

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

CRIMINAL WRIT PETITION NO.3411 OF 2022

Vajinath Mallinath Kiwade ...Petitioner
V/s.
The State of Maharashtra & Anr. ...Respondents

Mr. Paras Yadav a/w Mr. Prasad P. Kulkarni for Petitioner.
Mr. A. R. Patil, APP for Respondent No.1 (State).

CORAM : AMIT BORKAR, J.
DATE : DECEMBER 01, 2022

P.C.:

1. The petitioner is challenging order dated 28th June 2022, passed below Exhibit-44 by the learned Additional Sessions Judge, Pune in Special Sessions Case No.308 of 2017. The Application for recall of witness was allowed.

2. The petitioner is an original accused in proceedings under Section 354(B) of Indian Penal Code, 1860 and 7, 8, 11(ii) and Section 12 of Protection of Children from Sexual Offences Act, 2012 (for short "POCSO Act").

3. On 17th November 2018, charges were framed against the petitioner, and thereafter, prosecution examined six (6) witnesses.

4. On 21st February 2022, statement of the petitioner under Section 313 of Code of Criminal Procedure, 1973 was recorded and the matter was fixed for final hearing.

5. On 28th February 2022, both parties to the proceedings filed evidence close pursis and the learned Special Sessions Judge heard final arguments. The accused filed written submissions in support of oral arguments.

6. The prosecution thereafter on 27th April 2022 filed an Application under Section 311 to recall witness as Rajesh Shinde & Devram Anand Doiphode. The learned Sessions Judge by the impugned order allowed the Application holding that the evidence is essential for just decision of the case.

7. Learned advocate appearing for the petitioner submitted that the final arguments have been advanced by the accused, therefore legal prejudice would be caused to the accused if Application under Section 311 of Code of Criminal Procedure, 1973 is allowed. He submitted that the Application below Exhibit-44 has been filed to fill up lacuna in the case of the prosecution.

8. Per contra, learned APP for the prosecution submitted that the impugned order does not suffer from perversity as the accused is not only disputing the existence/identity of the victim but is also disputing the age of the victim. The prosecution by way of recall of witnesses want to bring on record birth certificate to prove the age of the victim and to clarify the relationship of the witness with the victim.

9. Having heard both sides, in my opinion, oversight or mistake during conducting of case cannot be understood as lacuna and it can be corrected by the prosecution at any stage. Lacuna is inherent weakness or a latent wedge in the matrix of the prosecution case. The expression lacuna in the context of Section 311 of Code of Criminal Procedure, 1973 has been interpreted by the Apex Court in the instructive decision in **Rajendra Prasad Vs. Narcotic Cell**, reported in (1999 SCC (Cri.) 1062), wherein the Apex Court in paragraph nos.7 and 8 has held as under:

“7. It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act, 1872 by saying that the Court could not “fill the lacuna in the prosecution case”. A lacuna in the prosecution is not to be equated with the fallout of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage “to err is human” is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such lapses or mistakes during the conducting of a case cannot be understood as a lacuna which a court cannot fill up.

8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal Court is administration

of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.”

10. In relatively recent Judgment, the Apex Court in the case of **Rajaram Prasad Yadav Vs. State of Bihar**, reported in ((2013) 14 SCC 461) in paragraph no.17 laid down the principles to be borne in mind by the Court while considering Application under Section 311 of Code of Criminal Procedure, 1973. The Apex Court in paragraph no.17 has held as under:

“17. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

17.1. Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?

17.2. The exercise of the widest discretionary power under Section 311 Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

17.3. If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.

17.4. The exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

17.5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious

prejudice to the accused, resulting in miscarriage of justice.

17.6. The wide discretionary power should be exercised judiciously and not arbitrarily.

17.7. The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

17.8. The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

17.9. The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

17.10. Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.

17.11. The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

17.12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

17.13. The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

17.14. The power under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.”

11. In the facts of the case, the case of the prosecution is that the victim on the date of offence was 1½ year old and, therefore, in the context of the facts of the case, the findings recorded by the Special Court cannot be termed as perverse. The finding that the examination of witnesses under Section 311 of Code of Criminal Procedure, 1973 is necessary for just decision of the case is based on judicious exercise of discretion by the learned Special Judge. The said finding cannot be termed as perverse nor there is miscarriage of justice, therefore, interference in the extraordinary constitutional jurisdiction is not called for.

12. Writ Petition is therefore disposed of. No costs.

(AMIT BORKAR, J.)