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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 5214 OF 2021

The State of Maharashtra	...Petitioner
Versus	
Somnath Nandu Nikam and Ors.	...Respondents

Mrs. P.P.Shinde, APP for the Respondent-State.

Mr. Nitin Gaware Patil a/w Mr. Narayan G. Rokade for the Respondent Nos.1 to 3.

CORAM : REVATI MOHITE DERE, J.
DATE : 25th MARCH, 2022

P.C. :

1 Heard learned counsel for the parties.

2 Rule. Rule is made returnable forthwith, with the consent of the parties and is taken up for final disposal. Mr. Nitin Patil waives notice for the respondents.

3 By this petition, the petitioner-State of Maharashtra, has impugned the order dated 22nd February 2021 passed by the learned Additional Sessions Judge-1, Niphad, Nashik, by which the learned Judge rejected the petitioner's application (Exhibit 84) filed under Section 311 of

the Code of Criminal Procedure (`Cr.P.C.`) seeking issuance of witness summons to the Medical Officer-Dr. Gaikwad, who had examined the prosecutrix, for the purpose of recording his evidence.

4 Perused the papers. The respondents-accused were arrested in connection with C.R. No. 47/2016 registered with the Lasalgaon Police Station, Taluka Niphad, District Nashik, for the alleged offences punishable under Sections 376, 366, 366(A) read with 34 of the Indian Penal Code (`IPC`) and Section 4 of the Protection of Children from Sexual Offences Act (`POCSO`). It is the prosecution case, that after doing agricultural work, the first informant (father of the prosecutrix) returned home; that his daughters (including the prosecutrix) had prepared a meal at about 7:00 p.m, after which, they had dinner at 8:00 p.m. According to the first informant, the prosecutrix aged 14 years, disclosed to her mother that she was going to the toilet. As the victim girl did not return for quite sometime, the first informant alongwith his wife went in search of the victim girl, however, she was not found. It is the prosecution case that the first informant's neighbour i.e. accused No. 1 was also missing at the same time, pursuant to which, an FIR was lodged as against the respondents-accused. The victim girl was traced by the police on 15th April 2016. Thereafter, the

accused were arrested. After investigation, charge-sheet was filed as against the respondents-accused. Thereafter, the case was transferred to the Sessions Court, Niphad, for trial. On 5th July 2018, charge was framed as against the respondents-accused for the offences punishable under Sections 376(2)(i), 363, 366-A r/w 34 of the IPC and under Section 3 r/w 4 of the POCSO Act, to which they pleaded not guilty and claimed to be tried. On 2nd August 2019, the prosecution preferred an application and sought issuance of witness summons to about 11 witnesses.

5 In the present application, we are concerned with witness at serial No. 9, the Medical Officer, Civil Hospital, Nashik, MLC No. 4156/2016 (no name of the doctor was mentioned in the list). A perusal of the said list shows that names of all the witnesses were given, except that of the Medical Officer. It is a matter of record, that the prosecutor filed an application dated 4th March 2020 for issuing witness summons to the Medical Officer, Civil Hospital, MLC No. 4156/2016. The said application was allowed by the learned Judge vide order dated 4th March 2020. The said order is at page 31 of the application. It appears that thereafter, the prosecutor made inquiries with the Police Station Officer ('PSO'), regarding the name of the Medical Officer who had examined the victim,

pursuant to which, the PSO informed the prosecutor that the name of the Medical Officer was, Dr. Gaikwad. Pursuant thereto, the learned Assistant Public Prosecutor again filed an application on 19th March 2020, praying therein, that witness summons be issued to Dr. Gaikwad, who had conducted the medical examination of the prosecutrix. The Assistant Public Prosecutor, appearing in the trial Court disclosed that the name of the doctor was not mentioned in the charge-sheet, and that only after the PSI had gathered necessary information, the name of the Medical Officer had came to light. The learned Sessions Judge allowed the said application vide order dated 9th March 2020, after observing that the name of the Medical Officer was revealed today and as a last chance, opportunity is given to the prosecution to examine the said witness. Accordingly, the learned Sessions Judge issued witness summons to the Medical Officer of the Civil Hospital, Nashik i.e. Mr. Gaikwad and fixed the case on 23rd March 2020 for recording his evidence, with a direction to the prosecution, that if the witness fails to appear on the said date, the evidence of the prosecution shall be closed and the statement of the accused will be proceeded with, under Section 313 of the Cr.P.C.

6 Today, learned A.P.P has tendered a copy of the Roznama,

which shows that the matter could not be taken up on 23rd March 2020, having regard to the SOPs issued by the High Court. She submits that in view of the SOPs, the matter was again adjourned. The Roznama does not reveal whether *purshis* was filed by the prosecution or not.

7 Be that as it may, the learned Judge proceeded to record the 313 statement of the accused on 12th January 2021 and 22nd February 2021. Thereafter, the matter was posted for arguments, when again, an application (Exhibit-84) was preferred by the prosecution under Section 311 Cr.P.C for re-issuing summons to Dr. Gaikwad, Medical Officer of Civil Hospital, Nashik and for issuing show-cause notice to the concerned PSO of the Police Station for not serving the summons previously to the Medical Officer. The learned Judge rejected the said application, after observing that the case was fixed for final arguments and despite opportunities being given to the prosecution, the said Medical Officer was not kept present by the prosecution, as summons were not served on the said witness. It was observed that there was a lapse on the part of the Investigating Officer, who had conducted investigation in a serious offence, like rape on a minor girl. It was further observed that after the lock-down i.e. when physical functioning of the Court started, the statement of the accused was recorded,

however, the prosecution had not bothered to examine the Medical Officer.

