



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPLICATION NO. 3791 OF 2024

Rushikesh s/o Bhimrao @ Pimrao Walunjkar ... **Applicant**
Age:23 yrs, Occ: Agri.,
R/o: Jawalke, Tq. Jamkhed, Dist.
Ahmednagar.

VERSUS

1. The State of Maharashtra
Through Kharda Police Station, Tq. Jamkhed,
Dist. Ahmednagar(Crime No.53/2024)
2. X...Y...Z...
(Name and address of the first informant are
not mentioned as the case is
under provisions of POCSO Act)

Mr. Sachin S. Panale, Advocate for the Applicant
Mr. N. D. Batule, APP for the Respondents State.

CORAM : Y. G. KHOBRADE, J.

Dated : 12th November, 2024

ORDER:-

1. By present Criminal Application under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter to be referred as Cr.P.C.). The Applicant has impugned the order dated 19.08.2024, passed by the learned Special Court, Shrigonda, District Ahmednagar below Exhibit 31 in Special Case (POCSO) No. 44 of 2024, whereby the request for recall of witnesses (PW-1 and PW-2) under section 311 of the Cr.P.C. has been declined.

2. The learned Counsel for the applicant canvassed that present Applicant/accused alongwith others were charge sheeted for the offences punishable under sections 376(2)(n), 107, 109, 506 of Indian Penal Code, 1860 (I.P.C.) and under sections 4, 6 and 17 of Protection of Children From Sexual Offences Act, 2012 (POCSO Act) and under Section 128(1) and 194(C) of the Motor Vehicles Act, 1988 in connection with Crime No. 53/2024, registered on 11.03.2024 with Kharda Police Station, Tq. Jamkhed, Dist. Ahmednagar. The Applicant was apprehended on 14.03.2024 in connection with said crime and he was released on bail vide order dated 23.08.2024, passed in Bail Application No. 1125 of 2024 by this Court.

3. After due investigation, a charge sheet came to be filed against the Accused persons on 10.05.2024. Thereafter, on 14.06.2024, the charges against the Applicant and others were framed. Since the present applicant/ accused did not engage any counsel to defend his case, hence, the matter was adjourned to 15.07.2024, the date on which the prosecutrix was personally appeared, but the Applicant/Accused could not arrange the Advocate for defending his case. Therefore, on oral request of the Applicant, time was granted for engaging an Advocate. However, the accused did not engage any counsel inspite of opportunity being granted. Therefore, the Court suo moto appointed a counsel for him namely Adv.

Mrs. Vijaya N. Jadhav from the legal aid panel to defend the case of the Applicant/Accused.

4. The learned counsel appearing for the Applicant canvassed that, the charges against the Applicant/Accused are very vague. The Applicant did not get an opportunity to give instructions to his counsel who came to be appointed from legal aid panel. So also, cross examinations of PW-1 and PW-2 were conducted through the counsel appointed from the legal aid, but no cross examination was conducted upto the mark. Therefore, on 26.07.2024, the Applicant/Accused engaged a private counsel and thereafter filed Exh.31 an application U/s 311 of the Cr.P.C. (Section 348 of BNSS, 2023) and prayed for recalling of witnesses PW-1 and PW-2 for further cross examination.

5. The learned counsel appearing for the Applicant/Accused canvassed that, on 15.07.2024, when the substantive evidence of the prosecutrix was recorded, the Court suo moto appointed a lawyer from the Legal Aid Panel, but the Applicant/Accused had not given oral or material documents to said counsel to prove that he is innocent and he has been falsely implicated in the crime. The charge against the Applicant is of serious nature and the lawyer appointed from the legal aid was forced to cross examine the prosecutrix on the same day. Therefore, the trial court

was interested in completing the substantive evidence without safeguarding the right of the accused, hence, serious prejudice caused to the Applicant. It is further canvassed that, the lawyer appointed from the legal aid panel has not conducted full fledged cross examination of both the witnesses, therefore, prayed for recalling of PW-1 and PW-2 for further cross examination.

6. The learned counsel for the Applicant further canvassed that during the course of cross examination, the counsel appointed from the legal aid failed to put proper questions to the witnesses and no omissions and contradictions were brought on record. Though, the statements recorded u/s 161 and 164 of Cr.P.C. are available on record, but no questions were asked in that regard. However, the learned Special Court failed to consider the facts and circumstances of the case and passed the impugned order, which is illegal and bad in law. To buttress his submissions, the learned counsel for the Applicant placed reliance on the following cases -

(1) Hoffman Andreas Vs. Inspector of Customs, (2000) 10 SCC 430

(2) Varsha Garg Vs. State of Madhya Pradesh, AIR 2022 SC (Criminal) 1253

(3) P. Sanjeeva Rao Vs. the State of A. P., AIR 2012 SC 2242

(4) Order dated 13.12.2022 in Criminal Appeal No. 131 of 2018,

Swapnil Ramesh Dhawale Vs. The State of Maharashtra.

