

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

CRIMINAL APPLICATION (APPA) NO. 194/2021 IN
CRIMINAL APPEAL NO. 130/2021

(Mahendra Daulatrao Ambilduke (In Jail) Vs. State of Maharashtra)

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

Court's or Judge's Orders

Shri R. Vyas, Advocate for the applicant/appellant.
Shri M. J. Khan, APP for non-applicant/State.
Shri G. S. Sengar, Advocate for informant.

CORAM : VINAY JOSHI, J.
DATE : 02.09. 2021.

Heard.

2. The appellant (accused) is seeking for re-examination of witness in terms of Section 311 read with Section 391 of the Code of Criminal Procedure (Code). In brief, it can be said that certain omissions were put to the prime witness i.e. PW-1 victim. However, they were not got proved by putting to the recorder of her statement i.e. PW-15 Police Officer. In order to prove the omissions, the limited exercise has been sought in the shape of recalling PW-15 for said purpose.

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3. The State as well as the informant resisted this application by stating that at appellate stage, such application cannot be entertained. The appellant has exhausted fullest opportunity of cross-examining PW-15 in the Trial Court. He has engaged Advocate of his choice. The reason of failure of Advocate to put the omissions would not sustain. A witness cannot be recalled to fill up the lacuna. With these submissions, application is prayed to be rejected. Learned APP in his resistance by placing reliance on the decision of **Hanuman Vs. State of Rajasthan, 2008 (15) SCC 652** would submit that the scope under Section 311 of the Code is quite limited.

4. Brief reference of background facts is needed to decide this application. At the instance of report lodged by the victim girl, crime was registered against appellant/accused for the offence of rape and penetrative sexual assault. On denial of guilt, the prosecution has examined in all 19 witnesses to establish his guilt. After full-fledged trial, the learned Judge held that the prosecution has duly proved the charged offences and ultimately convicted him for the offence punishable under Sections 376(2)(f)(n) of the

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Indian Penal Code, Sections 8 and 12 of the Protection of Children from Sexual Offences Act (POCSO). The Trial Court has imposed sentence to suffer rigorous imprisonment for 10 years along with fine of Rs. 30,000/-. Being aggrieved and dissatisfied by the judgment and order of conviction, the accused has come up in appeal in terms of Section 374(2) of the Code. This Court has not suspended execution of sentence of the appellant/accused. At this stage, this application is preferred to recall PW-15 for limited purpose as mentioned herein before.

5. With the assistance of both sides, I have gone through the evidence of PW-1 victim, recorded by the Trial Court vide Exh. 23. In para 10 of the evidence (cross-examination), various omissions running into two pages have been put to the witness. In response, the witness replied that she stated to the Police in her statement about all alleged omissions which were put to her. Naturally, as the witness has stated that she told said portion to the Police, it was incumbent upon defence to re-put those omissions to the recorder of statement. Contextually, I have gone through the statement of PW-15 Smt. Sweta

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Adityanath Mishra, PSI who has recorded the statement of victim. Notably not a single omission was put to the witness on behalf of accused, meaning thereby, the omissions were not got proved through the recorder of statement. So far as said factual position is concerned, there is no quarrel between the parties.

6. Whilst resisting the application, learned APP would submit that the evidence of victim on material aspect remained unshattered. He would submit that it is not expected that all minute details shall form part and parcel of First Information Report (FIR) since it is not an encyclopedia. According to him, the evidence of minor victim was sufficient to establish the charged offences. I am afraid to make any comment on this aspect since it is a matter of merit to be decided at the time of final adjudication.

7. The scope of this application is very much limited to the extent of exercising discretion at appellate stage in terms of Section 311 read with Section 391 of the Code. The learned counsel for victim also made submission that a gruesome act was

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committed by a teacher, however, this being part of merit requires no consideration at this stage.

8. In Trial Court application for recall was not filed, meaning thereby first time in appeal, learned counsel for the appellant in his wisdom thought it fit to resort said provision. Be that as it may, there is no legal bar to invoke the provision of Section 311 at appellate stage. On the said premise, learned counsel for the appellant has relied on the decision of this Court in case of ***Mr. Mahesh S/o Ramdatta Ahirrao Vs. State of Maharashtra & Ors., 2021 ALL MR (Cri) 1127*** which says that the Appellate Court can exercise power under Section 311 of the Code. However, it has to take recourse to the provision of Section 391 of the Code.

9. Learned counsel for the appellant candidly submits that it was a mistake of counsel appearing for accused in the Trial Court of not putting either of the omissions to the recorder of a statement. He would submit that the accused is illiterate in the sense in legal affair and therefore, due to inadvertent mistake of counsel, he cannot be punished. It is argued that the

accused was charged and now convicted under the stringent statute namely POCSO Act, which bears a presumption against the accused. The only effective tool available in the hands of accused is of cross-examining the witness to show falsity or to improbabilize the prosecution case. He reiterated that only for the limited purpose of putting omissions to the recorder of statement i.e. PW-15 recall is sought. According to him, the said exercise would not cause prejudice to the other side.

