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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL REVISION APPLICATION NO.313 OF 2022

The State of Maharashtra] .. Applicant
vs.
Mansur Abdul Samad Khan] .. Respondent

Mr.S.R. Agarkar, APP for the State a/w Sureeta Singh.
Ms.M.J. Reena Rolland, for Respondent.
HC Uttam Agre, Kalachowky Police Station present.

CORAM : BHARATI DANGRE, J

DATE : 6th November, 2023.

P.C.

1] The Criminal Revision Application is filed by the State of Maharashtra, being aggrieved by the interim order dated 09.03.2022, passed by the Additional Sessions Judge, City Civil & Sessions Court, Mumbai, in Special POCSO Case No.575/2018, thereby allowing the Application filed by the accused under Section 311 of the Criminal Procedure Code and thereby directing, recall of Prosecution Witness Nos.1 to 3, 5, 8, and 9 for cross-examination, on the point of bringing on record, contradictions and omissions or improvements in their evidence.

2] I have heard the learned APP Mr. S.R. Agarkar alongwith Ms.Sureeta Singh, the learned Prosecutor for the Applicant-State, and the learned counsel for the Respondent, Ms.M.J. Reena Rolland.

In POCSO Special Case No.575/2018, the accused is facing charge under Section 376(A)(B), 2(i) of the Indian Penal Code and under Section 4, 7, 8 and 10 of the The Protection of Children from Sexual Offences Act, 2012.

The complaint was filed on 12.10.2018 by the mother of the victim girl, aged 4 years, alleging that the victim was sexually abused by the Appellant.

3] On recording evidence of the prosecution witnesses, pursis was filed closing the evidence and defence in the matter and even the arguments of the learned APP was concluded on 20.02.2022. The defence lawyer also partly argued the matter on 02.03.2022 and it was kept for filing of written arguments.

At this stage, an Application is moved by the Advocate for the Accused seeking recall of witnesses and the grounds raised in the Application which reads thus :

“1. *The accused filed instant application u/sec. 311 of Cr.P.C. for recalling and summoning of witnesses.*

2. *It is submitted on behalf of accused that on 28.02.2022, argument of prosecution is completed and on 02.03.2022 part of the defence argument is heard. During the course of oral argument it transpired to the advocate appearing for accused that relevant material i.e. contradiction, omissions and improvements made by the prosecution witnesses are not brought on record during the course of cross examination of the witnesses. Fair trial is the right of accused and it cannot be denied due to lapse or inadvertence of someone else to ensure fair trial. Recalling prosecution witness no.1 to 5, 8 and 9 is necessary. Section 311 Cr.P.C. gives ample power to the Court to summon or to recall and re-exam any person who has already examined if, his evidence appears to be essential to arrive at the just decision of the case.”*

4] The submission was advanced, that recall of the above witnesses and re-examining them is necessary, to ensure fair trial to the accused as Section 311 empowers the Court to summon material witnesses or to examine a person present at “any stage, of “any enquiry or trial”, or “any other proceedings under the Cr.P.C.”.

By the impugned order, the learned Special Judge allowed the said Application by recording that the Advocate for the Accused had failed to point out the contradictions, omissions or improvements to the prosecution witnesses and seek their explanation and for a fair trial to the accused, this opportunity is necessary.

Though the learned Judge noted the submission advanced on behalf of prosecution that the trial has reached at its end, and the witnesses are examined long back, but in an attempt to strike a balance between hardship caused to both sides and to ensure fair trial, Section 311 was invoked and subject to payment of costs of Rs.500/- to legal aid fund, PW 1 to 3, 5, 8, 9 were directed to be recalled.

5] When the Revision Application was listed before me, taking note of the fact that the witnesses are not examined, by order dated 16.03.2023 it was directed that the impugned order shall not be given effect to, till the next date of hearing.

6] The position of law as regards Section 311 of the Cr.P.C is, by now well settled.

