

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

CRIMINAL WRIT PETITION NO. 1793 OF 2022

State of Maharashtra ...Petitioner
Versus
Saifu Sayyed Shaikh ...Respondent

....

Mr. Arfan Sait, APP for the Respondent – State.

Mr. Mohit P. Dalvi a/w Mr. Rakesh Bhatkar, Advocate for Respondent
No.1.

CORAM : PRAKASH D. NAIK, J.
DATE : 21st SEPTEMBER, 2022.

PER COURT:

1. This Petition is preferred by the State of Maharashtra challenging the order dated 3rd December, 2020 passed by Special Judge, Ratnagiri, in Special case No.7 of 2019.

2. The case of the prosecution is that, the informant, mother of victim girl registered the First Information Report (for short “F.I.R.”) on 3rd December, 2018 stating that, the date of birth of her daughter/victim is 8th October, 2003 and she is aged around 15 years and 1 month. The victim had irregular menstruation. She was taken for medical checkup. During the checkup, it was revealed that, she was pregnant. The informant inquired with the victim girl about the person with whom she had in physical relationship. The victim informed that, one Sahil Shirgaonkar had physical

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relationship with her. First Information Report was registered vide C.R. No.383 of 2018 under Section 376 of Indian Penal Code and Section 5 and 6 of Protection of Children from Sexual Offences (for short “P.O.C.S.O.”) Act, 2012. The victim was medically examined on 13th December, 2018. She provided medical history, giving name of one Saifu Shaikh as accused. The victim was produced before the child welfare committee wherein she stated that, she had wrongly named Sahil Shrigaonkar as a person who had physical relationship with her. Statement of the victim was recorded on 2nd January, 2019 before the child welfare committee. On 15th December, 2018 statement of the victim was recorded under Section 164 of Code of Criminal Procedure, (for short “Cr.P.C.”). Wherein she has stated that, the name of accused as Saifu Shaikh, supplementary statement of the informant was recorded on 2nd April, 2019, pregnancy was terminated with the consent of informant. Charge-sheet was filed against the accused, charge was framed vide order dated 19th September, 2019 under Section 376(3) of Indian Penal Code, Section 3(a) read with Section 4 of POCSO Act, Section 5 (j) (ii) read with Section 6 with POCSO Act,

3. The trial had commenced and four witnesses were examined including the first informant, victim, her father and medical officer. The prosecution filed an application (Exhibit-48) for examining

certain witnesses i.e. medical officers who collected the samples of victim, accused and aborted fetus and Mr. D. S. Sinha, Assistant Director, RFSL, Pune and Chairman and Members of CWC who record the statements of victim girl. The application was opposed by the Respondent/Accused by filing reply. The learned Special Judge vide order dated 3rd December, 2020 rejected the said application. Hence this Petition is preferred, challenging the said order.

4. This Petition was heard on 20th August, 2022 and notice was issued to respondent. The proceedings before the trial Court were stayed till the next date of hearing.

5. Learned APP submitted that, the learned Special Judge has committed an error in rejecting the application preferred by prosecution. The victim girl had not disclosed the name of the respondent and tried to misguide prosecution agency by giving fictitious names of a person not in existence. The victim is minor. She was pregnant. She had to undergo abortion. In her statement before CWC, the victim had disclosed the name of respondent. In statement under Section 164 of Cr.P.C. She gave name of respondent as accused. She also disclosed his name in supplementary statement recorded on 2nd April, 2019. Learned Special Judge overlooked the fact that, the DNA report of aborted

fetus is positive, as to the paternity of the respondent/accused. It is positively concluded by DNA report that, the biological father of aborted fetus is respondent. The learned Special Judge has committed an error in concluding that, since the name of the respondent is not mentioned in the FIR and victim girl did not cooperate with the investigation, the respondent cannot be liable for the said offence and he should not be prejudiced by witnesses who are not named in the charge-sheet. The learned Special Judge has erroneously relied on the evidence of PW-4 while rejecting the application preferred by the prosecution. The member of CWC and the medical officer who collected samples for DNA are material witnesses for the just decision of case. The learned Special Judge overlooked the scope of Section 311 of Cr.P.C.

6. Learned APP has relied upon following conditions:-

- i. *Mannan Shaikh And Others Vs. State of West Bengal and Another (2014) 13 SCC 59.*
- ii. *Sanjay Vasant Kadam Vs. State of Maharashtra 2016 Cri. Law Journal (NOC) 103 (BOM).*

7. Learned Advocate for respondent submitted that, there is no illegality in the order passed by the Special Court. The powers under Section 311 of Cr.P.C. cannot be used for filling-up lacuna. The application was preferred by the State after examination of

four witnesses. The witnesses sought to be examined by the prosecution are not named in the charge-sheet. The respondent was not named in FIR. The statements of proposed witnesses were not recorded. The evidence of victim girl is already recorded. She has been cross-examined. The prosecution should have given the names of witnesses to be examined along with the charge-sheet and their statements should have been part of charge-sheet. Permitting the prosecution to examine the witnesses would cause prejudice to the defence of accused. The learned Special Judge has passed reasoned order while rejecting the application preferred by the prosecution.

