

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

CRIMINAL WRIT PETITION NO. 861 OF 2021

Sudhir Sukhdeo Bhalerao	.. Petitioner
Age.42 years, Occ. Nil,	[accused]
R/o. Gandhinagar, Tal. Bolhegao,	
Tal. & Dist. Ahmednagar	
At present lodged in Sub-Jail,	
Ahmednagar.	

Versus

The State of Maharashtra	.. Respondent
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Mr.K.J. Tandale, Advocate for the petitioner.
Mr.R.B. Bagul, APP for the respondent/State.

CORAM : SURENDRA P. TAVADE, J.
DATED : 31.08.2021

ORAL JUDGMENT :-

01. Rule. Rule taken for hearing forthwith, with the consent of the parties.

02. The original accused has filed this writ petition to challenge the impugned order passed by the Additional Sessions Judge (POCSO), Ahmednagar on Exh.60 in Special Case No.134 of 2019, whereby the Trial Court has allowed the application of the prosecution to re-examine the prosecutrix.

03. It is contended that the petitioner is facing trial for the offences punishable under sections 376, 376(3), 376(c), 377, 506 of the Indian Penal Code and Sections 4,6,8 and 10 of the Protection of Children from Sexual Offences Act, 2012. It is contended that the charge came to be framed against the petitioner. The prosecution has examined in all seven witnesses. The statement of petitioner was recorded under section 313 of the Criminal Procedure Code. Thereafter, the prosecutrix filed an application for adjournment on 03.04.2021. It was rejected by the Trial Court. On 23.06.2021 the APP submitted an application for re-examination of the prosecutrix (Exh.60). It was contended therein that the prosecutrix has omitted to state certain things in connection with sexual assault on her. It is also contended that in medical evidence it was reported that hymen of the prosecutrix was ruptured, but the prosecutrix did not speak about sexual assault on her and she wishes to state certain things about the same. Hence, it was prayed that the prosecutrix be re-examined.

04. It is contended that the petitioner opposed the said application, but the Trial Court has allowed the same and permitted the prosecution to re-examine the prosecutrix.

05. Heard learned Counsel for the petitioner. He submits that the impugned order is not legal, valid. It affects the defence of the petitioner. It is contended that no grounds were made out by the prosecution for re-examination of the prosecutrix. It is contended that the evidence of the prosecutrix was recorded in length. There are no allegations that the prosecutrix was under pressure to depose in the court. In-fact, her evidence was properly recorded by the Trial Court. There was no need to recall her. It is contended that re-examination of the prosecutrix is only aimed at to fill up lacuna, which is not permissible. Hence, it is prayed that the application be rejected and the impugned order be set aside.

06. On the other hand, learned APP submits that at the time of alleged incident the prosecutrix was aged 13 years and when she was examined she was 14 years of age. She was hesitant in disclosing certain facts against her own father. She wanted to say something in the matter before the case is decided finally. Therefore, APP filed an application which was correctly decided by the Trial Court. It is also contended that the Trial Court has considered the evidence of the prosecutrix and the contents of the application for re-examination of the

prosecutrix in proper perspective and came to correct conclusion. Therefore, there is no need to interfere in the impugned order.

07. Admittedly, the APP has submitted application for re-examination of the prosecutrix under section 311 of the Code of Criminal Procedure. It is just necessary to reproduce the provisions of Section 311 of the Cr.P.C. for appreciating facts of the case. Section 311 of the Cr.P.C. runs as under :-

"Section 311. Power to summon material witness, or examine person present -

Any Court may, at any stage of any inquiry, trial or other proceeding under any Court may, at any, stage or 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."

08. There is no dual opinion about powers of the Court to examine or re-examine the witnesses at any stage of the Trial with the aid of Section 311 of the Cr.P.C. At the same time the Trial Court is required to see whether there is genuine error or mistake/fault on behalf of the party applying under section 311 of Cr.P.C. On this point, Counsel for the petitioner submits that re-examination of witness cannot be allowed to fill up lacuna in the evidence of the witness. Hence, he relied

upon the case of Dr.Kishor s/o. Uttamrao Hantodkar & Anr. Vs. Appropriate Authority & Another, 2015 ALL MR (Cri) 2522, wherein it was held that further evidence cannot be allowed to be lead by the prosecution/complainant either under section 244 or section 311 of the Cr.P.C. just to fill up lacuna in the prosecution case. The dominant reason for allowing of adducing of further evidence is of necessity of the same for reaching a just decision in the case.

