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**IN THE HIGH COURT OF ORISSA AT CUTTACK**

**CRLMC No. 2435 of 2023**

An application under Section 482 of the Code of Criminal Procedure, 1973 arising out of T.R. Case No. 84 of 2016 in the Court of the learned A.D.J. -cum- Special Court under the POCSO Act, Puri.

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***Madhu Baral @Madhusudan Baral* .....** ***Petitioner***

***-versus-***

***State of Odisha* .....** ***Opp. Party***

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For Petitioner : Mr. B. Baivab, Adv.

For Opp. Party : Ms. S. Patnaik, A.G.A.  
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**CORAM:**  
**HONOURABLE MISS JUSTICE SAVITRI RATHO**

**JUDGMENT**  
**25<sup>th</sup> July, 2023**

***Savitri Ratho, J*** This application under section 482 of the Code of Criminal Procedure has been filed by the petitioner for quashing the order dated 27.02.2023 passed by the learned A.D.J. -cum- Special Court under the POCSO Act, Puri in T.R. Case No. 84 of 2016 arising out of Balanga P.S. Case No. 63 of 2016, rejecting the application of the petitioner filed under Section 311 of Cr.P.C. for

recalling P.W.1- victim and P.W.3 - informant for further cross-examination.

## **FACTUAL MATRIX**

2. The petitioner is facing trial in T.R. Case No. 84 of 2016 for commission of offences punishable under Section -363 /376 (2) (n) /313 of IPC and Section – 6 of the POCSO Act. The victim has been examined as P.W.1 in the trial on 17.05.2017 and cross examined and discharged and her father P.W.3 has been examined on 08.02.2018 and cross examined and discharged. More than four years thereafter on 30.09.2022, an application was filed under Section – 311 Cr.P.C. on behalf of the petitioner with a prayer to recall P.W.1 and P.W. 3 for cross examination for a just decision in the case stating interalia that the victim had got married for which the matter had been compromised and the victim had sworn an affidavit on the basis of which the petitioner had been granted bail by the High Court on 29.04.2022 in CRLA 582 of 2019.

## **IMPUGNED ORDER**

3. The learned District Judge -cum- Special Court under the POCSO Act, Puri has referred to the submission of the learned counsel for the accused who submitted that some material contradiction could not be put to the victim and the informant for

which the two witnesses should be summoned so that the contradictions can be put to them. The learned Court has observed that P.W.1 the victim has been examined and cross-examined on 17.05.2017 and P.W.3 the informant has been examined and cross-examined 08.02.2018 and ten witnesses have already been examined from the side of the prosecution. The learned Court has also observed that power under Section 311 of Cr.P.C. can be exercised at any stage for just decision of the case but should be exercised judiciously and not arbitrarily and that the application should be bonafide and should not be filed by way of an after thought or to delay disposal of the case or in order to patch up the lacuna in evidence of a party. Holding that the P.Ws.1 and 3 have been examined and cross-examined in full and discharged, the learned counsel has not submitted the questions to be put to the two witnesses, the petition has been filed much after their evidence and relying on a decision of this Court , rejected the petition.

#### **SUBMISSIONS**

4. Mr. B. Baivab, learned counsel for the petitioner submits that after P.W.1 and P.W.3 had been examined and discharged, the matter has been amicably settled and the victim has got married and blessed with a child and she does not want to proceed against

the petitioner. In **CRLA No. 582 of 2019** filed by the petitioner with prayer for bail, the victim has filed an affidavit stating that she does not want to proceed against the petitioner for which his prayer for bail has been allowed. The application under Section – 311 Cr.P.C. had therefore been filed to recall the two witnesses for their further cross examination and copy of the application has been annexed to this CRLMC. He has ultimately submitted that P.W.1 and P.W.3 have sworn affidavits before the Notary Public, Nimapara on 27.02.2023, stating that that they do want to proceed against the petitioner and these had been filed before the learned trial Court but the petition under Section – 311 Cr.P.C. has been rejected on the same day in a hyper technical manner. The application under Section 311 Cr.P.C. is annexed as Annexure-1 to this CRLMC.

