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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPLICATION NO.441 OF 2017

1.	Rizwana Feroz Khan	
2.	Reshma Nasir Sayyed	...Applicants
	Versus	
	The State of Maharashtra	...Respondent

Mr.Mohammed Akbar Ansari, for the Applicants.

Mr.H.J.Dedhia, A.P.P for the Respondent-State.

CORAM : REVATI MOHITE DERE, J.

DATE : 12th JANUARY, 2018

P.C. :

1. Heard learned Counsel for the parties.

2. Rule. Rule is made returnable forthwith with the consent of the parties and is taken up for final disposal. Learned APP waives service on behalf of the Respondent - State.

3. By this application, the applicants have impugned the orders dated 7th October, 2016, passed below Exhibit – 44; the order dated 21st

November, 2016, passed below Exhibit – 46; and the orders dated 15th March, 2017, passed below each of the Exhibits i.e. Exhibits – 47, 48 and 49 separately, by the learned Designated Judge under Protection of Children from Sexual Offences Act, 2012, (POCSO) for Greater Bombay, in POCSO Special Case No.50 of 2014.

4. Learned Counsel for the applicants submitted that the learned Judge, had clearly erred in law, by exhibiting the birth certificate of the victim girl as Exhibit-45, on mere tendering of the same, by the learned prosecutor. He submitted that the procedure adopted by the prosecutor conducting the case was completely erroneous. He submitted that the learned Judge ought not to have entertained the applications filed by the prosecutor and issued witness summons to the Bombay Municipal Corporation Officer, the Magistrate who recorded the 164 statement, the officer of the CWC and the Investigating Officer, at the fag end of the trial, when the arguments were almost over.

5. Learned APP opposed the application. He, however, does not dispute the fact, that the Birth Certificate (Exhibit – 45) could not have

been exhibited in the manner, in which it was done by the learned Judge. The learned APP further submitted that the learned Judge had rightly issued summons to the witnesses under Section 311 Cr.PC, as in the facts, the same was necessary for the just decision of the case. He further submitted that the victim girl was a minor aged 15 years and hence, it was necessary for the prosecution to place on record the birth certificate of the victim girl, her 164 statement recorded by the learned Magistrate and the Notification in respect of the PITA Act.

6. Perused the papers. According to the complainant, who is the maternal grandmother of the victim girl, the accused i.e. the applicants would provide narcotic substances to the minor victim girl and would keep her under the influence of the same and exploit her for sexual purposes with men. Pursuant to the said complaint, the Dharavi Police Station on 14th December, 2013, registered C.R. No.500 of 2013, as against the applicant-accused, alleging offences punishable under Sections 363, 376 r/w 34 of the Indian Penal Code; under Sections 4, 8 and 12 of Protection of Children from Sexual Offences Act, 2012 (POCSO); and under Sections 3, 4, 5 and 7 of Immoral Traffic (Prevention) Act, 1956 (PITA). The

applicants were arrested in connection with the said offences and after investigation they were charge-sheeted. On 16th April, 2014, charge was framed as against the applicant-accused for the aforesaid offences. The accused pleaded not guilty and claimed to be tried. The prosecution in support of their case, examined 7 witnesses, including the victim girl, the complainant and others. Thereafter, the statements of the applicant-accused were recorded under Section 313 of Code of Criminal Procedure and one of the applicant-accused examined 3 defence witnesses in support of her case. When the matter was posted for final arguments, the Advocate for the accused no.2 expired, and hence an Advocate from the Legal Aid Panel, Mr.Ansari was appointed for accused no.2 and subsequently even for accused no.1. After the arguments of Mr.Ansari concluded, it is at that time, that the learned Special Public Prosecutor filed an application i.e. Exhibit – 44 and prayed that the original birth certificate and the 164 statement recorded by the Magistrate of the victim girl, be marked as exhibits. The learned Judge was pleased to allow the said application partly vide order dated 7th October, 2016 and the birth certificate of the victim girl came to be marked as Exhibit – 45. As far as prayer for marking 164 statement of the victim girl as an exhibit is concerned, the same was

rejected. Thereafter, Mr. Ansari, Advocate appointed for the accused nos. 1 and 2 filed an application (Exhibit – 46) for de-exhibiting the birth certificate, which was marked as Exhibit – 45. The said application was rejected by the learned Judge vide order dated 21st November, 2016. Thereafter, again on 26th December, 2016, the learned Special Public Prosecutor filed an application (Exhibit-47) for issuing witness summons to the Bombay Municipal Corporation Officer, who had issued the birth certificate; to the learned Magistrate who recorded the statement of the victim girl under Section 164; and to the officer of the Child Welfare Committee under whose custody the victim girl was kept. The said application (Exhibit-47) was allowed vide order dated 15th March, 2017, and the learned Special Judge issued witness summons to the Officer of the Bombay Municipal Corporation, the learned Metropolitan Magistrate and the office of CWC. On 19th January, 2017, the learned Special Public Prosecutor again filed another application (Exhibit-48) and sought production of documents i.e. order of the Commissioner of Police and a notification issued by the State Government under the PITA Act and Exhibit – 49 for recalling the Investigating Officer (PW 6), for bringing on record the said documents. The said applications were resisted by Mr. Ansari,

learned advocate appointed for the applicants. The learned Judge after hearing the parties was pleased to allow all the said applications i.e. Exhibits – 47, 48 and 49 vide separate orders dated 15th March, 2017. Hence, this application.

