Court of Session to be a Special Court for each district to try the offences under the Act, for the purposes of providing a speedy trial.

11. The procedure and powers of Special Courts and recording of evidence is contained under Chapter VIII of the POCSO Act. Section 33 (1) empowers the Special Court to take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts.

12. Section 35 is with regard to the period for recording of evidence of child and disposal of case, and sub-section (1) thereof mandates that the evidence of the child shall be recorded within a period of thirty days of the Special Court taking cognizance of the offence and reasons for delay, if any, shall be recorded by the Special Court. Sub-section (2) of Section 35 provides that the Special Court shall complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offence.

13. It would be seen that the POCSO Act has been enacted as a self contained comprehensive legislation to provide for protecting of children from the sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well being of the child at every stage of the

judicial process, incorporating child-friendly procedures for reporting, recording of evidence, investigation and trial of offences and also provision for establishment of Special Courts for speedy trial of such offences.

14. One of the principal objectives of enactment of the POCSO Act as a special Act being for providing a special procedure to ensure speedy trial so as to protect the children in respect of certain specified offences, the provisions of the enactment would have to be interpreted in a manner so as to effectuate the object of the enactment and not to frustrate the same.

15. Having regard to the aforesaid, the conclusion drawn by the court below with regard to the application under Section 311 having been filed so as to delay the proceedings, cannot be said to be without basis in view of the object of ensuring the speedy trial under the special Act.

16. As regards, the nature and scope of the power of the court to summon, examine, recall and re-examine any witness in the context of Section 311 Cr.P.C., the said provision (and also the corresponding provision as contained in Section 540 of the Old Code of 1898) was subject matter of consideration in **Mohanlal Shamji Soni v Union of India and another**<sup>4</sup>, and it was held that the power in this regard is in the widest terms exercisable at any stage so long as the court is in *seisin* of the proceeding as may be considered essential for a just decision of the case.

17. In **U.T. of Dadra and Nagar Haveli v Fatehsinh Mohansinh Chauhan**<sup>5</sup>, while considering the power of the court to summon material witnesses under Section 311 Cr.P.C., it was opined that the said power can be exercised only with the object of finding out the truth or obtaining proper proof of facts

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4 1991 SCC (Cri) 595

5 (2006) 7 SCC 529

which may lead to a just and correct decision.

18. The nature, scope and object of Section 311 Cr.P.C. came to be extensively discussed in **Zahira Habibullah Sheikh (5) and another v State of Gujarat and others**<sup>6</sup>, and a view was taken that the underlying object of the provision is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side.

19. A similar view was reiterated in **P. Sanjeeva Rao v State of A.P.**<sup>7</sup>, after referring to the earlier decisions in **Hoffman Andreas v Inspector of Customs**<sup>8</sup>, **Mohanlal Shamji Soni v Union of India**<sup>4</sup> and **Maria Margarida Sequeria Fernandes v Erasmo Jack de Sequeria**<sup>9</sup>.

20. Considering the scope and object of Section 311 Cr.P.C. in **Natasha Singh v CBI**<sup>10</sup>, it was held that the power conferred is to be invoked by the court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection.

21. The nature and scope of the powers to be exercised by the court under Section 311 Cr.P.C. was elaborately considered in the case of **Rajaram Prasad Yadav v State of Bihar and another**<sup>11</sup> and after considering the earlier precedents, the principles to be followed by the courts with regard to exercise of powers under the said section have been explained and enumerated. It has been stated thus:-

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6 (2006) 3 SCC 374

7 (2012) 7 SCC 56

8 (2000) 10 SCC 430

4 1991 SCC (Cri) 595

9 (2012) 5 SCC 370

10 (2013) 5 SCC 741

11 (2013) 14 SCC 461

“14. A conspicuous reading of Section 311 CrPC would show that widest of the powers have been invested with the courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression “any” has been used as a prefix to “court”, “inquiry”, “trial”, “other proceeding”, “person as a witness”, “person in attendance though not summoned as a witness”, and “person already examined”. By using the said expression “any” as a prefix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the court was only in relation to such evidence that appears to the court to be essential for the just decision of the case...It is, therefore, imperative that the 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 as noted by us earlier. 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, 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. Therefore, 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. To put it differently, while such a widest power is invested with the court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.

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17. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 CrPC...we feel the following principles will have to be borne in mind by the courts:

17.1. Whether the court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the court for a just decision of a case?

17.2. The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

17.3. If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.

17.4. The exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

17.5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

17.6. The wide discretionary power should be exercised

judiciously and not arbitrarily.

17.7. The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

17.8. The object of Section 311 CrPC simultaneously imposes a duty on the court to determine the truth and to render a just decision.

17.9. The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

17.10. Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that 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.

17.11. The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

17.12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

17.13. The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

17.14. The power under Section 311 CrPC must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.”

22. The power to summon material witnesses under Section 311 Cr.P.C. which falls under Chapter XXIV containing the general provisions as to inquiries and trials has been held to confer a very wide power on the courts for summoning witnesses and accordingly the discretion conferred is to be exercised judiciously as wider the power the greater is the necessity for application of judicial mind.

23. The power conferred has been held to be discretionary

and is to enable the court to determine the truth after discovering all relevant facts and obtaining proper proof thereof to arrive at a just decision in the case. The power conferred under Section 311 is to be invoked by the court to meet the ends of justice, for strong and valid reasons and it is to be exercised with great caution and circumspection. The determinative factor in this regard would be whether the summoning or recalling of the witness is in fact, essential to the just decision of the case keeping in view that fair trial – which entails the interests of the accused, the victim and of the society – is the main object of the criminal procedure and the court is to ensure that such fairness is not hampered or threatened in any manner.

24. The aforementioned legal position has been discussed in detail in a recent decision of this court in **Ajmer vs. State of U.P.**<sup>2</sup> and **Manish Vs. State of U.P. and another**<sup>3</sup>.

25. Counsel for the applicant has not been able to dispute the aforesaid legal position with regard to the scope of the powers of the court under Section 311 Cr.P.C. and has not been able to point out any material error or illegality in the exercise of the aforesaid discretion by the court below, which may warrant interference.

26. Having regard to the aforesaid, this Court is not inclined to exercise its inherent jurisdiction under Section 482 Cr.P.C. in the facts of the case.

27. The application stands accordingly **dismissed**.

**Order Date :- 1.12.2021**

Imroz/Pratima

(Dr. Y. K. Srivastava, J.)

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2 2021 (115) ACC 409

3 Application u/s 482 No. 23428 of 2021, decided on 22.11.2021