

Sri Raghavendra vs State Of Karnataka By on 17 December, 2024

Author: M.Nagaprasanna

Bench: M.Nagaprasanna

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NC: 2024:KHC:53196
CRL.P No. 7964 of 2024

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 17TH DAY OF DECEMBER, 2024

BEFORE
THE HON'BLE MR JUSTICE M.NAGAPRASANNA
CRIMINAL PETITION NO. 7964 OF 2024

BETWEEN:

SRI RAGHAVENDRA,
S/O JAYARAM,
AGED ABOUT 20 YEARS
R/O KODIGEHALI VILLAGE
K.R. PURAM
BENGALURU - 560 036.

...PETITIONER

(BY SRI M.R.NANJUNDA GOWDA, ADVOCATE)

AND:

Digitally signed
by NAGAVENI
Location: HIGH
COURT OF
KARNATAKA

1. STATE OF KARNATAKA BY
RAYALPAD POLICE

SRINIVASAPURA, KOLAR,
REPRESENTED BY
STATE PUBLIC PROSECUTOR
HIGH COURT BUILDINGS
BENGALURU - 560 001.
2. SRI NARAYANASWAMY

S/O LATE CHANGAPPA
AGED ABOUT 50 YEARS
R/O KOTHAPETE VILLAGE,

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CRL.P No. 7964 of 2024

SRINIVASAPUR TALUK,
KOLAR - 563 135.

...RESPONDENTS

(BY SRI HARISH GANAPATHY, HCGP FOR R-1;
R2 SERVED AND UNREPRESENTED)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF CR.P.C., (528 OF BNSS) PRAYING TO SET ASIDE THE ORDER DTD 23.07.2024 IN SPL.CASE (POCSO) NO.11/2024 PENDING ON THE FILE OF THE ADDITIONAL DISTRICT AND SESSIONS JUDGE, FTSC-I (POCSO), KOLAR, FOR THE OFFENCES P/U/S 363, 376(2)(n), 306 OF IPC, 6 OF POCSO ACT AND PERMIT THE PETITIONER TO CROSS EXAMINE PW-1 VICTIM GIRL, PW-2 COMPLAINANT, PW-3 DR.NAGAVENI WHO EXAMINED THE VICTIM GIRL AND PW-7 VENKATARAVANA A.S.I WHO REGISTERED THE CASE FOR JUST DECISION OF THE CASE.

THIS PETITION, COMING ON FOR ADMISSION, THIS DAY,
ORDER WAS MADE THEREIN AS UNDER:

CORAM: HON'BLE MR JUSTICE M.NAGAPRASANNA

ORAL ORDER

The petitioner is before this Court calling in question an order dated 23.07.2024, passed by the Additional District and Sessions Judge, FTSC - I (POCSO), on an application filed in Spl.Case (POCSO) No.11/2024, registered for the offences under Sections 363, 376(2)(n) and 306 of the IPC and Section 6 of the Protection of Children from Sexual Offences, 2012 (for NC: 2024:KHC:53196 short 'the POCSO Act'), insofar as it denies recall of witnesses PW.1, 2, 3 and 7 for further cross-examination.

2. Heard Sri Nanjunda Gowda M.R., learned counsel for petitioner and Sri Harish Ganapathy, learned High Court Government Pleader for respondent No.1. Respondent No.2 -

complainant is served and unrepresented.

3. Facts in brief, germane, are as follows:

The petitioner gets embroiled in a crime in Crime No.109/2023, initially registered for the offence under Section 363 of the IPC. The crux of the allegation was, on 24.11.2023, at about 8.30 a.m., the daughter of the complainant, 16 years old, studying in I year Pre-University goes missing; she is traced and aforesaid offences are laid against the petitioner.

The issue in the lis does not pertain to the merit of the matter.

On 05.03.2024, the victim girl was cross-examined along with others. After about 3 months, an application is filed by the petitioner seeking recall of the victim girl, her father, the doctor and four other witnesses for further cross-examination, on the NC: 2024:KHC:53196 ground that they were not fully cross-examined by over sight and few questions were left out as there was change of the defence advocate. On all these grounds, comes the application under Section 311 of the Cr.P.C. The application is partly allowed by denying further cross-examination of PWs.1, 2, 3 and 7 and permitting for further cross-examination of other witnesses by the impugned order and therefore, the petitioner is before this Court.

