

(2022) 07 KAR CK 0014
In the Karnataka High Court
Case No : Criminal Petition No. 3648 Of 2022

Yashwanth Kumar

APPELLANT

Vs

State By Chamaraja Nagara Town Police Station Chamaraja
Nagar

RESPONDENT

Date of Decision : 15-07-2022

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 311

Indian Penal Code, 1860 — Section 354A

Protection Of Children From Sexual Offences Act, 2012 — Section 8, 33(5)

Citation : (2022) 07 KAR CK 0014

Hon'ble Judges : M. Nagaprasanna, J

Bench : Single Bench

Advocate : Prince Isac, K.P. Yashodha

Final Decision : Allowed

Judgement

M. Nagaprasanna, J

1. The petitioner is before this Court calling in question an order dated 04.03.2022 passed in Spl.C.No.134/2020 by the Principal District and Sessions Judge, Chamarajanagar, whereby the learned Special Judge partly allows the application filed by the petitioner under Section 311 of Cr.P.C., permitting recalling of PWs.3 and 4, while rejecting recalling of PWs.1 and 2.

2. Heard Sri. Prince Isac, learned counsel appearing for the petitioner and Smt. K.P.Yashodha, learned HCGP for the respondent.

3. Sans details, the facts in brief, are as follows:-

The petitioner is an accused facing proceedings that are punishable under Section 354A of the IPC and Section 8 of the Protection of Children from Sexual Offences Act, 2012. The proceedings are pending before the learned Sessions Judge in Spl.C.No.134/2020. The issue is not with regard to the merit of the matter.

4. The petitioner files an application on 26.10.2021 under Section 311 of Cr.P.C., seeking recalling of witnesses PWs.1, 2, 3 and 4 on the ground that the day on which they were examined by the prosecution, the counsel for the petitioner was suffering ill-health and was not able to cross-examine the witnesses immediately.

5. The learned Sessions Judge considering the application, rejects the same on the ground that the witnesses cannot be repeatedly called, insofar as it pertains to PWs.1 and 2 as PW.1 is the victim is 8 years old and PW.2 the brother of the victim, is 10 years old. PWs.1 and 2 are therefore not permitted to be recalled for cross-examination. PWs.3 and 4, who are the parents of the victim are permitted to be cross-examined by allowing the application for recalling under Section 311 of Cr.P.C. The rejection of application insofar as PWs.1 and 2 is what drives the petitioner to this Court.

6. The learned counsel appearing for the petitioner submits that the cross-examination of PWs.1 and 2 were declared to be 'nil', on the date that they were examined, on the ground that the learned counsel for the petitioner therein was not in a position to cross-examine the witnesses immediately and would submit that if one opportunity is granted, he would cross-examine the witnesses in terms of law and conclude it on the same day.

7. The learned HCGP though would refute the submissions of the learned counsel appearing for the petitioner for recalling but would admit PWs.1 and 2 have not been cross-examined at all.

8. I have given my anxious consideration to the contentions of respective learned counsel and have perused the material on record.

9. The petitioner is facing proceedings under Section 8 of the POCSO Act read with Section 354A of IPC. The witnesses PWs.1, 2, 3 and 4 were all examined on 19.04.2021, on which date the learned counsel for the petitioner therein could not cross-examine any of the witnesses owing to his ill-health. Later, the matter was listed on several occasions but the petitioner failed to file any application on those dates but filed an application only on 26.10.2021 seeking recalling of PWs.1 to 4.

10. The reason rendered by the learned Sessions Judge to reject the application, is that the victim and the brother of the victim are both below 18 years of age and Section 33(5) of the POCSO Act prohibits a repeated calling of the witnesses for cross-examination, when once the accused has lost the opportunity of such cross-examination. The reason rendered by the learned Sessions Judge though in the first blush would become acceptable, but the fact remains that it would be a case where PWs.1 and 2 the victim girl or his brother have not been permitted to be cross-examined at all by the petitioner. Therefore, it cannot become a case of no cross-examination of the prosecution witnesses.

11. The Apex Court in the case of V.N.PATIL v. K.NIRANJAN KUMAR (2021)3 SCC 661 interpreting Section 311 of the Cr.P.C. 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 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 CRL.P NO. 3648 OF 2022 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)

12. In the light of the admitted facts and the judgment of the Apex Court, one opportunity to cross-examine the witnesses PWs.1 and 2 is to be accorded to the petitioner.

13. Learned counsel for the petitioner at this juncture would submit that the next date of hearing is on 19.07.2022. Therefore, the learned counsel for the petitioner shall cross-examine witnesses PWs.1 and 2 on 19.07.2022 or on a particular date fixed by the learned Sessions Judge. That date shall be the only opportunity that the petitioner would get to cross-examine witnesses PWs.1 and 2. Any further application under Section 311 of Cr.P.C., shall not be entertained.

14. For the aforesaid reasons the following:

ORDER

i) The criminal petition is allowed.

ii) The order dated 04.03.2020 in Spl.C.No.134/2020 on the file of the Principal District and Sessions Judge, ChamaraJanagar stand quashed.

iii) The application filed by the petitioner insofar as cross-examination of PWs.1 and 2, stands allowed.

iv) The learned Sessions Judge is directed to fix a date for cross-examination of PWs.1 and 2 and the petitioner shall cross-examine the witnesses PWs.1 and 2 on that date and conclude.

v) The cross-examination of PWs.1 and 2 shall be strictly in terms of the Act, by the questions routed through the learned Sessions Judge and the answers again routed through the learned Sessions Judge.

vi) The cost of appearance of PW.1 and 2 shall be borne by the petitioner.

In view of the disposal of the main petition, I.A.No.1/2022 also stands disposed.