



**IN THE HIGH COURT OF ANDHRA PRADESH
AT AMARAVATI
(Special Original Jurisdiction)**

[3396]

**TUESDAY, THE FIRST DAY OF OCTOBER
TWO THOUSAND AND TWENTY FOUR
PRESENT**

THE HONOURABLE SMT JUSTICE VENKATA JYOTHIRMAI PRATAPA

CRIMINAL PETITION No. 2421 of 2023

Between:

Pothina Nani @ Mahidhar

...PETITIONER/ACCUSED

AND

The State Of Andhra Pradesh

...RESPONDENT/COMPLAINANT

Counsel for the Petitioner/accused:

1. CHALLA AJAY KUMAR

Counsel for the Respondent/complainant:

1. PUBLIC PROSECUTOR (AP)



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The Court made the following:**COMMON ORDER:**

1. Since the issue involved and the parties are one and the same, with the consent of the parties, all these Criminal Petitions are being disposed of by this Common Order.

2. Petitioner is the Accused and respondent is the State/Complainant in SC No.07 of 2019 on the file of the Court of Special Judge for Speedy Trial of Offences under Protection of Children From Sexual offences Act, Vijayawada.

3. For the sake of convenience, the parties hereinafter are referred to as they are arrayed in SC No.07 of 2019.

4. Brief facts of the Prosecution case are that P.W.1 is resident of Kanuru Village Penamaluru Mandal and P.W.3 is a minor girl by the date of offence and studying Intermediate First Year in Stella College. On 19.10.2015, P.W.1 found that P.W.3 is missing from Kanaka Durga Temple Bus Stop, Moghalrajapuram, Vijayawada, while, she along with her grandmother/P.W.1, younger sister/P.W.2 visited temple. On 20.10.2015, P.W.1 gave a report to P.W.5, which was registered as a case in Crime No.606/2015 u/Sec.s 363 and 376(2) IPC and Section 6 read with Section 5(l) of POCSO Act. On the same day at 9.30 P.M., P.W.1 produced P.W.3 (victim girl) before the Police. P.W.3 in her statement stated that her date of birth is 10.06.1999. She had an acquaintance with the Accused, who is drop out of X Class, aged about 21 years old

and is a painter. Their acquaintance turned into love in the year 2015 and in the month of August, 2015, they both went to Machilipatnam Beach and stayed in a room and met physically. On 21.10.2015, they both went to Mumbai and took a room at the house of Muteen near Oxford school and had sexual intercourse every day. Basing on the state of P.W.3/Minor Girl altered the Section of Law from 363, 376(2)(N) IPC and Section 6 read with Section 5(l) of the Protection of Children From Sexual Offences Act, 2012 (for short 'the POCSO Act, 2012') and issued altered FIR on 20.11.2015. After completion of investigation, Police filed Charge Sheet, which was taken on file and numbered as SC No.13 of 2017 on the file of the Court of Special Judge for Speedy Trial of Offences Under Protection of Children From Sexual offences Act, Vijayawada, for the offences under Sections 363 and 376(2)(N) IPC and Section 6 read with Section 5(l) of POCSO Act.

5. During the course of trial, P.Ws.1 to 10 were examined and Exs.P1 to Ex.P11 were marked and Accused was examined under Section 313 Cr.P.C. At the stage of reply arguments, Prosecution has filed a Petition under Section 311 Cr.P.C. *vide* CrI.M.P.No.1382 of 2022 to recall P.W.3 along with her date of birth certificate for the purpose of marking of the same through her followed by another Petition *vide* CrI.M.P.No.1381 of 2022 to reopen the evidence of P.W.3 for the purpose of marking her date of birth certificate. After hearing both the parties, the Learned Trial Judge *vide* Common Order dated 20.10.2023 allowed the

said petitions and ordered to recall and reopen the evidence of P.W.3 for the purpose of marking original birth certificate of the victim girl. Challenging the Order Common Order dated 20.03.2023 passed in CrI.M.P.Nos.1381 of 2022 and 1382 of 2022 in SC No.07/2019, CrI.P.Nos.2419 of 2023 and 2421 of 2023 respectively are filed.

7. Heard Sri Challa Ajay Kumar, learned counsel for the Petitioner, Ms. Priyanka Lakshmi, learned Assistant Public Prosecutor appeared on behalf of learned Public Prosecutor for Respondent/State. Perused the material on record.

8. Learned counsel for the Petitioner would submit that only to fill up the lacuna, at the fag-end of the case, these Petitions are filed, which are not permissible and not maintainable either in law or on facts. Learned counsel further would submit that the Prosecution has to establish that the victim is a minor girl as on the date of the incident. In the instant case, they have failed to establish the age of the victim and at the time of reply arguments of the Prosecution, they have come up with these petitions to recall P.W.3 and to mark the date of birth certificate through her. Learned counsel submits that the date of birth of the victim girl is very much available, but they did not choose to file the same along with the charge sheet. Learned counsel further would submit that the discretion which has been exercised by the Learned Trial Judge is beyond the scope of Section 311 Cr.P.C. Assailing and feeling aggrieved by, the

present Criminal Petitions are filed seeking quashment of the impugned common order.

