

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 06TH DAY OF JUNE, 2022

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPRASANNA

CRIMINAL PETITION No.4449 OF 2022

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BETWEEN:

MAHAMMAD ALI AKBAR @ ALI UMAR
S/O HASSAN MAHAMMAD
AGED ABOUT 23 YEARS
R/AT NO.10, 1ST FLOOR
11TH MAIN, ABBIGERE MAIN ROAD
KAMMAGONDANAHALLI,
JALAHALLI WEST,
BENGALURU – 560 015.

... PETITIONER

(BY SRI SYED MUZAKKIR AHMED, ADVOCATE)

AND:

STATE OF KARNATAKA BY
YESHWANTHAPURA POLICE
BENGALURU CITY – 560 022.

(REPRESENTED BY THE LEARNED
STATE PUBLIC PROSECUTOR
HIGH COURT OF KARNATAKA
BENGALURU 560 001.

... RESPONDENT

(BY SMT.K.P.YASHODHA, HCGP)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF
CR.P.C., PRAYING TO QUASH THE ORDER DATED 07.04.2022
REJECTING THE APPLICATION FILED BY THE PETITIONER U/S 311
OF CRPC FOR RECALL OF PW-1 FOR FURTHER CROSS-

EXAMINATION PASSED IN SPL.CC.NO.407/2019 ON THE FILE OF THE ADDL. CITY CIVIL AND SESSIONS JUDGE, FTSC-II, BANGALORE AND CONSEQUENTLY ALLOW THE PETITION AND RECALL PW-1 FOR FURTHER CROSS-EXAMINATION.

THIS CRIMINAL PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 30.05.2022, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

ORDER

The petitioner/accused in Special C.C.No.407 of 2019 before Additional City Civil and Sessions Judge, FTSC-II, Bengaluru arising out of Crime No.1 of 2019 registered for offences punishable under Sections 376 and 506 of the IPC and Sections 4 and 5 of the Protection of Children from Sexual Offences Act, 2012 ('the Act' for short) is before this Court calling in question order dated 07-04-2022 rejecting the application filed by him under Section 311 of the Cr.P.C. for recalling of PW-1 for further cross-examination.

2. Heard Sri. Syed Muzakkir Ahmed, learned counsel appearing for the petitioner and Smt. K.P.Yashodha, learned High Court Government Pleader for the respondent.

3. Facts in brief that are germane for consideration of the present *lis* are as follows:

The complainant is the mother of the victim and the petitioner is the son of her husband's elder sister and are thus, members within the same family. In the month of April, 2018, it is alleged that, when the parents were not at home, the petitioner had indulged in certain acts on the daughter of the complainant which became an offence punishable under the provisions of the Act. The petitioner also alleged to have threatened the victim that if she raises hue and cry of the incident he would upload such photographs on the social media and that became offence punishable under Section 506 of the IPC and the alleged sexual acts became offence under Section 376 of the IPC. A crime came to be registered invoking the aforesaid provisions of law. The Police, after investigation, have filed a charge sheet and the matter is pending consideration in Special C.C.No.407 of 2019 before the learned Sessions Judge.

4. In the said case, the petitioner files an application under Section 311 of the Cr.P.C. seeking recall of the victim for further cross-examination. This having been rejected by the learned Sessions Judge, the petitioner has knocked the doors of this Court in the subject petition.

5. The learned counsel appearing for the petitioner submits that further cross-examination is sought for in the light of peculiar facts of the case, as the victim is a member of the family and was in love with the petitioner. Both these facts if elicited from the mouth of the victim, the case against the petitioner would likely to end in acquittal as it would become a consensus act or the matter would be settled since the victim is petitioner's mother's brother's daughter. The learned counsel would submit that it is also the case of the father of the victim in his cross-examination that the petitioner has not committed any sexual act on the victim. It is on these grounds, he has sought recalling of the witness.

6. On the other hand, the learned High Court Government Pleader representing the State would vehemently refute the submissions and contends that repeated cross-examination or calling of the victim for cross-examination is specifically barred under the statute itself and, therefore, no fault can be found with the order of the learned Sessions Judge in rejecting the said application under Section 311 of the Cr.P.C.

