

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL REVISION APPLICATION NO.293 OF 2023

Munna Mithu Chauhan .. Applicant
Versus
The State of Maharashtra .. Respondent

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Mr.Pravin Naik for the Applicant.
Mr.S.R.Agarkar, A.P.P. for the State/Respondent.

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CORAM: BHARATI DANGRE, J.
DATED : 10th OCTOBER, 2023

P.C:-

1. The Applicant/Accused is facing trial in POCSO Special Case No.495 of 2019 and he came to be arrested by Sahar Police Station, on being accused of committing an offence under Section 376(2)(i) of the Indian Penal Code (for short, **“the IPC”**) read with Sections 4, 6, 8 and 10 of the Protection of Children from Sexual Offences Act, 2012 (for short, **“the POCSO Act”**). The trial was expedited by the High Court and it is informed that when it was at the fag end, on an application filed by the Public Prosecutor vide Exh.88 on 06/02/2023, the charge against the Accused was altered to 376-AB of the IPC.

2. The aforesaid event led to pursis being filed by the Advocate for the Accused on 27/02/2023, marked as Exh. 95,

seeking recall of the witnesses, so as to re-examine the witnesses and the pursis reads thus :-

- “1. That the charges have been altered in the aforementioned matter.
 2. That abovementioned Accused has accrued the right to recall witnesses to examine in his evidence.
 3. That the following in the list of witnesses which the Accused wants to examine in his evidence-
- (A) Bharat Singh (Brother-in-law of Munna Mithu Chauhan)
 - (B) Javin Valakath (Employer of Munna Mithu Chauhan)
 - (C) Bank Manager of Union Bank of India (Bank of Accused)
 - (D) Principal of Pragati School (School of Victim).”

Pertinent to note that at the time when charge was altered from Section 376(2)(i) to 376-AB, the case was at the stage of judgment.

The Accused had already examined his employer, brother-in-law and the Bank Managar as defence witnesses and they were also thoroughly cross-examined by the prosecution.

As far as the victim's birth certificate (Exh.17) is concerned, it was admitted on behalf of the Accused.

3. Considering the provision in form of Section 217 of the Criminal Procedure Code (for short, “**the Cr.P.C.**”) and accepting the fact that there was alteration in charge, the Special Judge formed an opinion that by recall of the defence witnesses, which are already examined, the Accused is attempting to bring additional material on record, but, since this course is not permissible, they cannot be allowed to be recalled. As far as the examination of the Principal of the

school is concerned, it was noted that since the birth certificate of the victim was already on record and was admitted, summoning of the said witness was also not necessary.

4. In calling in question the impugned order, the learned counsel has relied upon the decision of the Apex Court in the case of *R. Rachaiah Vs. Home Secretary, Bangalore*¹, wherein the purport of Section 217 of the Cr.P.C. has been analysed and it is held that the provisions of Sections 216 and 217 are mandatory in nature, as they not only sub-serve the requirement of principles of natural justice, but guarantee an important right given to the accused persons to defend themselves appropriately, by giving them full opportunity.

Worth it to note that the aforesaid observations were made by Their Lordships in the peculiar facts, when the charge framed under Section 306 of the IPC was altered to Section 302 and without affording an opportunity to the accused persons, conviction was awarded under Section 302.

5. Chapter XVII of the Cr.P.C., which contains a provision for “Charge”, by virtue of Section 216 permits the Court to alter or add any charge, at any time before judgment is pronounced, with a only rider that the accused must be offered an adequate opportunity to meet the same.

In connect with this, Section 217 provides that whenever the charge is altered or added, the Prosecutor and the accused

¹ Cri.Appeal No(s).2375 of 09 decided on 05/05/16

shall be allowed to recall or re-summon and examine with reference to such alteration or addition, any witness who may have been examined, unless the Court, for reasons to be recorded in writing, considers that the Prosecutor or the accused, as the case may be, desires to recall or re-examine such witness for the purpose of vexation or delay or for defeating the ends of justice. Any further witnesses is permitted to be recalled whom the Court may think to be material.

