

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 480 OF 2021

Vinod s/o Vikram Paithankar,
Age; 23 years, Occ; under trial,
Residing at Rajwada, Ashok Nagar,
Old Jalna, Jalna.

...Petitioner

VERSUS

The State of Maharashtra
Through Police Station Officer
Kadim Police Station, Jalna.

...Respondent

...

Advocate for Petitioner : Mr. Surve Hemant
APP for Respondent-State : Mrs. Geeta L. Deshpande

...

CORAM : SURENDRA P.TAVADE , J.

**RESERVED ON : 17th August, 2021.
PRONOUNCED ON : 23rd August, 2021.**

JUDGMENT :

1. Rule. Rule made returnable forthwith. By consent of learned counsel for both the parties, heard finally at the admission stage.

2. The petitioner is seeking reliefs as under :

B) The unilateral decision of the learned trial Court to Exhibit the statements of the witnesses recorded under Section 164 of the Criminal Procedure Code, 1973 without

they being spoken about in the testification by the witnesses before the Court while recording their evidence, may kindly be faulted and that the exhibition done by the learned trial Court from Exh. 116 to 122 of the trial Court record, i.e. in Special Case (child) No. 10 of 2018 may kindly be ordered to be upset and these statements de-exhibited;

C. In the alternative, the defence be permitted to cross-examine the relevant witnesses on their respective statements recorded under Section 164 Cr.P.C. by allowing the application of the Petitioner recorded at Exh. 135 of the lower Court proceeding, being Special Case (child) No. 10 of 2018, and consequently, upsetting of the impugned order of the learned trial Court passed below Exh. 135 decided on 25.02.2021.

3. It is contended that the petitioner is facing trial for the offences punishable under Sections 376 (2) (i), 323 read with Section 34 of the Indian Penal Code (for short 'IPC') read with Sections 4, 5(m), 6 and 8 of the Protection of Children from Sexual Offences (POCSO) Act, 2012.

4. The charge came to be framed against the petitioner on 12.03.2018. Thereafter, the charge was altered on 12.02.2020. The prosecution led the evidence of the victim and others. The prosecution has closed the evidence and the matter was listed for hearing on 17.02.2021. During the arguments of the Public Prosecutor, the petitioner came to know that the trial Court has

exhibited the statements of witnesses recorded under 164 of the Code of Criminal Procedure (for short “Cr.P.C.”) without giving notice to the petitioner. The petitioner had submitted an application (Exh. 135) for recalling of witnesses for cross-examination in the light of their statements recorded under Section 164 of the Cr.P.C. The said application came to be rejected. While rejecting the application, the trial Court has passed remarks against the Advocate of the petitioner. The said remarks are un-warranted hence, are required to be set aside. It is also prayed that the statements of witnesses recorded under Section 164 of the Cr.P.C. be de-exhibited and in the alternative the petitioner be allowed to cross examine the witnesses.

5. Heard Mr. Hemant Surve, the learned counsel on behalf of the petitioner and Mrs. Geeta L. Deshpande, the learned APP on behalf of the Respondent-State.

6. Learned counsel for the petitioner has raised following questions which are as under :

“a. Whether, the statements recorded under Section 164 of the Code of Criminal Procedure, 1973 before the learned Magisterial Court, could be exhibited under Section 80 of the Evidence Act, 1872 whereby the right of the accused to question the prosecution witnesses on these statements could be snatched away ?

b. Whether, the statements under Section 164 of the Code

of Criminal Procedure, 1973 could be exhibited unilaterally without even affording of the copies of these statements to the accused ?

c. Whether, the observations of the learned Judge, while adjudicating the application under scrutiny by this Honourable Court, were at all warranted ? and

d. Whether, such observations correspond to the factuality ?

7. Learned counsel for the petitioner submitted that the trial Court is likely to read the statement of witnesses recorded under Section 164 of the Cr.P.C. as an evidence against the petitioner, which is not permissible. To substantiate his case he relied on the ratio laid down in the case of **Hanumantha Mogaveera vs. State of Karnataka in the case of Criminal Petition No. 2951 of 2020.**

In the case cited supra the Hon'ble Chief Justice of the Karnataka High Court by order dated 12.01.2021 constituted a Bench to consider the reference made by the Single Judge of that Court under the provisions of Protection of Children from Sexual Offences Act, 2012 ("POCSO Act") and under Section 164 and other provisions of the Code of Criminal Procedure ("Cr.P.C."). The **Single Judge has made reference to the Division Bench** in following terms :

"26. At this juncture, it is brought to the notice of this Court that when already the co-ordinate Bench in

the case of Vinay Vs. State of Karnataka, rep. by Special PP, (Supra) and other two co-ordinate Benches have taken a different view and this Court is taking a different view, then under such circumstances, the matter has to be referred to the Larger Bench to consider the aspect of laying down the law. In that light, I am of the considered opinion that the matter requires to be referred to the Larger Bench to consider the following issues :

- i) Whether the evidence which has been recorded under Section 164 of Cr.P.C. can be considered to be an evidence under Section 35 of the POCSO Act ?*
- ii) If the evidence of the child has not been recorded within a period of thirty days of taking cognizance of the offence, and if the Special Court does not complete the trial within a period of one year from the date of taking cognizance, whether accused is entitled to be released on bail holding that it is a default clause which gives a right to the accused ?”*

8. The Hon'ble Bench has answered the issue No. 1 by holding that the statement recorded under Section 164 cannot be considered to be evidence under Section 35 of the POCSO Act. The Hon'ble Bench has answered the issue No. 2 by holding that non compliance of Section 35 of POCSO Act cannot be a basis for releasing accused on bail as that could be the misreading of the provisions.

