

IN THE HIGH COURT OF UTTARAKHAND
AT NAINITAL

SRI JUSTICE S.K. MISHRA, A.C.J.
AND
SRI JUSTICE R.C. KHULBE, J.

24TH MARCH, 2022

IA No. 01 OF 2021
IN
CRIMINAL APPEAL No. 231 OF 2021

Between:

Mohit.

...Appellant

and

State of Uttarakhand.

...Respondent

Counsel for the appellant. : Mrs. Neetu Singh, the learned counsel.

Counsel for the respondent. : Mr. J.S. Virk, the learned Deputy Advocate General assisted by Mr. Rakesh Joshi, the learned Brief Holder for the State of Uttarakhand.

Upon hearing the learned Counsel, the Court made the following

JUDGMENT : (per Sri S.K. Mishra, A.C.J.)

This matter has been listed today for orders, and for hearing on the Bail Application (IA No. 01 of 2022) filed by the appellant under Section 389 of the Code of Criminal Procedure (hereinafter referred to as "the Cr.P.C."). The appellant has been convicted for the offences under Sections 376(3) and 506 of the Indian Penal Code (for short "the IPC") and Section 3/4 of the Protection of Children from Sexual Offences Act, 2012

(hereinafter referred to as the "POCSO Act"). For the offence under Section 376(3) IPC, the appellant has been sentenced to twenty years' rigorous imprisonment with a fine of Rs. 50,000/-, and in default of payment of fine to undergo further six months' additional imprisonment. For the offence under Section 506 IPC, the appellant has been sentenced to undergo two years' rigorous imprisonment with a fine of Rs. 5,000/-, and in default of payment of fine to undergo further six months' additional imprisonment. Since the punishment prescribed under Section 376(3) IPC and Section 3/4 of the POCSO Act is same, the learned Trial Judge proceeded to sentence the appellant only under Section 376(3) IPC.

2. During the course of the arguments, it was brought to our notice that the victim-girl was not cross-examined at all by the appellant, and his application to re-call the witness for cross-examination was rejected by the learned Trial Judge on 24.02.2021 on the ground that it is provided under Sub-Section (5) of Section 33 of the POCSO Act that repeated attendance of the child should be avoided.

3. We have carefully examined the order-sheet of the case. The case was posted to 09.08.2019. On that day the examination-in-chief of the victim-girl was taken up. Further, the deposition itself shows that, on that day, the Presiding Officer of the Court of Special Judge POCSO/FTC/ADJ got engaged in some other cases in the midst of the examination of the child witness. Neither the order-sheet, nor the deposition (comments on the deposition), shows that the appellant's lawyer was not ready to cross-examine the child witness. So, we presume that, on that day, the learned counsel for the accused-appellant was present, but the learned Court itself took up other cases for trial etc. leaving the examination of the child halfway.

4. The case was deferred to 14.08.2019, for cross-examination of the child. While rejecting the application to re-call the child, the learned Additional Sessions Judge/FTSC Roorkee took into note Sub-Section (5) of Section 33 of the POCSO Act, which provides that the Special Court shall ensure that the child is not repeatedly called to testify in the Court.

5. In this case, we find that when the examination-in-chief of the child was done on the first date, i.e. on 09.08.2019, it was because of the action of the learned Judge presiding that the case was adjourned to 14.08.2019. The learned Judge presiding could have firstly taken up the said case, and only after cross-examination of the victim-girl, she could have engaged herself in other works. We could not understand why the child was asked to again report to it on 14.08.2019 for cross-examination, when on 09.08.2019 itself the entire cross-examination could have been done.

6. On 26.08.2019, an application for re-calling the child witness was filed by the appellant. We have also carefully examined the order-sheet maintained by the learned Additional Sessions Judge/Special Judge, POCSO in the trial, and it is apparent therefrom that the matter was never taken up by the Court for consideration. The matter was taken up only after a lapse of about 1½ years, when the application for re-calling the child witness was dismissed by the learned Additional Sessions Judge/FTSC. We note that, by that time, the learned Judge presiding the Special Court was transferred. In totality, we find that the learned

Additional Sessions Judge/FTSC presiding the matter was not sensitive to the needs and requirements of a child while examining her.

7. In that view of the matter, it was erroneous on the part of the learned Additional Sessions Judge/FTSC to reject the application to re-call the child witness only on the ground that Sub-Section (5) of Section 33 of the POCSO Act provides that repeated attendance of the child should be avoided. Moreover, an accused, who is arraigned for committing serious offence like rape and penetrative sexual intercourse, should be given an adequate opportunity of cross-examining the witness.

8. Hence, in the interest of justice, we hold that this Criminal Appeal should be allowed. Accordingly, the order dated 24.02.2021 passed in the application to re-call the child witness, and the final judgment dated 28.06.2021 convicting the appellant for the offences under Sections 376(3) and 506 IPC and Section 3/4 of the POCSO Act, 2012, are hereby set-aside. The application dated 26.08.2019 to re-call the child witness is, hereby, allowed.

9. However, we hasten to add that, while cross-examining the child witness on re-call, the learned Additional Sessions Judge/Special Judge POCSO shall apply the principles and directions issued by the Hon'ble Supreme Court in the case of ***Smruti Tukaram Badade v. State of Maharashtra & Anr.; Criminal Appeal No. 1101 of 2019*** dated 11.01.2022.

10. We also observe that, while re-calling the child witness for cross-examination, the learned Additional Sessions Judge/Special Judge POCSO may take into consideration the use of Mobile Van that has been provided by this High Court, along with the State Legal Services Authority, for recording of evidence, if it is considered appropriate by the learned Additional Sessions Judge.

11. With such observations, this Criminal Appeal is, hereby, allowed. The order dated 24.02.2021 passed in the application seeking re-call of the child witness, and the final judgment dated 28.06.2021 convicting the appellant, are hereby set-aside, as stated above. The Lower Court Records be sent back to the concerned

Court for trial according to law, and the observations made by us in this judgment.

12. In sequel thereto, all pending applications also stand disposed of.

S.K. MISHRA, A.C.J.

R.C. KHULBE, J.

Dt: 24th March, 2022
Rahul

(Urgent certified copy of this judgment be provided to the learned counsel for the parties, as per Rules.)