



THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC No.1506 of 2024

(In the matter of an application under Section 482 of Cr.P.C.)

Tapas Swain @
Tapas Kumar Swain

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Petitioner

-Versus-

State of Orissa & another

Opp. Parties

For the Petitioner : Mr. D.P. Dhal, Sr. Advocate

For the Opp. Party : Mr. P.K. Maharaj,
Addl. Standing Counsel

CORAM:

THE HONOURABLE SHRI JUSTICE SIBO SANKAR MISHRA

Date of Order: 17.05.2024

1. Heard.

2. The petitioner in this petition is aggrieved by the order dated 03.04.2024 passed by the learned A.D.J. - cum- Special Court under POCSO Act, Bhadrak in Special Case No.94 of 2017 whereby his application under Section 311 of Cr.P.C. seeking recalling of P.W.6/victim has been turned down.



3. Mr. Maharaj, learned counsel for the State submits that the application under Section 311 of Cr.P.C. seeking recalling of the victim witness in a POCSO case is barred under Section 33(5) of the POCSO Act.

4. Mr. Dhal, learned Senior Advocate appearing for the petitioner strongly controverted the objection raised by Mr. Maharaja and on the strength of numerous judgments submits that it is no more res-Integra that the section 33(5) of POCSO Act does not create an absolute bar for recalling a witness, who is a minor victim. He relied upon the following judgments to buttress his arguments :

2022 SCC Online Ori – 802 (Pidika Sambaru vs. State of Odisha & others), 2023 SCC Online Del - 6471 (A through Guardian vs. State & another), 2023 SCC Online Del – 2989, 2022 SCC Online Kar – 1048 (Mahammad Ali Akbar vs. State of Karnataka) & 2019 SCC Online Del – 12078 (Jaidev vs. State).

From the judgment of **Pidika Sambaru** (*supra*), Mr. Dhal emphasized on Paragraphs 6, 9 & 10 which reads as under:

“6. 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:



9. In *Vimal Khanna vs. State* 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) Court⁵ 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.

10. 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.”

By relying upon **A through Guardian** (*supra*), he submits that the bar under 33(5) of the POCSO Act needs to be balanced



with the other statutory provision operating in the field, he emphasized on Paragraphs 17, 19 & 20, which reads as under:

"17. Since the application has been rejected on the ground of bar under section 33(5) of POCSO Act, it is relevant to reproduce the said section, which reads as under:

"33(5) The Special Court shall ensure that the child is not called repeatedly to testify in the Court."

19. In Mohd. Gulzar v. The State (GNCTD), 2018 SCC OnLine Del 11845, a coordinate bench of this Court made the following observations with regard to balancing of the rights under section 33(5) POCSO and section 311 Cr.P.C.:

"6. Perusal of orders dated 10.04.2018, 11.04.2018 and 12.04.2018 shows that the counsel for the petitioner was not present for the purpose of cross-examination. The right of cross-examination is a valuable right provided to an accused. No doubt, a child under Section 33(5) of Chapter VIII POCSO also has rights of not being harassed at trial but a balance has to be achieved between the two rights."

20. The Orissa High Court in Pidika Sambaru v. State of Odisha, 2022 SCC OnLine Ori 802 while reiterating the observations of this Court in Vimal Khanna (supra) and Mohd. Gulzar (supra) ordered recalling of the witnesses on the ground that non-cross-examination of the witnesses would put the petitioner in prejudice. Similar view was held by Karnataka High Court in Deva @ Devaraj v. State of Karnataka, Crl. Petition No. 201325/2019."



In the case of **Vinod Rawat** (*supra*), Hon'ble Supreme court has held as under:

"18. However, Section 33(5) cannot be read alone, as a balance of rights under Section 33(5) and Section 311 Cr.P.C. reads to be maintained. The right to fair trial as well as the bar under Section 33(5) both read to be looked into while deciding such application, depending upon facts of each case. This view has also been expressed in catena of cases across several Courts in the country.