09. On the other hand, the State has relied upon ratio in the case of Haribhau s/o. Vithal Pharate and Ors. Vs. The State of Maharashtra & Anr., 2006(6) Mh.L.J.540, wherein the application for recalling of witness was allowed. The said order was challenged before this court, wherein provisions of Section 311 of the Cr.P.C. are reproduced and observed that :-

"S. 311. Powers to summon material witness, or examine persons 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.

It does not put any limit or restriction about stage at which a witness may be summoned or may be allowed to be examined by the Court. It empowers the Court to issue summons at any stage of enquiry or trial if evidence of such witness is necessary for fair trial and just decision. In P. Chhaganlal Daga Vs. M. Sanjay Shaw, in a complaint under section 138 of Negotiable Instruments Act, the

complainant had completed his evidence including his examination, cross-examination and re-examination. During cross-examination the accused had denied service of statutory notice and had disowned the signature on the acknowledgment. After completion of evidence, case was posted for judgment. At that stage, the complainant sought permission to produce additional material, that is postal receipt, to prove the service of the statutory notice. The trial Court granted the permission, which was set aside by the High Court. The Supreme Court held that the High Court had erred in interfering in the order of the trial Court. After referring to authority in Rajendra Prasad V. Narcotic Cell, the Supreme Court observed as follows in para 6 of the said judgment.

In deciding so, this Court has taken into account some of the earlier decisions of this Court including Mohanlal Shamji Soni Vs. Union of India. In the said decision this Court had observed that the power to receive evidence in exercise of Section 311 of the Code could be exercised '' even if evidence on both sides is closed'' and such jurisdiction of the Court is dictated by the exigency of the situation and fair play. The only factor which should govern the Court in exercise of powers under Section 311 should be whether such material is essential for the just decision of the case. Even a reading of Section 311 of the Code would show that Parliament has studded the said provision lavishly with the word '' any'' at different places. This would also indicate the widest range of power conferred on the Court in that matter. It is so stated by this Court in Ram Chancier Vs. State of Haryana.

In Sama Ram Vs. State of Rajasthan and Another 2002 Cril.L.J. 3134, the Rajasthan High Court held that an application for summoning material witnesses can be filed at any stage before pronouncement of judgment and power under Section 311 can be exercised even during final arguments of the case. In Sidhu Sukhdev Waghmare Vs. State of Maharashtra, 2004(1) BCR (Cri.) 351, the learned Single Judge of this court held that Section 311 of the Criminal Procedure Code empowers the Court to

issue summons to witness at any stage of trial if the evidence of such witness is essential to just decision of the case. The learned Judge observed in para 6 as follows :

''However, after taking into consideration the provisions of Section 311 of Code of Criminal Procedure, it is clear that it is not restricted only to issuing the summons to examine the witness who is cited as a witness by the prosecution, but summons can also be issued by the Court to a witness whose evidence is essential for the just decision of the case even if the said witness is not cited as witness by the prosecution''.

In view of the provisions of Section 311 and the above-referred authorities, it is abundantly clear that Section 311 empowers the Court to issue summons to any witness whose evidence is found essential for the just decision of the case, even if such witness is not cited by the prosecution originally and this power can be exercised at any state of the enquiry or trial till before the judgment is actually pronounced. ''

10. In the present case, the prosecutrix was examined by the prosecution and cross-examined by the defence. The statement of the petitioner was also recorded. Thereafter, application for re-examination was filed. On going through the application it appears that the prosecution came with a story that at the time of recording the evidence the prosecutrix was confused and she omitted to state certain facts. It is also contended that the medical evidence shows that the hymen of the prosecutrix was ruptured and there were some marks on the private part of the prosecutrix but the prosecutrix omitted to state the fact of sexual assault on her. The

Trial Court observed that the prosecutrix was 13 years of age at the time of incident and she was exploited by her own father for a long period in the house. There were number of events to be deposed by the prosecutrix but she could depose only few incidents in the examination-in-chief. The prosecution has brought on record the medical evidence of the prosecutrix which established her sexual exploitation. Therefore, it was observed by the Trial Court that re-examination of the prosecutrix was just necessary to decide the controversy.

11. The Court has to see whether examination or re-examination of witness is essential for just decision of the case. In the present case the Trial Court has observed that re-examination of the prosecutrix is essential for just decision of the case, as there is other evidence on record to establish charge against the accused. Therefore, in my opinion, the Trial Court has exercised its discretion in meaningful way. Therefore, there is no need to interfere in the same. Hence, I pass following order :-

O R D E R

- i) The petition is dismissed.

(9)

crwp861.21

ii) The impugned order dated 6th July, 2021 passed by the Trial Court on Exh.60 in Special Case No.134 of 2019 is hereby confirmed.

iii) Rule discharged.

[SURENDRA P. TAVADE, J.]