

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

CRIMINAL REVISION APPLICATION NO. 286 OF 2018

Shrawan Kumar Patiraj Jaiswar

... Applicant

Vs.

The State of Maharashtra

... Respondent

...

Mr. Anil G. Lalla a/w Ms. Anchal Lalla, Mr. Beerja Bajwar, Ms. Monali Mengle I/b Lalla & Lalla for the applicant.

Ms. P.N. Dabholkar, APP for the State.

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CORAM : PRAKASH D. NAIK, J.

DATE : 14th JUNE, 2018

P.C.

1. The applicant is facing prosecution for the offences punishable under Sections 363, 376, 342, 323, 506, 201 read with Section 34 of Indian Penal Code and Sections 4, 5 and 12 of Protection of Children from Sexual Offences Act, 2012.

2. The applicant has approached this Court challenging the order dated 17th April, 2018 passed by the Additional Sessions Judge, Greater Bombay in POCSO Special Case No. 551 of 14. The trial Court has refused the application for recalling of witnesses viz P.W.Nos.1, 2 and 4.

3. After the commencement of trial, the prosecution had examined 8 witnesses in support of its case. P.W.No.1 is the complainant and the uncle of the victim. P.W.No.2 is the victim and P.W.No.4 is the Medical officer who examined the victim. The accused was represented by advocate. The witnesses were cross-examined by the defence. However, during the cross-examination of P.W.No.5 and 6, the advocate for the applicant-accused was not present.

4. Thereafter, the applicant changed the advocate. In pursuant to that, the application to recall P.W.No.1 and P.W.No.2 was preferred before the Trial Court on 13th April, 2018. Subsequently, another application was preferred for recall of P.W.No.4, 5 and 6 on 16th April, 2018. The Trial Court vide order dated 17th April, 2018 allowed the application to the extent of recalling of P.W.Nos. 5 and 6 and the prayer for recall of P.W.Nos. 1, 2 and 4 was rejected. The P.W.Nos. 5 and 6 were recalled and they were cross-examined by the advocate for the applicant. While rejecting the applications herein above, the trial Court has observed that witnesses P.W.No.1, P.W.No.2 and P.W.No.4 were cross-examined at the instance of defence. However, P.W.Nos. 5 and 6 were not cross-examined at the instance of applicant.

P.W.No.5 and P.W.No.6 are Police Officers concerned with the investigation of the case. Considering the fact that they were not cross-examined the Court allowing recall of said witnesses for just decision of case. As far as the other witnesses which were sought to be recalled at the instance of the applicant, the Court observed that there are no sound grounds to recall the said witnesses and there was delay in preferring the said application. It is also observed that as per Section 33(5) of the POSCO Act, victim cannot be repeatedly testified and she was cross-examined in detail by advocate for applicant. The accused is facing prosecution under the provisions of POSCO Act and the trial is expedited which is required to be concluded expeditiously.

5. Learned counsel for the applicant submitted that P.W.Nos. 1, 2 and 4 are required to be recalled in the interest of justice. The witnesses were not cross-examined in proper prospective by the earlier advocate and the relevant questions were not put to the said witnesses which would cause great prejudice to the defence of the accused. It is submitted that P.W.No.1 is the uncle of the victim whose cross-examination is cryptic and several vital questions including suggestions were not put to the said witnesses by the advocate representing him at the

earlier point of time. Similarly, P.W.No.2 who is the victim in the case is also not properly cross-examined. P.W.No.4 is Medical Officer and several vital aspects were required to be brought on record including the proof of date of birth of the victim. It is submitted that there is no effective cross-examination by the earlier advocate representing the applicant. It is submitted that in the interest of justice the powers under Section 311 of Code of Criminal Procedure can be exercised at any point of time before the conclusion of the trial. Considering the right to defend provided to the accused, the said witnesses are required to be recalled. It is submitted that the trial Court has not taken into consideration these aspects and has rejected the application without assigning proper reasons.

6. Learned APP Ms. Dabholkar submitted that sufficient opportunity was given to the defence to cross-examine the witnesses and the right to cross-examine the witnesses has been exhausted by the defence. She pointed out that the evidence of the said witnesses and the cross-examination was conducted by the defence advocate. She submitted that change of advocate is not a ground to allow the application for recall of witnesses. Applicant is required to make out a case for granting of such relief.

It is submitted that the object of Section 311 of Code of Criminal Procedure is not to fill up the lacunae and such a relief can be granted only for the just decision of the case. The trial was expedited by this Court and the prosecution had examined about eight witnesses. It is therefore submitted that the application preferred by the applicant-accused being devoid of merit is rightly rejected by the trial Court.

7. It is settled principle of law, the powers under Section 311 of the Code of Criminal Procedure can be exercised for the just decision of the case and in the interest of justice at any stage. In the present case, the prosecution had examined eight witnesses. The accused was represented by the advocate. P.W.No.1 has been examined on 05.01.2018. Cross-examination was conducted at the instance of the defence. P.W.No.2 is the victim who was aged about 11 years at the time of alleged offence and about 15 years of age when the evidence was recorded. Her evidence was recorded on 18.01.2018. She was cross-examined.

8. I have perused the evidence of the said witnesses including cross-examination conducted at the instance of applicant and other accused. The cross-examination also includes suggestions put to the said witnesses. The trial Court has passed

an order allowing to recall of P.W.No.5 and 6 in the interest of justice as the advocate representing to the said accused was not present and the said witnesses could not be cross-examined. However, the prayer for recall of other witnesses was not granted. P.W.No.4 is the Medical Officer who has examined the victim. However, the cross-examination of the said witnesses conducted by the defence advocate is cryptic and being the Medical Officer the said witness was apparently required to be cross examined on vital aspects. In my opinion P.W.No.1 and 2 cannot be recalled as their cross-examination was conducted at the instance of defence in detail. The applicant could not give any cogent reasons, except what is stated above to recall the said witnesses. However, in the interest of justice and looking into cross-examination of P.W.No.4, the Medical Officer who examined the said victim it would be appropriate to recall P.W.No.4. The evidence of P.W.No.1 and 2 has been recorded and there is extensive cross-examination of the said witnesses and the relief for recall of the said witnesses cannot be granted. Hence, I pass the following order.

ORDER

- (i) The application is partly allowed;
- (ii) The prayer for recall of P.W.No.4 is allowed. However, the

relief sought by the applicant for recalling P.W.Nos. 1 and 2 is rejected;

(iii) The trial Court is directed to recall P.W.No.4 for the purpose of cross-examination at the instance of the applicant;

(iv) Application stands disposed of;

(v) Parties to act on the authenticated copy of this order.

(PRAKASH D. NAIK, J.)