

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

CRIMINAL APPLICATION NO. 1341 OF 2021

Ashutosh Anil Vhawale ...Applicant
Versus
The State Of Maharashtra And Anr. ...Respondents

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Mr. Shailesh Kharat, Advocate for the Applicant.

Mr. Ajinkya Udane, Advocate for Respondent No.2.

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

Mr. Vijay M. Nikam, (API) Malbar Hill Police Station, Present.

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CORAM : PRAKASH D. NAIK, J.
DATE : 10th AUGUST, 2022.

PER COURT:

1. The applicant is prosecuted for the offences punishable under Sections 354, 354-D, 509 of Indian Penal Code (for short “IPC”) and Sections 12 & 18 of the Protection of Children from Sexual Offences Act, 2012 (for short ‘POCSO Act’). The First Information Report (for short ‘FIR’) was registered on 24th March, 2018. The applicant was arrested. On completing investigation, charge-sheet was filed.

2. The trial had commenced. The prosecution examined PW-1 (victim) on 7th August, 2019. The evidence of the said witness was completed. Thereafter, PW-2 was examined on 2nd November, 2019.

After completing her examination-in-chief, further cross examination of said witness was kept in abeyance. PW-3 was examined on 3rd March, 2020. On completing the evidence of PW-3, the cross examination of PW-2 was conducted on 11th March, 2022.

3. The applicant had preferred an application for recalling PW-1 and PW-3. The said application was allowed by the Court and PW-1 was recalled. However, the prayer for recalling PW-3 was kept in abeyance. It appears that the Advocate for the applicant was absent and hence the Court proceeded to pass no cross order. Thereafter, the application under Section 311 of Cr.P.C. was preferred by the applicant which has been rejected vide order dated 16th November, 2021.

4. Learned Advocate for the applicant submitted that the order dated 16th November, 2021 is erroneous. The applicant is facing serious charge. There are presumptions under the POCSO Act. The applicant is required to rebut the presumption. In the event, PW-1 and PW-3 are not recalled, grave prejudice would be caused to the defence of the applicant. At the earlier point of time, the trial Court had allowed the application and recalled PW-1 (victim).

5. Learned APP and learned Advocate for respondent No.2

submitted that the impugned application was preferred belatedly. Although, sufficient opportunity was given to the applicant, he did not avail the facility of cross examination of PW-1. The application was vague. The victim cannot be compelled to attend the Court proceedings repeatedly. It would be against the object and scope of provision of the POCSO Act. There is no reason to recall PW-1 or PW-3. Learned APP submitted that PW-1 is presently at Surat.

6. It is pertinent to note that, the applicant is facing the charge under Sections 354, 354-D, 509 of IPC and Sections 12 & 18 of the POCSO Act. The contention of the applicant is that, while cross examining PW-1, he was not allowed to confront the victim with the statement under Section 164 of Cr.P.C. and thereafter, the Court proceeded to record the evidence of PW-2 and pending the cross examination of PW-2, the evidence of PW-3 was recorded. Certain aspects which were deposed by PW-2, who was examined subsequent to the evidence of PW-3 are required to be put to PW-3. In these circumstances, it is necessary to recall PW-1 as well as PW-3. It is relevant to note that, at the earlier point of time, the application for recalling PW-1 was allowed. It is only because the Advocate the applicant was not present on the date of hearing before the trial Court, the Court proceeded to pass order of closing

the evidence. Considering the factual aspects of this matter and in the interest of justice this application is required to be allowed.

ORDER

- i. Criminal Application No. 1341 of 2021 is allowed and disposed of;
- ii. Impugned order dated 16th November, 2021 is set aside. PW-1 & PW-3 are recalled.
- iii. The Special Court under the POCSO Act, is requested to allow the recalling of these witnesses and the advocate for the applicant be permitted to cross examine PW-1 and PW-3.
- iv. The recording of evidence be completed as far as possible within a period of two weeks.
- v. It is made clear that, when PW-1 or PW-3 are available for recording cross examination before the trial Court, the trial Court, the Advocate for applicant shall proceed with the cross examination without further delay.
- vi. The applicant shall pay cost of Rs.2000/- to the Tata Memorial Centre, Mumbai within two weeks and the receipt of the payment of cost be produced before the trial Court.

Bank Account No. : 1002449683.
 City : Mumbai
 Bank Name : Central Bank of India
 Branch : TMH
 Bank IFSC Code : CBIN0284241.
 Account type : Current

(PRAKASH D. NAIK, J.)