In view of the above ratio, it can be said that the statements of witnesses recorded under Section 164 of the Cr.P.C. cannot be considered to be the evidence under Section 35 of the POCSO Act.

9. It is the basic case of the petitioner that the Court has exhibited the statements of witnesses recorded under Section 164 of the Cr.P.C. without giving notice to the petitioner. According to the petitioner, the said act of the Court is unilateral and affected his rights. Admittedly the statements of witnesses are recorded by the Judicial Magistrate First Class with the help of Section 80 of the Indian Evidence Act. To appreciate the above contention one has to fall back upon the provisions of Section 80 of the Act. Therefore, the provisions of Section 80 of the Act are required to be considered, which runs as under :

“80. Presumption as to documents produced as record of evidence, – Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorised by law to take such evidence, or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume –

that the document is genuine; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken."

10. On this point a useful reference can be made to the ratio laid down in the case of **Madi Ganga Vs. State of Orissa reported in AIR 1981 SC 1165**, wherein it is held that

"Section 80 of the Evidence Act makes the examination of the Magistrate unnecessary. It authorises the Court to presume that the document is genuine, that any statements as to the circumstances under which it was taken are true and that such confession was truly taken in accordance with law."

11. Admittedly, during the cross-examination of witnesses, their statements recorded under Section 164 of the Cr.P.C. were not shown to them but witnesses have categorically stated that their statements were recorded by the Judicial Magistrate First Class during the course of the investigation. So there is no dispute that the statements of witnesses were recorded by the Magistrate under Section 164 of the Cr.P.C.

12. On perusal of the impugned order (Exh. 135), the trial Court has made it clear that the statements of witnesses under Section 164 of the Cr.P.C. were the part of the charge-sheet. The

copies of the said statements were provided to the petitioner. The petitioner has also put some questions to the witnesses wherein, the witnesses have admitted that their statements were recorded by the Judicial Magistrate First Class. It appears that inspite of having statements of witnesses recorded under Section 164 of the Cr.P.C., the petitioner has not cross-examined the witnesses, with reference to the contents of said statements. The statements of witnesses are recorded under Section 164 of Cr.P.C. were exhibited on 20.12.2019. Thereafter, the matter was adjourned for time to time for arguments.

13. The petitioner came with a story that he came to know about the exhibition of statements of witnesses recorded under Section 164 of Cr.P.C. on 17.02.2021 during the arguments of the public prosecutor. It is not disputed by the petitioner that copies of the statements under Section 164 have been supplied to him along with the charge-sheet. So, the petitioner was well aware of the contents of the statements so he could have confronted the witnesses with the aid of the said statements recorded under Section 164 of the Cr.P.C. Now the petitioner cannot take stand that he was un-aware of the contents of the statements, therefore, he must be given chance to cross-examine witnesses on the basis of statements recorded under Section 164 of Cr.P.C. It is the mandate of law that the evidence of the victim should be recorded within one month from

taking cognizance of the offence, which is done by the trial Court, therefore, the victim cannot be recalled for cross-examination. If she is allowed to be re-called for cross-examination, then it would be like causing trauma to her. The Trial Court has exhibited the statements of witnesses under Section 164 of the Cr.P.C. as per the provisions of law. At the same time, I must mention here that the said statements cannot be read in evidence as observed in the case of **Hanumantha** cited (supra). It cannot be said that as the trial Court has exhibited documents, therefore, the petitioner has caused prejudice. Therefore, on this count, the petitioner is not entitled for de-exhibition of the statements of witnesses recorded under Section 164 of the Cr.P.C. or recalling of witnesses for further cross-examination.

14. The second grievance of the learned counsel for the petitioner is that the trial Court has passed remarks against him which reflect on his career. According to the learned counsel for the petitioner, he had co-operated with trial Court for recording evidence, as well as expeditious hearing of the case, but due to pandemic situation, he was compelled to stay in the house. Therefore, he could not attend the Court. He also submitted that he never dragged the matter. The above facts can be considered in the light of observations made by the trial Court. In paragraph 5 (h) of the impugned order the trial Court has mentioned that the matter was closed for final

arguments on 15.01.2020, thereafter it was posted for arguments on 29.01.2020, 12.02.2020, 26.02.2020, 11.03.2020 and 18.03.2020. It was also mentioned by the trial Court that for one reason or other arguments were not advanced by the learned counsel on behalf of the petitioner. It is also observed that the dates were given as per the convenience of the counsel for the petitioner. In view of the said facts, it cannot be said that, there was active co-operation of the counsel for the petitioner for deciding the criminal case as early as possible. Admittedly on above dates the lock down was not declared by the Government and there was no ban on the Courts functioning. Therefore, it was expected from the counsel for the petitioner to argue the matter on one of the above dates but, it was not happened, thus, the trial Court was not happy with the conduct of the counsel for the petitioner. It was observed by the trial Court that the counsel for the petitioner has dragged the matter without any cause. The said remarks are harsh but it was not without material. There was material which established that the matter was dragged on behalf of accused/petitioner. Therefore, I am of the opinion that the remarks made by the trial Court reflects the conduct and behaviour of the learned counsel for the petitioner. There is material to that effect, therefore, there is no question of expunging of the said remarks. With this, I hold that the petition has no merit and is required to be dismissed. Hence following order is passed :

ORDER

1. The petition is dismissed.
2. Rule is discharged.

**(SURENDRA P.TAVADE)
JUDGE**

mahajansb/