7. Per contra, the learned APP supported the findings recorded by the learned Special Court and canvassed that the Applicant/Accused was given sufficient opportunity to engage counsel at his own choice, but the Applicant/Accused did not avail the said opportunity at the initial stage. Thereafter, the court suo moto appointed the counsel from the legal aid panel for defending cause of the applicant. The counsel appointed from legal aid panel conducted thorough cross examination of PW-1 and PW-2. Merely the Applicant/Accused subsequently engaged private counsel, it cannot be the ground for recalling of the witness by invoking section 311 of the Cr.P.C. In support of his submissions the learned APP placed reliance on the case of ***Popatlal Jethabhai Shah Vs. State of Maharashtra, 2002 Cri.L.J. 794.***

8. Having regard to the submissions canvassed on behalf of both sides, I have gone through the record. It is a matter of record that the present Applicant/Accused alongwith other accused is facing trial for the offences punishable under sections 376(2)(n), 107, 109, 506 of I.P.C., under Sections 4, 6 and 17 of POCSO Act and under Sections 128(1) and 194(C) of the Motor Vehicles Act in connection with Crime No.53/2024 registered on 11.03.2024 with Kharda Police Station. It is also a matter of

record that on 14.03.2024, the Applicant/Accused was arrested and initially he was remanded in police custody, but subsequently he was remanded in judicial custody. It a matter of record that at the time of incident, victim (PW-1) was 13 years old. Therefore, the victim is a child within the meaning of Section 2(d) of the POCSO Act.

9. As per circular dated 15.02.2023 issued by the POCSO Committee of this Court, charge is required to be framed within a period of one month from filing of the charge-sheet and evidence is required to be completed within a period of two months from the date of framing of charge, if the offence pertains to POCSO Act. In the case in hand, it *prima facie* appears that, on 10.05.2024, the Investigating Officer filed charge sheet against the Applicant/Accused and others. The Special Court has taken cognizance on 06.06.2024.

10. Section 35 of the POCSO Act provides that evidence of the victim child shall be recorded within a period of one month from the date of cognizance of the offence. However, after filing of the charge sheet, the Applicant/accused moved an application for bail bearing M. A. No. 357 of 2024 which was rejected on 14.06.2024. Thereafter, on 14.06.2024, the charges as against the Applicant/Accused and others were framed after hearing Advocate Y. P. Lekurwale, who secured the applicant's signature on

Vakalatnama with permission of the court. So also, the Applicant/Accused moved an application for bail bearing B.A. No. 1125 of 2024. On 23.08.2024, this Court (Coram: S. G.Mehare, J.) enlarged the accused on bail. However, on 26.06.2024, the prosecution had already submitted the list of witnesses and report under section 294 of Cr.PC. Accordingly, witness summons were issued. The Applicant/Accused had submitted an Application Exh. 19 for grant of time to appoint advocate and the said application was allowed. Thereafter, the applicant/accused through his newly appointed counsel filed Exh. 31 an application u/s 311 of Cr. P. C. and prayed for recalling of PW-1 & PW-2 only on ground that, he had not given any instructions to the counsel appointed from Legal Aid Panel and no proper cross-examination of both the witnesses are conducted. So also, no omission and contradictions were put to the witnesses.

11. On 19.08.2024, the learned Special Court, Shrigonda passed the impugned order below Exh. 31 and rejected the application holding that, both the witnesses (PW-1 and PW-2) are thoroughly cross examined on behalf of the Applicant/Accused and though sufficient opportunities were granted, but the Applicant/Accused initially did not engage counsel of his own choice. So also, on 02.07.2024 and 15.07.2024, victim PW-1 and her mother PW-2 were present in the Court. On 15.07.2024, the Informant's counsel Adv. Shri S.K. Patil, APP Smt. P. K. Kapse and Advocate

Shri S.P. Deshmukh for Accused Nos. 2 and 3 were present in the Court hall. The Informant's counsel and counsel for Accused Nos. 2 and 3 made a statement that the matter is compromised. However, considering the past conduct of applicant/accused No.1, the Court suo moto appointed an Advocate Smt. Vijay Jadhav from the Legal Aid Panel, who has 30 years practice to defend the case of Accused No.1/Applicant. On perusal of the cross examination of PW-1 and 2 conducted on behalf of accused No.1, no peculiar facts and circumstances have been made out by the present Applicant/Accused to recall both the witnesses for further cross examination.