8 Ms. Shinde, learned A.P.P appearing for the petitioner-State submitted that the examination of the Medical Officer is essential for a just decision of the case. She submits that the prosecutrix was only 14 years of age and that since the victim girl was examined by the Medical Officer, it was incumbent to examine the said witness, his evidence being crucial in the said case, of sexual assault. Learned A.P.P relied on the judgment of the Apex Court in ***Rajendra Prasad vs Narcotic Cell***¹.

9 Learned counsel for the respondents-accused opposed the application. He submitted that no interference was warranted in the impugned order and that the learned Judge had rightly exercised his discretion and rejected the prosecution's application seeking examination of the Medical Officer. He further submitted that the application (Exhibit 84) was filed belatedly and that despite giving several opportunities to the prosecution, the prosecution had failed to keep the Medical Officer present. He submits that when the matter was posted for arguments, the prosecution filed the said application (Exhibit 84) seeking issuance of witness summons

1 (1999) 6 SCC 110

to the Medical Officer-Dr. Gaikwad.

10 Learned APP appearing for the petitioner-State relied on the judgments in the case of **V.N.Patil v/s. K. Niranjan Kumar and Others**² and **Rajendra Prasad V/s. Narcotic Cell Through its officer in charge, Delhi**³; whereas, the learned Counsel for the respondents relied on the judgments in the case of **Rajaram Prasad Yadav V/s. State of Bihar & Anr.**⁴, **Nayna Rajan Guhagarkar V/s. State of Maharashtra**⁵ and **Shankar Lotlikar V/s. Pundalik Venktesh Verlekar**⁶.

11 It is pertinent to note that the respondents/accused are facing serious charges for the offences punishable under Sections 376, 366, 366(A) r/w 34 of the Indian Penal Code and under Section 4 of the POCSO Act. The prosecutrix, at the time of the incident was of tender age i.e. 14 years. Generally, in cases of sexual assault, medical evidence assumes important, when available and as such, it was incumbent on the prosecution to examine the Medical Officer, when there was medical evidence available on record, to show sexual assault on the victim. Infact, if the prosecution fails to examine the Medical Officer, the learned Judge dealing with such

2 Appeal No.267-2021 dated 4th March, 2021

3 (1999) 6 Supreme Court Cases 110

4 2013 DGLS(SC) 511

5 2021 DGLS (Bom.) 846

6 2020 DGLS (Bom.) 336

cases, can always examine the Medical Officer, as a Court witness. The present case is not one where the Medical Officer has not been cited as a witness nor is it a case where Medical evidence is not available. It is a case where only the name of the medical officer was not mentioned in the list of witnesses and hence, when the summons were issued, the same could not be served. The prosecution not once, but on two occasions had filed an application seeking issuance of witness summons to the Medical Officer, one to the Medical Officer, Civil Hospital, Nashik and then when the name was made available, to Dr. Gaikwad, the then Medical Officer, Nashik Civil Hospital. No doubt, the trial Court had passed an order on 19th March, 2020 allowing the said application, by way of last chance, to examine the said witness, however, what cannot be lost sight of is, that on the day the witness was to remain present i.e. on 23rd March, 2020, the High Court had issued SOP's with respect to trials and the same is reflected in the roznama, and as such, the trial could not proceed on the said date. Atleast, in the roznama, there is nothing to show that the prosecution has filed a closure pursis.

12 It appears that when the regular Court functioning commenced, the 313 statement of the respondents / accused were recorded by the Court,

on 12th January, 2021 and 22nd January, 2021. When the matter was posted for arguments, the prosecution again filed an application (Exhibit-84) and sought issuance of summons to the Medical Officer – Dr. Gaikwad for recording his evidence. A perusal of the medical report shows that there are certain findings recorded by the Medical Officer as observed by him during the victim's examination i.e. there was swelling, tenderness and bruises on the private part of the victim and that her hymen was also torn. When there is material to that effect, the learned Judge ought to have allowed the said application and issued witness summons to the Medical Officer. The learned Judge cannot be a mute spectator. Infact, the learned Judge ought to have, on his own volition, summoned the Doctor, in the peculiar facts.

13 There is no dispute with respect to the legal position, that an application under Section 311 of the Cr.P.C. can be filed at any stage of the proceedings. Infact, the Hon'ble Supreme Court in the case of **Rajendra Prasad V/s. Narcotic Cell** has observed as under:

“12. We cannot therefore accept the contention of the appellant as a legal proposition that the court cannot exercise power of resummoning any witness if once that power was exercised, nor can the power be whittled down merely on the ground that the prosecution discovered laches only when the defence highlighted them during final arguments. The power of the court is plenary to summon or even recall any witness at

any stage of the case if the court considers it necessary for a just decision. The steps which the trial Court permitted in this case for resummoning certain witnesses cannot therefore be spurned down or frowned at.”

14 In the facts of this case, it cannot be said that by filing the said application, the prosecution would be filling up the lacunae in the case. It is the duty of the prosecution to bring on record all such material to prove its case as against the accused. Needless to state that the examination of the Medical Officer, in the facts, is essential for the just decision of the case.

15 Accordingly, the petition is allowed and the impugned order dated 22nd February, 2021 passed by the Additional Sessions Judge – 1, Niphad in Sessions Case No. 48 of 2016 is quashed and set aside.

16 The learned Judge to issue witness summons to the Medical Officer Dr. Gaikwad. Needless to state that the respondent/accused will be at liberty to cross-examine the said witness.

17 Rule is made absolute on the aforesaid terms and is accordingly disposed of.

18 All concerned to act on the authenticated copy of this order.

REVATI MOHITE DERE, J.