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Shamshad Ahmed Shah	]	..	Petitioner
vs.			
State of Maharashtra	]	..	Respondent

Mr.S.R. Agarkar, APP for the State.

DATE : 9th October, 2023.

1] Heard learned counsel for the Petitioner, who is aggrieved by the refusal by the Sessions Judge, Thane for recalling the prosecution witness No.1(mother) and PW 2 (the victim) in Special POCSO Case No.245/2018, in exercise of the power available under Section 311 of the Cr.P.C.

1/4

moved for recalling of these two witnesses. Considering the scope of Section 311 of Cr.P.C. and its purport, which definitely is not a mechanism available to fill the lacuna in the case of the prosecution or the defence, the Special Judge POCSO Act, Thane has rightly rejected the Application on 04.07.2023.

3] It is trite position of law that though Section 311 grant a wide discretion by use of the word “power” in summoning any person or witness or examine any person in attendance though not summoned as a witness and recall and re-examine any person who has already been examined, the necessary rider is this power is to be exercised only when the evidence of such a witness on his recall appears to the Court to be essential to the “just decision of the case”.

4] The learned counsel, has rightly placed reliance upon the decision of the apex Court in cases of *Varsha Garg vs. State of Madhya Pradesh and Ors.* AIR 2022 SC 3707, which in turn has referred to an earlier decision of the Apex Court in case of *Mohanlal Shamji Soni vs. Union of India*, (1991) Supp.(1) SCC 271, where the scope of Section 311 has been discussed and the position which has been categorically set out and which has been consistently followed by the highest Courts of the country, is that though the power confer

discretion, it must be exercised judicially and not capriciously or arbitrarily, because any improper or capricious exercise of the power may lead to undesirable results. It has been held that due care should be taken by the Court while exercising the power conferred under Section 311 and it not be used for filling up the lacuna left by the prosecution or defence or to the disadvantage of the accused or to cause serious prejudice to the defence of the accused or to give unfair advantage to the rival side, as collection of this evidence would be projected as a disguise for retrial or to change the nature of the case.

The nature of the application which has been preferred, and particularly in the wake of the extensive cross-examination of the two witnesses, it contemplate to establish the false implication of the accused who according to the learned counsel was known to the witnesses. It was open for the lawyer representing the accused to cross-examine these two witnesses, to put specific question, but having avoided to do so, the only thing is that he intended such an admission to be brought on record about the victim and the mother knowing the accused person, I do not think that the victim deserve to be recalled in the witness box, particularly in the case where allegations are under POCSO Act, as recalling her to undergo the cross-examination would amount to nothing but asking her to repeat the narration about the incident in her examination in chief and relieve the dreadful act.

5] Since I do not find any legal infirmity in the interim order, which has rightly construed the provision and the power conferred under Section 311 and by a reasoned order, the learned Judge has specifically concluded that the re-examination of the witnesses is not essential to the just decision of the case for extracting an admission which the accused intend to have on record, upholding the impugned order, the Writ Petition is rejected.

[BHARATI DANGRE, J]