

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

CRIMINAL APPLICATION (APL) NO. 736/2022

Shubham @ Pavan s/o Gautam Waghmare,
Aged – 30, Occupation – Labour,
R/o Rana Jin, Near Buldana Urban,
Taluka – Dhamangaon Railway, District-
Amravati.

.... **APPLICANT**

VERSUS

- 1) State of Maharashtra,
through Police Station Officer,
Police Station, Akot Fail, Akola.
- 2) XYZ, through its complainant,
In Crime No.316/16, Police
Station, Akot Fail Taluka, District
Akola.

.... **NON-APPLICANTS**

Shri A.S. Londhe, Counsel for the applicant,
Shri H.D. Dubey, Addl.PP. for non-applicant No.1,
None for non-applicant No.2.

CORAM : VINAY JOSHI, J.
DATED : 13th JUNE, 2022

ORAL JUDGMENT :

Heard.

2. **Admit.**

3. Heard finally by consent of both parties.
4. The applicant-accused, who is facing trial under the provisions of the Protection of Children from Sexual Offences Act (POCSO Act), challenges the order of rejection to recall of the victim.
5. The learned Counsel for the applicant has submitted that while the applicant-accused was in Jail, without instructions his Counsel has conducted the cross-examination. Having regard to said fact, the applicant, on his release on bail, gave proper instructions to his Counsel and then application Exhibit 64 was moved for recall of victim for further cross-examination. It reveals that the learned Special Judge has rejected the application to recall the witness primely stating that Section 33(5) of the POCSO Act precludes the Court from repeatedly calling child witness to testify before Court. The learned Additional Public Prosecution has justified the impugned order by contending that victim is already cross-examined, hence there is no propriety in recalling the child witness.
6. It reveals from the record that child witness-victim, aged about 14 years, was examined by the Special Court on 13-11-2021. The victim has stated about sexual assault at the hands of accused. The

victim's cross-examination consists of only two lines. On material aspect only single denial was recorded. It is apparent that the victim was not thoroughly cross-examined to find out the truth.

7. The learned Special Judge, while rejecting the application, expressed that Section 33(5) of the POCSO Act precludes from recalling the child witness. Moreover, it is contended that there is possibility of tampering the prosecution evidence and, therefore, prayer for recall was rejected. Undoubtedly, the cross-examination was not conducted on factual aspect. Only a single suggestion in the form of denial was given. Section 311 of the Code of Criminal Procedure empowers to recall a witness if it appears that evidence of said witness is essential to the just decision of the case. The fate of criminal trial in such kind would largely depends upon the worth of the evidence of victim only. Though Section 33(5) of the POCSO Act puts embargo to repeatedly call child witness to testify in the Court, however, it does not mean that the Court lacks power to recall the witness in terms of Section 311 of the Code of Criminal Procedure. Section 33 of the POCSO Act provides a procedure and powers of the Special Courts. It has been cautioned in general form that victim should not be repeatedly called to testify the witness. The very purpose behind sub-clause (5) of the POCSO Act is that the Special Court shall record the evidence of child witness on the

very day and not require child witness to repeatedly attend the Court.

8. Section 311 of the Code of Criminal Procedure is a special power invested with criminal Courts to recall the witness when his evidence is essential for the just decision of trial. Thus the reason recorded by the Special Court does not appear to be sound. In criminal trial the accused must get every opportunity to put up his defence. Virtually, there is no cross-examination to the victim as only two suggestions have been given. Having regard to peculiar facts of this case, it is desirable to allow the defence to cross-examine the victim as it would be of great assistance to the Court to arrive at right conclusion.

9. The impugned order dated 21-3-2022 regarding rejection of recall to the extent of victim is hereby quashed. The application Exhibit 64 stands allowed to the extent of recall of victim. The accused shall cross-examine the victim on the very day without seeking adjournment. If the accused fails to cross-examine the victim on the date of her appearance, no further adjournment or chance shall be given.

10. The application stands disposed of in above terms.

JUDGE

adgokar

Digitally signed by PRAFULLA
MANOHARRAO ADGOKAR
Signing Date: 15.06.2022 15:16