

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.

Criminal Revision Application No.7 of 2019
(Pyarelal Lilaram Tagde .vs. State of Maharashtra through PSO PS Bela,
Dist. Nagpur.)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders or directions Court's or Judge's orders.
and Registrar's orders

Mr. Mir Nagman Ali, Advocate for Applicant
Mr. H.R. Dhumale, APP for Non-applicant/State.

CORAM : Manish Pitale, J.
DATED : June 27, 2019.

The applicant herein has approached this Court challenging order dated 10.01.2019 passed by the Court of Additional Sessions Judge 9, Nagpur on Exh.77 in Special POCSO Case No. 123 of 2016, which was an application filed under Section 311 of the Cr.P.C. for recalling of the witnesses. By the said order, the Sessions Court has rejected the application filed by the applicant herein.

2. The applicant is accused of having committed offences under Section 354(a)(1) of the IPC and Section 8 of the Protection of Children from Sexual Offences Act, 2012. The prosecution examined witnesses in support of its case, including the prosecutrix and her father.

3. Since the present case involves offence under POCSO Act, the question of date of birth of the victim assumes critical importance. The victim/prosecutrix was examined as PW1 in the present case and on her

statement regarding her specific date of birth, in the cross-examination, the omission was indeed brought out. But, it is pointed out by the learned counsel for the applicant that inadvertently the said aspect which was reiterated by PW2 (father of the victim) regarding specific date of birth of the prosecutrix, no specific cross-examination was conducted regarding the omission in the statement of the said witness before the Police. Similarly PW7, PW8 and PW9 were also inadvertently not examined on the said aspect.

4. It is the case of the applicant that when the said inadvertance and oversight came to the notice of the counsel appearing for the applicant before the Sessions Court, the aforesaid application at Exh.77 for recalling of witnesses was moved on behalf of the applicant. It was specifically pointed out before the Sessions Court that the prosecution witness Nos. 2,7,8 and 9 were not specifically cross-examined on the question of material omissions pertaining to the date of birth of the prosecutrix (PW1). On this basis, prayer was made for grant of permission to recall the said witnesses.

5. By the impugned order dated 10.01.2019 passed by the Sessions Court, the said application was rejected on the ground that the applicant could not be permitted to fill lacunae.

6. The learned counsel for the applicant has submitted that insofar as the omissions pertaining to

the specific date of birth of the prosecutrix stated by the said witness were concerned, it was necessary that an opportunity be granted to the applicant to cross-examine the said witnesses so that no prejudice is caused to him at the stage of final arguments. It is pointed out by the learned counsel that as per judgment of Division Bench of this Court in the case of **Kundan Nanaji Pendor .vs. State of Maharashtra** reported in **2017 ALL MR (Cri) 1137**, particularly paragraph 11 thereof, it has been reiterated that the settled position of law is that if a witness is not cross-examined on a particular portion of her deposition in examination-in-chief, the said statement is required to be accepted as the same is not challenged by the defence. It is also pointed out that the said judgment also concerned the question of age of the prosecutrix at the relevant time because the offence in the said case also pertained to the provisions of the POCSO Act. On this basis, it was submitted that although the prosecutrix (PW1) in the present case was indeed cross-examined on the said omission, the other witnesses were not cross-examined on that aspect, thereby necessitating the recall of the said witnesses. The learned counsel also placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Iddar .vs. Aabida** reported in **2007 ALL MR (Cri) 2073 (S.C.)**, wherein the Hon'ble Supreme Court has laid down the law pertaining to the approach to be adopted by the Court while exercising power under Section 311 of the Cr.P.C. pertaining to the power of the Court to summon witnesses. On the other hand, the learned APP appearing for the non-applicant/State

submitted that the case against the applicant before the Sessions Court was at final stage of arguments and the application filed on behalf of the applicant was nothing but an attempt to fill the lacunae. It is submitted that the Sessions Court rejected the said application by appreciating the scope of power of the Court under Section 311 of the Cr.P.C.

7. Heard the learned counsel for the rival parties and perused the material on record. It is found that the prosecutrix (PW1) was indeed cross-examined on behalf of the applicant as regards the omissions pertaining to the specific date of birth claimed by her. But, a perusal of the evidence of the other prosecution witnesses i.e. PW2, PW7, PW8 and PW9 shows that on this aspect, the said witnesses were not cross-examined. The applicant apprehends that in absence of specific cross-examination regarding omissions on the aspect of date of birth of the prosecutrix claimed by the said witnesses, there is every possibility that the applicant would be put to prejudice on the basis of law laid down by the Division Bench of this Court in the case of **Kundan Nanaji Pendor .vs. State of Maharashtra** (supra). Although, the prosecutrix in the present case has been indeed cross-examined on the said aspect, there is a possibility that absence of the cross-examination of the other above specified witnesses on the said aspect might cause prejudice to the applicant in the present case.

8. The learned counsel for the applicant has

correctly relied upon judgment of the Hon'ble Supreme Court in the case of **Iddar .vs. Aabida** (supra), wherein the Hon'ble Supreme Court has laid down in the context of Section 311 of the Cr.P.C. as follows:-

"10. The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequence, the first part gives purely discretionary authority to a Criminal Court and enables it at any stage of an enquiry, trial or proceeding under the Code : (a) to summon any one as a witness, or (b) to examine any person present in Court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the Court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the Court the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the Court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a Court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the Court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are

known to be in a position to speak important relevant facts.

11. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the Section merely because the evidence supports the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind."

9. The aforesaid position of law makes it clear that the Courts are expected to adopt a liberal approach while exercising power under Section 311 of the Cr.P.C. to ensure that exercise of such power would assist the Court in arriving at the truth of the matter. Applying the aforesaid yardstick, it becomes clear that the Sessions

Court in the present case committed an error in rejecting the application filed by the applicant for recall of witnesses.

10. In view of the above, present application is allowed. The impugned order dated 10.01.2019 passed by the Sessions Court is quashed and set aside and the application for recalling of witnesses filed by the applicant (Exh.77) is allowed in terms of the prayer made therein.

11. Considering the facts and circumstances of the present case, the proceedings before the Sessions Court are expedited.

JUDGE

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