Section 311 of the Cr.P.C. empowers the Court to summon a material witness, or to examine a person present at, "at any stage", of "any enquiry", or "trial" or "any other proceeding", under the Code or to summon any person as a witness or to recall and re-examine any person, who has already been examined, if his evidence appears to be essential to the arrival of just decision of the case.

Undoubtedly, while the discretionary power is vested upon the court, but it is well settled that such discretion shall be exercised

judiciously and not arbitrarily. The power vested in the court is wide and even the Court has been held to exercise the powers suo motu even if no such application is filed by either of the parties. However, the power shall be exercised only when the Court is satisfied, that it is essential to examine such a witness or to recall him for further examination, for doing justice to the parties..

7] In *Mir Mohd. Omar and others vs. State of West Bengal*, (1989) 4 SCC 436, it is held that once the accused has been examined under Section 313 of the Code, in the event that the liberty is given to the prosecution to recall a witness, the same will amount to filling up lacuna existing in the case of prosecution.

In *Mohanlal Shamji Soni vs. Union of India & Anr.* 1991 Supp (1) SCC 271, the Apex Court has observed as under :-

“It is a trite position of law and as reflected in T. Nagappa s. Y.R. Murlidhar, AIR 2008 SC 2010, the court has recorded as under :-

“What should be the nature of evidence is not a matter which should be left only to the discretion of the court. It is the accused who knows how to prove his defence. It is true that the court being the master of the proceedings must determine as to whether the application filed by the accused in terms of sub-section (2) of Section 243 of the Code is bona fide or not or whether thereby he intends to bring on record a relevant material. But ordinarily an accused should be allowed to approach the court for obtaining its assistance with regard to summoning of witnesses, etc. If permitted to do so, steps therefor, however, must be taken within a limited time. There cannot be any doubt whatsoever that the accused

should not be allowed to unnecessarily protract the trial or summon witnesses whose evidence would not be at all relevant.”

8] Application under Section 311 Cr.P.C. , thus, shall not be entertained only to fill up the lacuna in the prosecution, or of the defence, or to the disadvantage of the accused or to cause serious prejudice to the defence or to give an unfair advantage to the opposing party.

Additional evidence which is sought to be received shall not be in form of disguise of re- trial or changing the case of the prosecution and merely because while cross-examining the prosecution witnesses, the counsel for the accused has failed to bring on record the contradictions/ omissions, which he was entitled to, shall definitely not be a ground for recalling the witnesses and though the stage at which the power can be exercised may not be very germane and its exercise may be justified even at the fag end of the trial, but if the object of the recalling of witnesses is merely to extract certain omissions or contradictions, which despite an opportunity of being availed, when the prosecution witnesses were cross-examined, as the advocate representing the accused failed to bring the same on record, definitely would not warrant exercise of power under Section 311 of the Code to fill up the lacunas.

9] The reliance by the learned counsel on the decision of Mohanlal

Shamji Soni (*supra*) where an observation is pertinently made that a lacuna in the prosecution is not to be equated with the fallout of an oversight committed by Public Prosecutor during trial, either in producing relevant material or in eliciting relevant answers from the witnesses. It is not applicable to the present case, as mistake in conduct of case definitely cannot be understood as leaving the lacuna which is not permitted to be filled up at a later point of time, just by change of a counsel.

The only purpose for which the application under Section 311 was filed to bring omissions and contradictions on record, which ought to have been done by the defence counsel when the witnesses were cross-examined. In such a case the effect of not extracting such contradictions and omissions, will have to be faced at the trial and the Judge before whom the evidence was recorded shall appreciate the same in that perspective.

10] In the wake of above, I find that the impugned order is unjustified, as power has been exercised by the learned Judge merely to bring on record the omissions and contradictions and in this case particularly when the victim is a young girl, recalling the said witnesses would make her relive the horrendous experience alongwith her family members once again and this should be surely discouraged.

As as a result, the impugned order dated 09.03.2022 is quashed and set aside. The learned Special Judge, shall complete the trial in expeditious manner by pronouncing the Judgment, as the trial for all purposes is over expect for the Judgment.

Criminal Revision Application is allowed in the aforesaid terms.

[BHARATI DANGRE, J]