

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO. 398 OF 2023

Rajkumar Satish Rikhre	.. Applicant
Versus	
The State of Maharashtra	.. Respondent

...

Mr. Arif M. Hussain for the applicant.
Mr.S.R.Agarkar, APP for the State.

CORAM: BHARATI DANGRE, J.
DATED : 26th APRIL 2023

P.C:-

1 Heard learned counsel for the applicant and the learned APP. Perused the application as well as the impugned order.

2 The applicant is aggrieved by order dated 21/3/2023 passed by the Metropolitan Magistrate, 68th Court, Borivali Mumbai, thereby rejecting the application (Exhibit-30) moved by the applicant/accused u/s.311 of the Cr.P.C, for recalling PW No.1 (victim) and PW 3 (Investigating Officer).

The FIR came to be registered against the accused by invoking Section 354 of IPC and charge came to be framed

against him on 24/7/2018. The prosecution examined PW 1, eye witness – PW 2 and Investigating Officer and closed it's case.

Thereafter, the accused cited a witness (DW 1) whose evidence was recorded on 8/3/2023, and after some point of time, he also sought examination of another defence witness and the Court magnanimously allowed examination of DW 2, though it declined another witness to be examined on behalf of the accused.

3 The Application for recalling was filed on the ground that the Medical Officer has been permitted to be examined as defence witness and he brought on record certain relevant facts, which need to be confronted with PW 1 and PW 3.

The application specifically stated that PW 1 had improved her version in describing the molestation as mentioned by her in the FIR, where she has not mentioned certain relevant aspects and therefore, she should be recalled along with the Investigating Officer.

4 The Application specifically pleaded as under:-

“The prayer was recalling is made only for the purpose of setting correct the contradictions in the legal manner”

4 It is settled principle of criminal jurisprudence that if the prosecution fails to prove it's case, by cogent and reliable evidence, the benefit must go to the accused. After the prosecutrix was examined and permitted to be cross-examined, if certain omissions and contradictions have appeared on record,

then, at the time of appreciation of evidence, the benefit can be derived by accused himself, but definitely, this lacunae cannot be permitted to be filled in, by recalling the witnesses of the prosecution.

5 It is settled position of law that power conferred u/s.311 of the Cr.P.C, is permitted to be invoked by the Court to meet the ends of justice and by now, it is settled position of law that exercise is justified only for strong and valid reasons and rather the power has to be exercised with great circumspection, since it should not result in abuse of the process of law.

6 The learned Judge, in the impugned order, has specifically recorded that the incident is more than 12 years old and therefore, recalling the witness of the prosecution which, apart from the fact that there would be a delay, would also have an adverse impact upon the victim, who would be required to re-live and re-narrate the incident, which had taken place 12 years back.

The discretion exercised by the learned Judge is guided by germane factors, and since it is the settled position of law that the witnesses cannot be recalled, merely because a new Advocate who has come on record, feel that the cross-examination has not come out, upto his satisfaction, I find no illegality in the impugned order.

7 Resultantly, by upholding the impugned order, the Revision Application is dismissed.

Before I part, I would like to specifically direct the learned Judge to expeditiously conclude the Case No.2964/PW/2011, which is pending before him for more than a decade. Every attempt should be made to dispose of the said proceedings within a period of three months from today.

(SMT. BHARATI DANGRE, J.)