4. Learned counsel for the petitioner submits that he would restrict his prayer to recall of PWs.1 and 2, the victim girl and her father and leave out the others. It is his submission that the earlier counsel had not cross-examined the victim in full and some vital questions were left out and therefore, seeks for recalling of the aforesaid witnesses i.e., the victim and the her father for further cross-examination. Learned counsel for the petitioner submits that the concerned Court has erred in law in not permitting the two witnesses for further cross-

examination as they were sought.

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5. Per contra, learned High Court Government Pleader for the State would refute the submissions to contend that the victim cannot be repeatedly recalled for the purpose of further cross-examination merely because there was change of the advocate and insofar as the other witnesses are concerned, the learned counsel would leave it to the decision of the Court.

6. I have given my anxious consideration to the submissions made by the learned counsel for both the parties and have perused the material on record.

7. The afore-narrated facts are not in dispute. PW.1 whom the petitioner wants to recall is the victim girl, who at the time of the incident was 16 years. The incident had happened on 24.11.2023 and therefore, she yet to turn 18.

Section 33(5) of the POCSO Act prohibits repeated calling of the victim girl for cross-examination. The purport of Section 33(5) of the POCSO Act is considered by the Apex Court in the case of

MADHAB CHANDRA PRADHAN VS STATE OF ORISSA in SLP (Crl.) No.10082/2024, disposed on NC: 2024:KHC:53196 05.08.2024. The Apex Court considers the interplay between the rights of an accused under Section 311 of the Cr.P.C., with Section 33(5) of the POCSO Act. The Apex Court has held as follows:

"3. The petitioners have challenged the order dated 15.05.2024 passed by the High Court of Orissa, by which their application filed under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter 'Cr.P.C.') was dismissed. The petitioners had approached the High Court, assailing the order dated 10.10.2023 by which the Special Court rejected their application under Section 311 of Cr.P.C, which was filed for recalling the victim/PW-1 for re-examination as witness. While rejecting the plea for recall of the victim, the Special Court relied upon Section 33 (5) of the Act where the statute itself mandates that a child will not be called in the Court to testify.

4. The High Court again held the same provision against the petitioners while dismissing the Application under Section 482 of the Cr.P.C filed by them. It is important to state here that POCSO Act is a special legislation, which was enacted to protect children from sexual offences and for safeguarding interests and ensuring the well-being of the child at every stage of trial of offences under the Act. Section 33 of the POCSO Act provides for the procedure and powers of the Special Court and reads as under:

"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.

NC: 2024:KHC:53196 (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....."

A bare perusal of Section 33 (5) of the Act indicates that a duty is cast upon the Special Court to ensure that a child is not repeatedly called to give his/her testimony before the court. The legislative intent behind this provision is clear. It is to ensure that the child who has suffered a traumatic experience of sexual assault is not called time and again to testify about the same incident.

5. We have heard learned counsel for the petitioners, who would submit that Section 33 (5) does not operate as an absolute bar for recalling the child as a witness for re-examination. Learned NC: 2024:KHC:53196 counsel for the petitioners would argue that Section 33 (5) would also not come in the way of the Special Court's powers under Section 311 of the Cr.P.C to recall or re-examine any person who has already been examined. It would be apposite to reproduce Section 311 of the Cr.P.C before adverting to the facts of the present case. Section 311 of the Cr.P.C reads as under:

"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..."

We are of the considered opinion that although Section 33 (5) would not act as an absolute bar to recall the victim for re-examination as a witness, each case must be looked at in the context of its individual facts and circumstances. Thus, the question which falls for our consideration in the present case is whether in the exercise of its powers under Section 311 of the Cr.P.C, the Special Court ought to have recalled the child/victim for re- examination as witness, keeping in mind the mandate under Section 33 (5) of the Act.