10. By placing reliance on the decision of the Supreme Court in case of ***Zahira Habibulla H. Sheikh & anr. Vs. State of Gujarat & ors. (2004) 4 SCC 158***, learned counsel for the appellant would submit that a fair trial is objective of criminal justice system and it is part of Article 21 of the Constitution of India. The concept of fair trial has been explained by the Supreme Court in the said case. It is undeniable that the primary aim of the criminal trial is to ascertain the truth. Denial of fair trial amounts to causing injustice. There can be no doubt about said general proposition. Per-contra, learned APP would submit that recall of witness shall be permitted in exceptional circumstances

but not on mere asking. In order to buttress said submission, reliance is placed on the decision of the Supreme Court in case of **State (NCT of Delhi) Vs. Shiv Kumar Yadav and anr. (2016) 2 SCC 402**. In said case, the Supreme Court while dealing with the powers under Section 311 of the Code has expressed that though the powers are wide and uncontrolled, they are to be exercised judiciously. Unless there are valid reasons, it should not be exercised. The Court while dealing with the application under Section 311 of the Code should be mindful of the fact about consequential harassment to the victim or witnesses by recall. It is also expressed that mere change of counsel cannot be a ground to recall the witness.

11. In the said case, application for recall of all 28 prosecution witnesses was filed. The Trial Court rejected the said application, however the High Court has reversed the order. In the light of said factual scenario, it was held that besides general observation, there were no tangible reasons for recall of all the witnesses therefore, rejection of recall of witnesses was affirmed.

12. For the sake of convenience, the provision of Section 311 is reproduced as below:-

“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.”

13. Section 311 of the Code in its former part speaks about the discretion of the Court whilst in later part mandates that, if it is essential to recall and re-examine any person referred in the former part for the just decision of the case, the Court is obliged to exercise the said power. There cannot be a straight-jacket rule to expound in which manner the exercise of power is to be tested. Width of power under Section 311 of the Code is much wider. The Legislatures have not bound the power under specific situation but wide discretion is left with the Court to exercise the power particularly when the Court forms its opinion that it is essential for the just decision of the case. Undoubtedly, the Section itself permits to use the power at any stage obviously including the appeal.

The meaningful reading of Section 311 of the Code would suggest that widest powers have been invested with the Courts to exercise discretion in befitting case.

14. True in the Trial Court, the appellant has not sought for recall of witness and therefore normally, at this late stage, one should be slow in using discretion. However, at the inception, the appellant has made it clear that the recall of PW-15 was not for general cross-examine but it is limited only to the extent of putting omissions to the recorder. The witness sought to be recalled is the Police Officer therefore, there can be hardly a question of harassment of witness. The accused is in Jail therefore, there cannot be a routine angle to look into the matter like filing such applications for protracting trial.

15. The case is peculiar one. The accused is not seeking to recall the victim or other witnesses. In that case, one can say that recall is to fill up the lacuna. The counsel defending in the Trial Court has very much put all omissions to the victim but appears to be forgot to get it proved by putting them to the recorder. The scope of recall was narrowed down by the

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appellant by bonafidely stating that only for the purpose of proving the omissions, recall is sought. After all the purpose of Court is to reach to the truth by way of conducting fair trail. The Legislative intent in enacting section 391 of the Code appears to be the empowerment of the Appellate Court to see that justice is done between the parties. If the Appellate Court finds it appropriate that such evidence is necessary then it may venture into said exercise. If PW-15 – Police Officer is recalled with clear understanding that recall is only for putting omissions then there would be no prejudice to the other side. Of-course, what is the worth of those omissions, its evidentiary value and use is a matter to be appreciated at the time of final hearing.

16. Particularly considering the limited purpose of recall, for giving fair opportunity, it can be allowed with specific directions . Always, there are chances of protracting the proceedings when the witness is recalled. Section 391 of the Code gives discretion to the Appellate Court to either take such additional evidence itself or direct it to be taken by the

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Magistrate. Since the recall is for limited purpose the said exercise can be done by this Court. So also it would not leave any scope of deviating from the limited permission, as well as would expedite the proceeding. In view of that, following order:-

(I) Application stands allowed and disposed of.

(II) PW-15 Smt. Sweta Adityanath Mishra, PSI is recalled strictly for the purpose of putting omissions to the witness which are already put to PW-1 victim.

(III) State is directed to keep PW-15 present in this Court for the purpose of recording her evidence.

17. At this juncture, learned APP prayed to tentatively keep the matter on 07.09.2021 for taking instructions about availability of PW-15 for giving evidence.

18. Stand over to 07.09.2021.

JUDGE

Gohane.