19. In Mohd. Gulzar v. The State (GNCTD), 2018 SCC OnLine Del 11845, a coordinate bench of this Court made the following observations with regard to balancing of the rights under section 33(5) POCSO and section 311 Cr.P.C.:

"6. Perusal of orders dated 10.04.2018, 11.04.2018 and 12.04.2018 shows that the counsel for the petitioner was not present for the purpose of cross-examination. The right of cross-examination is a valuable right provided to an accused. No doubt, a child under Section 33(5) of Chapter VIII POCSO also has rights of not being harassed at trial but a balance has to be achieved between the two rights."

Further relying upon **Mahammad Ali Akbar** (*supra*), he submits that in genuine cases court shall independently apply mind to ascertain as to whether recalling the victim is vital to the defense of the accused or not, he highlighted Paragraphs 17,18 & 19 of the judgment:



"17. The other ground on which the learned Sessions Judge declines to accept the application is placing reliance on the specific bar under Section 33(5) of the Act. Section 33(5) of the Act reads as follows:

"33. Procedure and powers of Special Court.--

... ..

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

18. In terms of Section 33(5) of the Act the Special Court has to ensure that the child is not called repeatedly to testify in the Court. A reading of Section 33(5) of the Act would clearly indicate the intention behind such enactment that in genuine cases the child-victim is not harassed. That would not mean that the accused can be deprived of his right to cross-examination in a trial, particularly, where offence punishable is beyond ten years. The mandatory nature to recall the witness for cross-examination, if the evidence appears to be essential, is always necessary for a just decision in a case, save in cases where repeated applications under Section 311 of the Cr.P.C. are filed on frivolous reasons.

19. The other factor that is necessary to be noticed is, the current age of the victim. The learned counsel for the petitioner has placed on record Ex.P9, the study certificate issued by the school in which the victim had studied. As on 18-01-2019 the victim was about 15 years of age as her date of birth was 02.01.2004. As on date of filing of the application by the petitioner under Section 311 Cr.P.C. which was on 28-03-2022 the victim had crossed 18 years of age. Once the victim crosses 18 years of age, the rigor of Section 33(5) of the Act gets diluted, as it is the child-victim who shall not be called for cross-examination or re-examination repeatedly. The word 'child' is defined under Section 2(1)(d) of the Act, to mean a person below 18 years of



age. On the child attaining 18 years of age, the rigor under Section 33(5) of the Act gets diluted and sequentially, will not become a bar for seeking further cross-examination of the victim under Section 311 of the Cr.P.C. It is more so in cases where the accused is alleged to have committed offences punishable under the Act as there is presumption under Section 29 of the Act against the accused. To bring in evidence contrary to the presumption is a heavy burden cast upon the accused for offences punishable under the Act. Therefore, to rebut such presumption, as also, peculiar reasons in the case at hand, the victim ought to have been permitted to be cross-examined by accepting the application seeking to recall the witness. This would be imperative to see that the trial does not result in miscarriage of justice in any manner and such miscarriage is prevented at any point of spell and juncture.”

Regard being had to aforementioned judgments, I am of the considered view that there is no absolute bar under Section 33(5) of the POCSO Act to recall a victim witness, every case has to be weighed on the strength of its own evidence and necessity of recalling the child victim. However, the intention of the legislator is to see that the repeatedly the victim who is a minor shall not be called to the Court in the guise of cross-examination, which would add to the ordeal. Therefore, the application moved by the petitioner under Section 311 of Cr.P.C. seeking recalling of the P.W.6/victim although was maintainable, however, on merit; the application deserves to be dismissed in view of the following.



5. I have perused the proposed questionnaires to be put to the witnesses vis-à-vis the cross-examination conducted by the defence on 07.09.2019. Almost all the questions have already been put to the victim witness and there are certain questions which are completely irrelevant and can be put to other witnesses like the parents of the victim witness or the I.O., etc. Apart from that there is a statutory bar under Section 33(5) of the POCSO Act to recall the victim in a POCSO case repeatedly to the Court for the purpose of examination. In that view of the matter, I am not inclined to entertain this petition. Since, dismissal of the present petition may not preclude the petitioner from recalling any other witnesses to test the questions as enumerated in the application under Section 311 of Cr.P.C., I am not inclined to interfere in the impugned order.

6. The present petition is disposed of with the aforementioned observation.

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(S.S. Mishra)
Judge

The High Court of Orissa, Cuttack.
Dated the 17th of May, 2024/ Amit