9. *Per contra*, Learned Assistant Public Prosecutor while vehemently opposing the Criminal Petitions would submit that the Learned Trial Judge has rightly exercised the discretion and allowed the Petitions since the evidence of P.W.3 regarding the date of birth certificate of the victim girl is very much essential to come to a just decision in the case. Learned Assistant Public Prosecutor further would submit that these Petitions can be entertained at any stage. No doubt, filing of these documents at the threshold of the matter is necessary, but, inadvertently, the Investigating Officer could not secure the documents from the victim family and therefore, could not file the same along with charge sheet. This is only a case of omission but not to fill up any lacuna. Learned Assistant Public Prosecutor would submit that the impugned common Order does not warrant any interference of this Court for quashment and prays for dismissal of the Criminal Petitions.

10. Prosecution has filed the above Petitions to reopen and recall P.W.3 for the purpose of marking her own original date of birth Certificate which shows the date of birth of the victim is 15.06.1999. Petitioner /Accused has filed objections to the effect that these Petitions cannot be filed without filing any petition to reopen the evidence of Prosecution witnesses. If the impugned common Order is allowed to be continued, great prejudice would be caused to the accused and his entire

case will be shattered. Finally, the petitioner stated that only to fill up the lacuna pointed out by the defence at the time of arguments, that too, when the matter is at the stage of reply arguments of the Prosecution, these petitions were filed, which are not maintainable either in law or on facts.

11. Learned Trial Judge after hearing both sides, allowed these petitions observing that no separate applications are required for receiving the documents and the document is a material document which would help the Court in arriving at a just conclusion as to the crucial aspect whether the victim girl was a child as on the date of the alleged incident as per Section 2(d) of POCSO Act.

12. Considering the submissions and a fair look at the impugned common Order, Petitioner/Accused is facing trial for the charge under Section 6 of the POCSO Act and Section 363 IPC. It is alleged against him that he kidnapped the victim girl and committed penetrative sexual assault repeatedly against her. There is no dispute about the fact that when the matter is at the stage of reply arguments of the Prosecution in the Trial Court, these Petitions are filed seeking to recall P.W.3 to mark the original date of birth certificate issued by the Medical and Health Department, Municipal Administration.

13. Needless to say, it is the fundamental duty of the Prosecution to establish that the victim girl is a minor as per Section 2(d) of POCSO Act,

which defines the *child means any person below the age of eighteen years.*

14. Having heard the submissions of both sides, it appears the Prosecution did not choose to file either the date of birth certificate of the victim or even her SSC certificate to prove her date of birth. No doubt, it is a crucial aspect. At the same time, as rightly put by learned Assistant Public Prosecutor, it is a material omission on the part of the Prosecution in not filing the document, in proof of the date of birth of the victim. But it is not a case of filling up of lacuna of the Prosecution case. The reason being, learned counsel for Petitioner submitted that the date of birth of the victim as per SSC Certificate is 10.06.1999. As per the date of birth certificate, it is 15.06.1999. Learned counsel for Petitioner fairly conceded that the date of the alleged offence is on 19.10.2015. By the time, the victim girl was a minor. As rightly put by learned Assistant Public Prosecutor, to meet the end of justice, learned Trial Judge has exercised the discretion by invoking the authority under Section 311 Cr.P.C.

15. The Hon'ble Apex Court in **Rajaram Prasad Yadav Vs. State of Bihar**, AIR 2013 SC 3081 held as follows:

“23. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

...

c) *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.*

d) *The exercise of power under Section 311 Cr.P.C. 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.*

e) *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.*

f) *The wide discretionary power should be exercised judiciously and not arbitrarily.*

g) *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.*

...

i) *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.*

j) *Exigency of the situation, fair play and good sense should be the safe guard, 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.*

...

m) *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.*

n) The power under Section 311 Cr.P.C. 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)

16. The Hon'ble Supreme Court in **Swapna Kumar Chatarjee Vs. Central Bureau of Investigation**, reported as 2019 (14) SCC 328, has held as follows:

12. 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 wide power under this Section to even recall witnesses for reexamination 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.

(Emphasis supplied)

17. As discussed supra, no doubt, the Petitions were filed at a belated stage before the Trial Court. But it does not mean that to fill up the lacuna, the Petitions were filed. It is only an omission on the part of the Prosecution. The argument that since the document is filed at the fag-end is not suffice for dismissal of the Petitions. In the interest of justice, a fair opportunity should be given to both parties to prove their respective contentions.

18. In that view of the matter, the impugned Common Order does not brook any interference of this Court under Section 482 Cr.P.C. and the Criminal Petitions deserves dismissal.

19. In the result, these Criminal Petitions are dismissed.

As a sequel thereto, miscellaneous petitions, pending if any, shall stand closed.

JUSTICE VENKATA JYOTHIRMAI PRATAPA

01.10.2024
*Mjl/**

HON'BLE SMT. JUSTICE VENKATA JYOTHIRMAI PRATAPA

Crl.P.Nos. 2419 and 2421 of 2023

01.10.2024

*Mjl/ **