6. A careful reading of Section 217 and, in particular, clause (a) would make it clear that the liberty, which can be availed by the Prosecutor as well as the accused for recalling or re-summoning and examining the witness is limited to “with reference to such alteration or addition”. The provision in the said Section need not be construed as a blanket opportunity to the Prosecutor or the accused to recall or re-summon any witness and examine him, with an intention to fill up lacuna in his case. Sections 216 and 217 contemplate a mechanism, when the charge is added or altered and an opportunity is given to the accused and the Prosecutor to deal with such alteration or addition of charge. The use of the words, “with reference to such alteration or addition”, makes it amply clear that the recall or re-summon must be restricted to ‘alteration or addition’.

7. In the present case, it can be seen that there was alteration of charge from Section 376(2)(i) to Section 376-AB

and for the said purpose, an opportunity deserve to be given if the witnesses to be recalled or re-summoned, have some bearing on the altered charge.

The witnesses, which the Applicant intends to re-call his brother-in-law, who has been examined for bringing on record a circumstance that the Applicant had attended the marriage in the village, at the relevant point of time. Now the witness is sought to be examined for bringing on record, the material to strengthen the evidence, in the form of video footage. As far as the employer is concerned, even he was examined, but now the Applicant intend to have more better particulars from this witness. So is the case of the Bank Manager as it is his submission that he intended to call the Bank Manager from Uttar Pradesh, but the wrong Bank Manager has been summoned.

I do not think that such an application fit into the parameters of Section 217 of the Cr.P.C.

Only one witness i.e. the Principal of Pragati School, where the victim was studying, may be a witness who deserve to be summoned, since the age of the victim would be a moot question, which would form the genesis of the trial and, particularly, when the charge is altered to Section 376-AB, indicating that the girl was below twelve years of age.

8. The learned A.P.P. would vehemently submit that the Applicant has already admitted the birth certificate.

But despite this submission, I deem it appropriate to grant an opportunity to summon the said witness, at the

instance of the Applicant and he be examined, as the Applicant deserve an opportunity to raise his defence, particularly when there is alteration in the charge and he is now facing a charge of committing rape upon a woman under twelve years of age.

Hence, the impugned order dated 01/06/2023, passed below Exh.95, is partly set aside, by directing the Special Judge to issue summons to the Principal of Pragati School, subject to the specification being given by the counsel for the Applicant, as regards the address of the school and the indication that the victim girl was studying in the said school.

9. Yet another order, which is impugned in the present Application, is dated 01/06/2023 passed on application below Exh.96, which seek the following directions to Sahar Police Station :-

(a) To provide the details of death of the deceased elder brother of the informant alongwith the death certificate and the hospital reports of the cause of death of deceased.

(b) The Call Details Report alongwith the details of the cell tower locations of both, the Accused and the Informant.

Worth it to note that such an application is moved at the fag end of the trial, with a contention that the aforementioned documents are vital for establishing the truth in the case.

10. This application came to be rejected on the very same date i.e. on 01/06/2023 by the Special Judge and as far as the first document is concerned, it is rightly recorded that the Informant was into the witness box and she was cross-

examined by the counsel for the Applicant, but she was not questioned in any manner about the name of her elder brother, the exact illness from which he was suffering and the cause of his death and, hence, issuance of direction under Section 91 of the Cr.P.C. to provide the documents relating to the elder brother of the Informant has been rightly held to be absolutely unnecessary. As far as the second request is concerned, the learned Special Judge permitted to call for CDR of the mobile used by the Applicant and that too subject to the counsel for the Applicant providing the specific number of the mobile of the Applicant, with supporting document to show that he was using the said mobile and the name of the service provider from whom the said information is sought.

Finding no legal infirmity in both the impugned orders passed by the learned Special Judge, except to the order below Exh.95 modified as above, the Revision Application is disposed off.

(SMT. BHARATI DANGRE, J.)