5. Ms. S. Patnaik, learned Addl. Govt. Advocate opposed the said prayer stating that the victim P.W.1 who was a minor at the time of the incident has already deposed in the trial in the year 2017 and has been discharged. Similarly P.W.3 has deposed in the year 2018 and has been discharged after being cross examined. The petition under Section – 311 Cr.P.C. has been filed after four years after their examination on the ground that the victim had got

married and the matter had been compromised. She has further submitted that POCSO cases, a victim should not be repeatedly called to the Court to depose especially when the defence had cross examined her. Power under Section – 311 Cr.P.C. cannot be utilized for facilitating a witness to resile from her/his earlier statement.

### **STATUTORY PROVISIONS**

6. The provisions necessary for deciding this application are Section 311 Cr.P.C. and Section -33 (5) of the Prevention of Sexual Offences against Children Act which are extracted below :

*“Section – 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.”*

*“ Section 33 (5) Procedure and powers of Special Court: (5) The Special Court shall ensure that the child is not called repeatedly to testify in the Court.*

## ANALYSIS

7. The position of law so far as exercise of power under Section – 311 Cr.P.C. is concerned has been dealt with by the Supreme Court and various High Courts including this Court in a catena of cases and the position of law has been settled and has to be applied to the facts of a particular case as facts in each case are different.

8. It would be apposite to refer to the decision of the Supreme Court in the case of ***Rajaram Prasad Yadav vs. State of Bihar : (2013) 14 SCC 461***, where an application under Section - 311 Cr.P.C. had been filed by a witness who wanted to be re-examined on account of an incident which had occurred after he had deposed in Court. After his application was rejected by the trial court, the High Court had set aside the order of the trial court. The Supreme Court while setting aside the order of the High Court has observed as follows :

*...“14. A conspicuous reading of Section 311 Cr.P.C. 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. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the Court. Order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 Cr.P.C. and Section 138 Evidence Act, in so far as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 Cr.P.C. It is, therefore, imperative that the invocation of Section 311 Cr.P.C. 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”*

After referring to its earlier decisions, the Supreme Court enumerated the principles to be kept in mind by the Courts while dealing with an application under Section – 311 of the Cr.P.C., which are extracted below:

*“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 and*



*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.”  
(emphasis supplied)*

It further held :

*..“28. We find that the factors noted by the trial Court and the conclusion arrived at by it were all appropriate and just, while deciding the application filed under Section 311 Cr.P.C. We do not find any bonafides in the application of the second respondent, while seeking the permission of the Court under Section 311 Cr.P.C. for his re-examination by merely alleging*

*that on the earlier occasion he turned hostile under coercion and threat meted out to him at the instance of the appellant and other accused. It was quite apparent that the complaint, which emanated at the instance of the appellant based on the subsequent incident, which took place on 30.5.2007, which resulted in the registration of the FIR in Khizersarai Police Station in case No.78/2007, seem to have weighed with the second respondent to come forward with the present application under Section 311 Cr.P.C., by way of an afterthought....”*

9. This Court in the case of ***Bhaskar Nayak vs. State of Odisha (CRLMC No. 1990 of 2023)*** decided on **05.05.2023**, relying on the case of ***Rajaram*** (supra) had held as follows :

*“11. From a careful reading of the provisions of Section 33( 5 ) of the POCSO Act , it is apparent that it is more in the nature of a safeguard than a bar . It provides that a child should not be called repeatedly to testify in the Court but it does not prohibit her / his recall . Therefore while considering an application to recall a victim where the accused is facing trial where one of the offences is under the POCSO Act , the provisions of Section 311 Cr.P.C (right of an accused to a fair trial) and the provisions of Section 33 ( 5 ) of the POCSO Act (protection of a child victim from harassment) , have to be kept in mind and the trial court has to be very cautious while considering the such application and*