7. I have given my anxious consideration to the submissions made by the respective learned counsel and perused the material on record.

8. The issue that falls for my consideration in this case is,

“Whether the petitioner was entitled to the relief in the application filed under Section 311 of the Cr.P.C. notwithstanding the bar under Section 33(5) of the Act?”

9. The afore-narrated facts are not in dispute. The contention of the learned counsel appearing for the petitioner is a matter of record. The record reveals that after framing of

charges against the petitioner the evidence commenced with examination of the victim/CW-2 as PW-1 on 25-04-2019. Later the cross-examination was done on 29-11-2019 and the matter was thereupon listed on certain dates and the Court was closed due to onset of pandemic – COVID 19. After the resumption of Court, the parents of the victim – PW-2 and PW-3 were examined. Due to the petitioner being in judicial custody right from 03-01-2019, it is the case of the learned counsel for the petitioner that cross-examination could not be completed by the counsel for manifold reasons.

10. A perusal at the cross-examination of PW-3, the father of the victim would reveal that he has admitted that there was no sexual act committed on the victim by the petitioner. In view of the said deposition, the petitioner files the application for further cross-examination of PW-1 on 28-03-2022 invoking Section 311 of the Cr.P.C. The Court rejects it by an order dated 07-04-2022. The reason for rejection is placing reliance upon Section 33(5) of the Act which directs that the victim-child

should not be repeatedly brought before the Court for tendering evidence. The application filed by the petitioner reads as follows:

“4. It is submitted that PW-1 is the victim and if she is not subjected for further cross-examination by the defence serious prejudice will be caused to the defence of accused, hence to meet the just decision of the case recalling of PW-1 for further cross-examination by the defence is absolutely necessary.

5. It is further submitted that the accused is in judicial custody from the date of his arrest and though PW-1 was cross-examined by the defence but on material aspects of the case if her evidence remains unchallenged it results serious prejudice to the defence of accused and therefore for meeting the just decision of the case, the recall of PW-1 for further cross-examination to a limited extent by the defence is absolutely necessary. No harm will cause to the prosecution if this witness is recalled.

Wherefore, the accused most humbly prays that this Hon'ble Court be pleased to recall PW-1 for cross-examination of defence, in the ends of justice.”

The petitioner narrates in the application (*supra*) that serious prejudice will be caused to the defence if cross-examination is not permitted of the victim-PW-1, that too in the light of admission of the father of the victim in his cross-examination that the accused has not committed any sexual act on the victim and also admits about the ill-will between the parents of the accused and the victim. This is turned down by the learned

Sessions Judge by holding that examination-in-chief and cross-examination was over on 09-01-2020 and after two years the petitioner has filed this application seeking recalling of the witness and that having been specifically barred, no relief can be granted to the petitioner on the application so filed. The other ground on which the application is rejected is that PW-1 victim has already been cross-examined at length on two hearing dates and as such no permission can be granted.

11. To consider the prayer of the petitioner in the subject petition, it is germane to notice the statutory provisions. Section 311 of the Cr.P.C. reads as follows:

“311. 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.”

In terms of Section 311 of the Cr.P.C. a Court may at any stage of any inquiry, trial or other proceeding, recall a witness for re-

examination, if his evidence appears to it to be essential for a just decision in the case. The Apex Court has interpreted Section 311 of the Cr.P.C. to be a very important tool in the hands of the Court towards the cause of justice. The Apex Court in the case of **V.N.PATIL v. K.NIRANJAN KUMAR**¹ has held as follows:

“13. The scope of Section 311 CrPC which is relevant for the present purpose is reproduced hereunder:

“311. 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.”

14. The object underlying Section 311 CrPC 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. The determinative factor is whether it is essential to the just decision of the case. The significant expression that occurs is “at any stage of any inquiry or trial or other proceeding under this Code”. It is, however, to be borne in mind that the discretionary power conferred under Section 311

¹ (2021)3 SCC 661

CrPC has to be exercised judiciously, as it is always said “wider the power, greater is the necessity of caution while exercise of judicious discretion”.