12. The learned Special Court passed the impugned order and specifically observed that Adv. Shri Jay Bhosale had requested for adjournment, hence, matter was kept for hearing on 15.07.2024 as per convenience of said counsel. However, on 15.07.2024, the counsel for the Applicant/Accused did not file appearance and did not appear in the matter. On perusal of the impugned order, it depicts that the victim PW-1 and her mother PW-2 were present in the Court on 02.07.2024 as well as on 15.07.2024. So also, Counsels for accused Nos. 2 and 3 as well as prosecutrix were present in the Court and statement was made on behalf of accused Nos. 2 and 3 that matter is compromised, however, both the witnesses were stick up with their stand. Therefore, considering the

conduct of the present Applicant/Accused, the learned Special Court suo moto appointed a counsel from the Legal Aid Panel to defend on behalf of the present Applicant/accused. The learned Special Court further observed that Adv. Mrs. Vijaya Jadhav who is appointed from the legal aid panel is having 30 years of practice. Therefore, it cannot be said that the counsel appointed from the legal aid panel was not having advocacy skill to conduct the cross examination.

13. Though, the learned counsel appearing for the Applicant canvassed that no instructions were given by the accused to the counsel who was appointed from the legal aid panel, hence, no proper cross examination was conducted. However, the Applicant has not brought any material on record to show that why he was prevented from giving instructions to his counsel who was appointed from the legal aid panel.

14. The Applicant/Accused placed depositions of PW-1 victim and PW-2 on record. On perusal of the cross examinations of PW-1 and PW-2, it appears that the counsel appointed from the Legal Aid Panel has thoroughly conducted the cross examinations and nothing has been left to bring on record to discard the testimony of PW- 1 & PW- 2. Not only this, even the defence counsel put appropriate questions pertaining to the statements recorded under section 161 and 164 of Cr.Pc.

15. In the case of **Hoffman Andreas**, *cited supra*, the defence counsel was died during the pendency of the trial and new counsel was appointed, who was not aware of the defence strategy of the former counsel and was also unaware of the reason for which the former counsel had not put further questions on certain aspects. Under the circumstance, the Hon'ble Apex court observed in Paragraph Nos. 6, 7 and 8 as under:

"6. Normally, at this late stage, we would be disinclined to open up a closed trial once again. But we are persuaded to consider it in this case on account of the unfortunate development that took place during trial i.e. the passing away of the defence counsel midway of the trial. The counsel who was engaged for defending the appellant had cross-examined the witnesses but he could not complete the trial because of his death. When the new counsel took up the matter he would certainly be under the disadvantage that The could not ascertain from the erstwhile counsel as to the scheme of the defence strategy which the predeceased advocate had in mind or as to why he had not put further questions on certain aspects. In such circumstances, if the new counsel thought to have the material witnesses further examined the Court could adopt latitude and a liberal view in the interest of justice, particularly when the Court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible.

7. We think that the plea of the defence that a further opportunity to put more questions to the three prosecution witnesses can be permitted on account of the unfortunate death of the defence counsel pendente lite, and a new counsel has to evolve his defence strategy afresh."

8. We make note of the fact that the new defence counsel filed the said petition for recalling the prosecution witnesses even before the accused was called upon to enter on his defence."

16. In the case of **Varsha Garg**, *cited supra*, the Hon'ble Apex

Court observed as under:

"Court is aptly empowered to summon any person as a witness or to examine any person in attendance, though not summoned as a witness and recall and re-examine any person who has already been examined. This power can be exercised at any stage of any inquiry, trial or other proceeding under the CrPC. The latter part of S. 311 states that the Court 'shall summon and examine or recall and re-examine any such person' if his evidence appears to the Court to be essential to the just decision of the case. S. 311 contains a power upon the Court in broad terms. The statutory provision must be read purposively, to achieve the intent of the statute to aid in the discovery of truth. First part of the S. 311 uses the expression 'may' which postulates that the power can be exercised at any stage of an inquiry, trial or other proceeding. The latter part of the provision mandates the recall of a witness by the Court as it uses the expression 'shall summon and examine or recall and reexamine any such person if his evidence appears to it to be essential to the just decision of the case'. Essentiality of the evidence of the person who is to be examined coupled with the need for the just decision of the case constitute the touchstone which must guide the decision of the Court. The first part of the statutory provision is discretionary while the latter part is obligatory. Power to summon witness is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which it can be exercised or the manner of its exercise. Power of the Court is not constrained by the closure of evidence. Therefore, it is amply clear from the above discussion that the broad powers u/S. 311 are to be governed by the requirement of justice. The power must be exercised wherever the court finds that any evidence is essential for the just decision of the case. The statutory provision goes to emphasise that the court is not a hapless bystander in the derailment of justice. Quite to the aid in the realization of justice is manifest.