*allow recall only when and where it is absolutely necessary for a just decision in a case . It is therefore important that the questions sought to be asked to the victim should be indicated in the petition so that the trial court can examine the questions and suggestions and allow those which have not been asked earlier to the witness or are irrelevant , as these will not be necessary for a just decision in the case but may frustrate the object behind Section – 311 Cr.P.C .”*

In the case of **Bhaskar Nayak** (supra) the application under Section 311 Cr.P.C. had been filed two months after the victim had deposed and the questions sought to be put to the victim had been indicated in the petition, but the application had been rejected by the learned trial Court relying on Section 33(5) of the POCSO Act.

10. From a reading of provisions and the settled position of law, it is apparent that power vested under Section 311 Cr.P.C. can be exercised by the Court at any stage in any inquiry or trial or other proceeding. Right of cross examination is a valuable right of an accused and the Court can summon any person as a witness or examine any person who is present in Court even though not summoned as a witness or recall and re-examine any person

already examined if it is of the opinion that such examination is necessary for a just decision in the case. The complainant/prosecution has a similar right. The paramount requirement for exercise of such power is whether it is essential for a just decision. For such determination, the purpose and reason for such witness to be recalled for re-examination or cross examination has to be examined. Right of cross examination is valuable right of an accused and should not be denied to an accused if such denial is likely to cause prejudice to the accused. If relevant material was not brought on record for some justifiable reason and the party has approached the Court promptly, the Court should be magnanimous while considering the application if it finds that it is necessary for a just decision in the case. But power under Section 311 Cr.P.C. cannot be exercised for changing the nature of evidence already recorded or for facilitating witnesses from resiling from their evidence. Prayer for exercise of such power should not be used as a disguise for retrial, and the evidence which is sought to be introduced should be essential for deciding the case. If the reason for recall has not been disclosed or the questions are irrelevant or the reasons for permitting rectification are not bonafide, the power should not be exercised. In cases involving offences under the

POCSO Act, the Court should be more vigilant as the trial should not be allowed to linger or the victim repeatedly summoned to the Court for adducing evidence in the absence of compelling reasons.

11. The prayer for bail of the Appellant has been allowed by this Court order dated 29.04.2022 passed in **CRLA 582 of 2019** taking into account the period of detention (since 07.06.2016 ) and keeping in view the settlement between the parties. A condition has been imposed that the Appellant should not humiliate the victim in any manner whatsoever.

12. There can be no quarrel over the proposition that on the basis of compromise, an accused may be released on bail. But such compromise cannot be the reason for recalling a witness. P.W.1 and P.W.3 have been examined, cross examined and discharged more than four years back. The questions proposed to be asked to P.W.1 and P.W.3 were not stated in the petition filed in the trial Court (Annexure 1 to this application) nor have they been mentioned in this CRLMC. But from the averments in the petition and the submissions of the learned counsel, it is apparent that the purpose of recalling the two witnesses is to bring the fact of the marriage of the victim and the compromise between the parties on

record. The marriage of the victim after the incident or the compromise between the parties are not relevant or essential for a just decision in the case and can therefore not be a ground for exercise of power under Section- 311 Cr.P.C. to recall her and her father P.W.3 for further cross examination.

### CONCLUSION

13. Power of this Court under Section 482 Cr.P.C. is very wide. But it is to be exercised to prevent the abuse of process of any Court or otherwise to secure the ends of justice and is to be used sparingly and cautiously. That apart, I do not find any infirmity in the impugned order. I am therefore not inclined to entertain this application by exercising power under Section 482 Cr.P.C.

14. The CRLMC is accordingly dismissed.

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**(Savitri Ratho, J)**

**Orissa High Court, Cuttack.**  
**The 25<sup>th</sup> day of July, 2023.**  
**S.K. Behera, Senior Stenographer.**