15. *The principles related to the exercise of the power under Section 311 CrPC have been well settled by this Court in Vijay Kumar v. State of U.P. [Vijay Kumar v. State of U.P., (2011) 8 SCC 136 : (2011) 3 SCC (Cri) 371 : (2012) 1 SCC (L&S) 240] : (SCC p. 141, para 17)*

“17. Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of the Code and the principles of criminal law. The discretionary power conferred under Section 311 has to be exercised judicially for reasons stated by the court and not arbitrarily or capriciously. Before directing the learned Special Judge to examine Smt Ruchi Saxena as a court witness, the High Court did not examine the reasons assigned by the learned Special Judge as to why it was not necessary to examine her as a court witness and has given the impugned direction without assigning any reason.”

16. *This principle has been further reiterated in Mannan Shaikh v. State of W.B. [Mannan Shaikh v. State of W.B., (2014) 13 SCC 59 : (2014) 5 SCC (Cri) 547] and thereafter in Ratanlal v. Prahlad Jat [Ratanlal v. Prahlad Jat, (2017) 9 SCC 340 : (2017) 3 SCC (Cri) 729] and Swapan Kumar Chatterjee v. CBI [Swapan Kumar Chatterjee v. CBI, (2019) 14 SCC 328 : (2019) 4 SCC (Cri) 839] . The relevant paragraphs of Swapan Kumar Chatterjee [Swapan Kumar Chatterjee v. CBI, (2019) 14 SCC 328 : (2019) 4 SCC (Cri) 839] are as under: (Swapan Kumar Chatterjee case [Swapan Kumar Chatterjee v. CBI,*

(2019) 14 SCC 328 : (2019) 4 SCC (Cri) 839] , SCC p. 331, paras 10-11)

“10. The first part of this section which is permissive gives purely discretionary authority to the criminal court and enables it at any stage of inquiry, trial or other proceedings under the Code to act in one of the three ways, namely, (i) to summon any person as a witness; or (ii) to examine any person in attendance, though not summoned as a witness; or (iii) to recall and re-examine any person already examined. The second part, which is mandatory, imposes an obligation on the court (i) to summon and examine, or (ii) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.

11. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has *vide* power under this section to even recall witnesses for re-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law.”

17. The aim of every court is to discover the truth. Section 311 CrPC is one of many such provisions which strengthen the arms of a court in its effort to unearth the truth by procedure sanctioned by law. At the same time, the

discretionary power vested under Section 311 CrPC has to be exercised judiciously for strong and valid reasons and with caution and circumspection to meet the ends of justice.”

(Emphasis supplied)

The Apex Court holds that the aim of every Court is to discover the truth. Section 311 of the Cr.P.C. is one of many such provisions which strengthen arms of a court in its effort to unearth the truth except where applications are filed as an abuse of the process of law. Such discretion will have to be exercised by the Court.

12. In the light of the judgment of the Apex Court (*supra*), the petitioner who is now facing trial for offences punishable under the provisions of the Act, if convicted, would end up with conviction of more than 10 years. In such a case, the accused should be given an opportunity to defend himself, except in cases where an application is filed by adopting dilatory tactics.

13. The reason rendered in the application filed is clear that it is filed only after the admission of the father of the victim

that there was no sexual act committed by the petitioner on the victim. Therefore, the order rejecting the application despite the soul and spirit of Section 311 Cr.P.C being as is held by the Apex Court is thus rendered unsustainable.

14. 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.”

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.

15. 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.

16. For the aforesaid reasons, I pass the following:

ORDER

- (i) Criminal petition is allowed and the order dated 07.04.2022 passed by the Additional City Civil and

Sessions Judge, FTSC-II, Bengaluru in Special C.C. No.407 of 2019 stands quashed.

- (ii) The application of the petitioner dated 28-03-2022 filed under Section 311 of the Cr.P.C. seeking recall of PW-1 for further cross-examination stands allowed and the petitioner shall be permitted to cross-examine PW-1 on a particular date to be fixed by the learned Sessions Judge as a last opportunity and shall complete cross-examination on that particular date so fixed by the learned Sessions Judge.
- (iii) It is made clear that the accused will not be entitled to filing of repeated applications of the nature under Section 311 of the Cr.P.C.

**Sd/-
JUDGE**

bkp
CT:MJ