

Nazar Hussain vs State Of Uttarakhand And Another on 20 October, 2022

Author: Sharad Kumar Sharma

Bench: Sharad Kumar Sharma

IN THE HIGH COURT OF UTTARAKHAND
AT NAINITAL
Criminal Misc. Application No. 1917 of 2022

Nazar HussainApplicant

Vs.

State of Uttarakhand and anotherRespondents

Present:- Mr. Mani Kumar, Advocates for the applicant.
Mr. V.S. Rathore, learned A.G.A. for the State.

Hon'ble Sharad Kumar Sharma, J (Oral)

A proceedings by way of Special Sessions Trial No. 374 of 2020 "State Vs. Nazar Hussain", stood instituted for being tried before the Court of learned Additional Sessions Judge/F.T.C./Special Judge (POCSO), Rudrapur, Udham Singh Nagar.

2. The proceedings when they were being carried PW1 and PW2, who were the victim and her father, were examined by the present applicant, and the learned counsel representing then. But yet an application under Section 311 of Cr.P.C., was filed on 20.06.2022, wherein the factum of being provided with the sufficient opportunity to cross-examine the witnesses, was a fact admitted, but the only distinction, which has been carved out, for the purposes of sustaining the application under Section 311 of Cr.P.C., was that, the counsel who represented the present applicant was unable to put proper questions to PW1 and PW2, and hence, the application under Section 311 Cr.P.C. was pressed into, to summon the PW1 & PW2, for their ex- examining. The said application, was rejected by the learned court below by the judgment/order dated 29.07.2022, which is under challenge, before this Court.

3. The arguments, which has been extended by the learned counsel for the applicant, while putting a challenge to the order dated 29.07.2022, resulting into a rejection of the application under Section 311 Cr.P.C., as paper no.29-kha, that they may not to be made to suffer, on account of incompetence of a counsel, who was earlier representing them, who despite of being provided the sufficient opportunity to cross examine, had not appropriately put up the questions before PW1 and PW2, hence, the re-examination was justified by the applicant.

4. This contention of the learned counsel for the applicant, to sustain the application under Section 311 Cr.P.C., on account of incompetence of their counsel to put a proper question, when they were provided opportunity of cross examination, which admittedly, according to their application, they have availed, it cannot be a reason, to invoke the provisions under Section 311 Cr.P.C. because logically, if this, percept is accepted, it would be an un-ending process, and the trial would not be concluded, because the competence of a counsel, varies from individual to individual. A professional representing the interest of a litigant, is expected to be diligent to place all the relevant questions, when the opportunity of cross examination, was provided, and which was availed in the instant case by the present applicant.

5. Section 311 of Cr.P.C. is extracted 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."

6. Section 311 of Cr.P.C., it never intends to enable a party to the proceedings to file an application on the pretext, that the proper question could not be placed at the giving opportunity, by the learned counsel or the applicant. It's not a philosophy, which is envisaged by the provisions contained under Section 311 of I.P.C., and particularly in the instant case, if the entire proceedings are taken into consideration, which has been held under Sections 5 & 6 of the Protection of Children from Sexual Offences Act, 2012 (in short 'POCSO Act, 2012'), that special statute of the POCSO Act, 2012, itself, under Sub-Section 5 of Section 33, creates a bar, and rather casts a duty on the court to ensure, that the child is not called repeatedly to testify in the court, in order to avoid the embarrassment, which the child may face, who is the subject of sexual exploitation.

7. In view of the mandate of statutory bar under the specific Act, as provided under Sub Section (5) of Section 33 of the POCSO Act, even thereto, when the application has been filed on the ground, on which, it has been sought to be pressed by the present applicant, would not be tenable under the law, as it will amount to taking an advantage of their own incompetence at the cost of embarrassment of a minor to be summoned before the court for the re- examination, and cause a persistent embarrassment to her by placement of repeated, embarrassing question, which has been deprecated by the Special Act, itself.

8. The learned counsel for the applicant, has made reference to a judgment reported in (2012) 7 SCC 56 "P. Sanjeeva Rao Vs. State of Andhra Pradesh", and particularly, he has made reference to paragraph no.18 of the said judgment, which is extracted hereunder:

"18. Denial of an opportunity to recall the witnesses for cross-examination would amount to condemning the appellant without giving him the opportunity to challenge the correctness of the version and the credibility of the witnesses. It is trite that the

credibility of witnesses whether in a civil or criminal case can be tested only when the testimony is put through the fire of cross- examination. Denial of an opportunity to do so will result in a serious miscarriage of justice in the present case keeping in view the serious consequences that will follow any such denial.

9. The wider principle, which has been considered in the said case, is that, if an opportunity of cross-examination of the witnesses is not provided, and the appellant therein, is permitted to be contest the proceedings, without providing sufficient and effective opportunity to cross examine the witnesses, it may lead to a deprivation of an opportunity, to prove his/her innocence for the allegations, for which, the trial is being conducted, but not in the cases, under the POCSO Act, where law itself, creates a bar.

10. This Court is of the view, that the ratio laid down by the Hon'ble Apex Court in the aforesaid judgment, has had always to be read in the context and the subject, which was under consideration. Isolatedly a basic principle of the judgment cannot be extracted to be made applicable in a case, which has been dealt with under a Special Act, which itself creates a bar that a minor cannot be repeatedly called for re-examination. Apart from the aforesaid reasons, aforesaid paragraph of the judgment (Supra) is not applicable in the present case, either because the ratio of the judgment of the Hon'ble Apex Court, was rendered in the situation, where the accused was being dealt with, under the provisions contained under Section 7, 13(1) & Section 13(1)(d) of the Prevention Of Corruption Act 1988, it would be a proceeding, which cannot be kept at parance, to the proceedings contemplate under the POCSO Act. Hence, the observation made in paragraph-18 of the judgment (Supra), has had to be read in context of the proceedings, which has been undertaken, as against the person, who has been deprived of in the opportunity of cross examination, by rejection of an application, under Section 311 of Cr.P.C.

11. There are various physiological factors, which have always been a question of debate in the judicial fraternity, as to whether at all a minor could be subjected to harassment by calling upon to appear in the witness box of re-examination repeatedly, to cause a mental trauma to the minor facing trial for a sexual offence committed by the accused, who has been tried, which in the instant case happens to be the present applicant. The legislature, always in its judicial wisdom, has with a conscious intent, provided with the provisions contained under Sub Section 5 of Section 33 of the POCSO Act, that a minor cannot be, and rather it casts a duty upon the court, that the court should avoid to summon a minor to be re-examined in the witness box. Hence, the Section 311 of Cr.P.C., which has been invoked herein, cannot be read in isolation to the implication of the social legislation, as contained under Sub- Section 5 of Section 33 of the POCSO Act.

12. In that eventuality, the C-482 application lacks merit, and the same is, accordingly, dismissed.

13. No order as to costs.

(Sharad Kumar Sharma, J.) 20.10.2022 Mamta