7. Section 311 of the Code of Criminal Procedure, 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.

8. The law with regard to when Section 311 of Code of Criminal Procedure can be invoked is no longer *res integra*. The Apex Court in the case of ***Jamatraj Kewalji Govani v/s State of Maharashtra***¹ has in para 14 observed as under:-

¹ AIR 1968 SC 178

“14. It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in court or to recall a witness already examined, and makes this the duty and obligation of the court provided the just decision of the case demands it. In other words, where the court exercises the power under the second part, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new evidence is needed by it for a just decision of the case. If the court has acted without the requirements of a just decision, the action is open to criticism but if the court's action is supportable as being in aid of a just decision the action cannot be regarded as exceeding the jurisdiction.”

9. It is thus evident that the power conferred under Section 311 Cr.PC can be invoked at any stage of any inquiry or trial or other proceeding under the Code. Section 311 confers a very wide power on the Court to summon or to recall and re-examine witnesses, if his evidence appears to be essential to the just decision of the case. Needless to state, that the discretion conferred on the Court is to be exercised judiciously, as wider the power, the greater is the necessity for application of judicial mind.

10. Considering the seriousness of the allegations in the present case and since the victim girl was a minor and the case was being tried in the POCSO Court, it was incumbent on the prosecution to bring on record the original birth certificate of the victim girl. Infact, even the 164 statement of the victim girl despite having being recorded has not been placed on record. The manner in which the birth certificate of the victim girl and the 164 statement were sought to be exhibited was completely erroneous and contrary to the provisions of the Evidence Act. It is necessary to mention, that the prosecutor conducting the case has not been diligent. It was the duty of the prosecutor to examine the witnesses and bring the original birth certificate and the 164 statement of the victim girl, through the evidence of witnesses or under Section 294 Cr.PC. The procedure adopted by the prosecution of tendering the documents i.e. birth certificate and the 164 statement of the victim girl by filing an application i.e. Exhibit – 44, for exhibiting the said documents was casual, completely erroneous and unsustainable in law and needs to be deprecated. In every application, Special Public Prosecutor has stated that it was an 'inadvertent mistake'. Learned APP ought to have been diligent. All the documents for which

evidence is sought to be led of witnesses were germane to the case and as such necessary for a just decision of the case.

11. Accordingly, in the peculiar facts of the case, having regard not only to the facts of this case, but the seriousness of the offence, the impugned order dated 7th October, 2016, passed below Exhibit – 44, by which the birth certificate of the victim girl was exhibited; as well as the order dated 21st November, 2016, passed below Exhibit – 46, by which the application of the applicant-accused for de-exhibiting Exhibit – 45 was rejected, are quashed and set aside. However, no interference is warranted in the orders dated 15th March, 2017, passed below Exhibit – 47, by which the application filed the learned Special Public Prosecutor for issuing witness summons to the officer of Bombay Municipal Corporation, to the Magistrate and CWC officer was allowed; the order dated 15th March, 2017, passed below Exhibit - 48, by which the application filed by the prosecution for production of the order of Commissioner of Police under Section 12 of the PITA and the notification issued by the State Government under the PITA came to be allowed and the order 15th March, 2017, passed below Exhibit - 49, by which the prosecution had prayed that the Investigating

Officer, Shri Raut be recalled to produce the order of the Assistant Commissioner of Police and Notification by the State Government under the PITA came to be allowed.

12. The learned Judge shall summon the said persons and record their evidence only for the purpose of placing the said documents on record vis-a-vis the documents and shall give an opportunity to the defence to cross examine the said witnesses. The entire exercise shall be conducted by the learned Judge as expeditiously as possible, and in any event, within four weeks from the date of receipt of this order. The learned Special Judge shall thereafter, hear the parties and decide the case as expeditiously as possible and in any event within four weeks thereafter.

13. Rule is made absolute in above terms.

14. Mr.M.A.Ansari, learned counsel for the applicants is a legal aid counsel appointed in the Trial Court to espouse the cause of the applicants. He is also appearing pro bono in the present application. Mr. Ansari as a pro bono advocate and as a legal aid counsel for the applicants has left no

stone unturned and has put in every effort to espouse the cause of the applicants. He has also with great tenacity, diligence and perseverance argued the aforesaid application, which is commendable.

15. All concerned to act on the authenticated copy of this order.

REVATI MOHITE DERE, J.