6. The principles which would guide the exercise of a Court's power under Section 311 of the Cr.P.C were succinctly summed up by this Court in State (NCT of Delhi) v. Shiv Kumar Yadav (2016) 2 SCC 402. It was laid down by this Court that first, the plea for recall of a NC: 2024:KHC:53196 witness under Section 311 must be bona fide and genuine. Secondly, applications for recall of a witness under Section 311 should not be allowed as a matter of course and the discretion given to the Court must be exercised judiciously, not arbitrarily.

7. Let us now examine whether in the given facts and circumstances, plea of the petitioners for recalling the victim as witness for re-examination ought to have been allowed by the Special Court. The victim here is a girl who at the time of the incident was around 15 years of age allegedly. It is an admitted fact here that even before the application under Section 311 of the Cr.P.C was filed by the petitioners, the defence counsel was given the opportunity to cross-examine the victim twice already. On 22.07.2023, the examination-in-chief of the victim was conducted and on the same day, she was cross-examined by the counsel engaged by the petitioners before the Special Court. Thereafter, further cross-examination of the victim was deferred to 14.08.2023 on the request of the

counsel engaged by the petitioners. On 14.08.2023, she was cross- examined at length and yet again, a request for adjournment was made by the counsel engaged by the petitioners, which was then turned down by the Special Court. It is then that the application under Section 311 of Cr.P.C came to be filed by the petitioners seeking recall of the victim which was rightly rejected vide Order dated 10.10.2023 of the Special Court.

8. What weighed with the Special Court, while dismissing their application was the fact that the after having availed their first opportunity to cross- examine the victim on 22.07.2023, the accused sought an adjournment which was granted and thus they were given a second opportunity to cross-examine the victim on 14.08.2023 and on this day,

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NC: 2024:KHC:53196 their advocate cross examined her at length but again sought an adjournment which was disallowed as there was no justification for seeking an adjournment. Since the accused did not challenge this order of rejection, the Special Court observed that its findings in the said order that there was no justification to adjourn or defer cross examination to a later date had attained a finality. The Special Court also placed its reliance on Section 33 (5) of the Act and emphasised that it is mandated to ensure that the child is not repeatedly called to testify before it.

9. From a perusal of the record of the case, it is abundantly clear that ample opportunities were given to the defence counsel to cross-examine the victim. When the victim has been examined and then cross- examined at length twice already, mechanically allowing an application for recall of the victim, especially in trial of offences under the POCSO Act would defeat the very purpose of the statute. Hence, we find no error or illegality in the impugned order of the High Court or the Order dt. 10.10.2023 of the Special Court.

(Emphasis supplied) The Apex Court observes that repeatedly calling the victim girl and speaking about traumatic experience should not be permitted. In that light, further cross-examination that is sought by the petitioner of the victim girl would run foul of the law laid down by the Apex Court in the aforesaid judgment (supra).

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8. Therefore, I decline to accept the submission of the petitioner that PW.1 - the victim girl should be recalled for further cross-examination. A caveat, if the victim is beyond 18 years today, it would have been altogether a different circumstance. She is not and the law is against the petitioner, insofar PW.1 is concerned. There is no legal impediment of the kind of PW.1 insofar as other witnesses are concerned.

Therefore, in that light I deem it appropriate to grant permission to the petitioner to further cross-examine PWs.2, 3 and 7, making it clear that it is a last straw of opportunity to the petitioner.

9. For the aforesaid reasons, the following:

ORDER

(i) Criminal petition is allowed-in-part.

(ii) The order dated 23.07.2024, passed by the Additional District and Sessions Judge, FTSC-1 (POCSO), Kolar, stands quashed, qua PWs.2, 3 and

7.

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(iii) The order dated 23.07.2024, passed by the Additional District and Sessions Judge, FTSC-1 (POCSO), Kolar, stands confirmed, qua PW.1.

(iv) Permission is granted to further cross-examine PW.2 on the date fixed by the concerned Court.

(v) It is made clear that no further opportunity of the kind would be granted even to cross-examine PW.2, in future.

(vi) The concerned Court shall permit the petitioner to cross-examine the witnesses on a fixed date and the petitioner shall conclude the same on the dates that would be fixed by the concerned Court.

Ordered accordingly.

Sd/-

(M.NAGAPRASANNA) JUDGE SJK/NVJ