8. The victim in a present case is aged around 15 years. The FIR was lodged by the mother of victim. The victim was pregnant. Pregnancy was terminated by consent of victims mother. The name of respondent was not disclosed in the FIR and the victim had given some other name of non existent person. However, the statement of the victim girl was recorded before CWC wherein, she disclosed the name of the respondent/accused as a person who had physical relationship with her. Her statement was recorded on 2nd January, 2019. The victim was medically examined on 13th December, 2018. While providing history, the victim disclosed name of the respondent as accused. In the statement under Section 164 of

Cr.P.C., also the victim disclosed the involvement of respondent/accused. Charge-sheet was framed, charge was framed. The DNA report was received after filing charge-sheet. The trial had commenced, evidence of first informant (mother of victim, victim, father of victim and the medical officer) was recorded. The victim had not supported prosecution.

9. The prosecution preferred an application under Section 311 of Cr.P.C. for examination of medical officers who collected samples of victim, accused and aborted fetus, D. S. Sinha Assistant Director RFSL, Pune, Chairman and Members of CWC who recorded statements of victim. The learned Special Judge however, observed that, the complainant has not mentioned the name of accused/respondent in complaint. Name of some other person was mentioned in the FIR as victims friend. The victim had not consented for her medical examination. The victim has deposed that, she was having physical relationship with Sahil Shirgaonkar. She also deposed that, she did not state the name of anybody to police on inquiry with whom she had physical relation. Before CWC she has stated name of Sahil Shrigaonkar. She had not stated name of accused to anybody. Prosecution has examined. Dr. Vanita Kangule. She stated that, panchas was not illegible. Samples were not taken in presence of panchas. In view of evidence of witnesses,

the witnesses whose names are mentioned in Exhibit-48 are not essential for just decision of the case. It is pertinent to note that, the victim had revealed the name of respondent/accused in her statement under Section 161 of Cr.P.C., Section 164 of Cr.P.C., and statement before CWC. The DNA report opines that, the respondent/accused is biological father of fetus. The DNA report was received after filing of charge-sheet. The Investigating Officer had informed that, DNA sample of accused is collected by Dr. Shashank Dhere. Dr. V. M. Kumre collected sample of accused for DNA. The Investigation Officer produced some documents i.e. attested copy of identification form of victim girl, which was prepared while collecting blood samples of victim for DNA purpose, attested copy of identification form of accused which was prepared at the time of collecting blood sample for DNA, attested copy of form of report of fetus of victim girl which was prepared for DNA and statement of Dr. Vinod Sangavikar recorded on 17th May, 2019 statement of Dr. Sangavikar was submitted in Special Case No.7 of 2019. Mr. D. S. Sinha is Assistant Director Regional Forensic Laboratory. He is a author of DNA report. The said report is on record. Mr. D. S. Sinha is expert witness, it is necessary to record his statement. The report, documents, certificates were prepared by the experts. The members of CWC and the Medical Officer who

collected samples for DNA are very material witness for the just decision of the case.

10. Section 311 of Cr.P.C. empowers the Court to summon any person as a witness or examine any person in attendance though not summoned as witness or recall and reexamine already examined witness. The Court shall summon and examine or recall or reexamine any such person if, his evidence appears to be essential for the just decision of the case.

11. In the case of Mannan Shaikh and others Vs. State of West Bengal and Another (Supra), it was observed that, the aim of every Court is to discover truth. Section 311 of the code is one of many such provisions of the code, to strengthen arms of Court in its efforts to find out truth by procedure sanctioned by law. The words “essential to the just decision of the case” are the key words. The Court must form an opinion that, for the just decision of the case recall or reexamination of the witness is necessary. Whether recall of a witness is for filling-up of lacuna or it is for just decision of a case depends on the facts and circumstance of each case. In the case of Sanjay Vasant Kadam Vs. State of Maharashtra (Supra), this Court has observed that, Section 311 of Cr.P.C., neither mandates recording of the statement under Section 161 of Cr.P.C., nor this Section provide any embargo on summoning any person as a

witness, whose statement has not been recorded under Section 161 of Cr.P.C. The only mandate of Section 311 of Cr.P.C., is that, the evidence of such person is essential for the just decision of the case. Combine reading of Section 161(1) and (3), 254 and 311 of Cr.P.C., leaves no doubt that, the prosecution is not precluded from calling any witnesses at the inquiry or trial who has not been examined by the police orally or whose statement has not been reduced into writing under Section 161(3) of Cr.P.C. The prosecution can neither be confined to evidence only of those persons whose statement had been reduced into writing under Section 161(3) nor can the recording of such statement be a pre-condition for examining any person as a witness under Section 311 of Cr.P.C.

12. The offence in the present case is of serious nature. The victim was subjected to sexual intercourse. She had conceived. The DNA report was received after filing of charge-sheet. DNA report supports the prosecution case. All the witnesses sought to be examined by the prosecution are material witnesses and their examination is essential to the just decision of the case. Hence the impugned Order deserves to be set aside.

13. Hence, I pass the following Order.

ORDER

- i. Criminal Writ Petition No.1793 of 2022 is

allowed and disposed off.

ii. The impugned order dated 3rd December, 2020 passed by Special Court, Ratnagiri, below Exhibit-48 in Special Case No.7 of 2019 is set aside.

iii. Application preferred by the Petitioners vide Exhibit-48 is allowed and the Petitioners are permitted to examine the witnesses named in the said application vide powers under Section 311 of Cr.P.C.

iv. The trial Court shall proceed with the case by permitting the Petitioner/State of Maharashtra to examine witnesses referred in Exhibit-48 by issuing summons to them.

(PRAKASH D. NAIK, J.)