17. In case of **P. Sanjeeva Rao**, cited supra, the Hon'ble Apex

Court observed as under:

“The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the Section merely because the evidence supports the case of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquires and trials under the Code and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.

18. In an unreported order dated 13th December, 2022 (Swapnil Ramesh Dhawale), *cited supra*, the appellant accused did not get fair opportunity to defend himself after his lawyer midway left the trial, hence the witness was recalled.

19. In **Popatlal Jethabhai Shah**, *cited supra*, the Co ordinate Bench of this Court has held in paragraph Nos.4 and 5 as under:

“4. No doubt Section 311 of the Code of Criminal Procedure, 1973 gives power to any Court at any stage of any inquiry, trial or other proceeding under this Code to summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined, if it is of the opinion that the evidence of that witness is essential to the just decision of the case. It is also true that there is no limitation on

the power of the Court arising from the stage to which the trial may have reached for examination of a witness, provided the Court is bona fide of the opinion that for the just decision of the case the step must be taken. It is clear from the language of the Section that the requirement of just decision of the case does not limit the action to something in the interest of the accused only. The action may equally benefit the prosecution. However, the Court is required to exercise its discretion properly and judiciously. This is a very wide discretion conferred on the Court, to act as the exigencies of Justice require. Another aspect of this power which is complementary to it is to be found in section 165 of the Indian Evidence Act.

Section 165 of the Indian Evidence Act, 1872 states as follows :

“165. Judge's power to put questions or order production.- The Judge may, in order to discover or to obtain proper proof of relevant facts, ask a question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant: and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:

.....

5. In the present case at hand, however, it seems that the Applicant/accused, inspite of engaging Advocate of his choice and after depositions of al the seven prosecution witnesses were recorded, vide this application, is taking frivolous contentions for recalling of all the prosecution witnesses. It appears that the Advocate appointed by the Applicant, probably did not effectively bring out certain material on record, which in the opinion of the Applicant was necessary, to weaken the prosecution case. The intention of the Applicant was therefore, to appoint another Advocate to effectively carry out this job and therefore, this application for recalling of all the prosecution witnesses was made. This certainly is not permissible. Therefore, the lower Court by its reasoned order, rightly rejected that application which certainly was not a bona fide application. I find to infirmity In the impugned order. The intention in invoking the provisions of Section 311 of the Cr.PC. is to further the cause of justice. But in the present case at hand, the intention of the Applicant certainly appears to abuse the process of law. This is

deplorable. Hence, the following order :

Criminal Revision Application No. 2 of 2001 is rejected. The proceedings in the lower Court to proceed In accordance with law."

20. Reverting back to the facts of the present case, it appears that as observed in foregoing paragraphs, initially, the Applicant was reluctant to engage the counsel to defend his case. Thereafter, a legal practitioner, who obtained the signature of the Applicant/Accused on vakalatnama with the permission of the court, appeared in the matter and in his presence charge against the Applicant/Accused was framed on 14.06.2024. The Applicant/ Accused was enlarged on bail vide order dated 23.08.2024. However, when he was in judicial custody, the prosecution examined PW-1 victim and her mother PW-2, but prior to entering both these witnesses into witness box, the Court suo moto appointed the counsel from the Legal Aid to defend the case on behalf of the accused. If the accused was really intended to give instructions, in that event, he could have given application to the jail authority for meeting with his defence counsel. Therefore, it appears that the Applicant/Accused wants to delay the trial as he released on bail and wanted enjoy liberty, which shows malafide intention. Needless to say that, after engaging another private counsel, the Applicant/Accused filed an Application Exh. 31 on 26.07.2024 for recalling of the witnesses with intention to fill-up the lacuna/loopholes as well as to delay the trial.

21. Therefore, as per the ratio laid down in the case of **Popatlal Jethabhai Shah**, *cited supra*, the witness whose cross examination has not been properly conducted by the previous counsel cannot be recalled, if the accused engages another counsel. In the case in hand, the present Applicant/Accused has filed Exh. 31, an application under section 311 of the Cr.P.C. for recalling of the witness after he engaged the new counsel. The learned Special Court has passed the impugned order and rightly rejected the application Exh.31 on ground that cross examinations of PW-1 victim and her mother PW-2 were already conducted by the previous counsel of the Applicant/Accused.

22. In view of the above, I do not find any sufficient ground to interfere with the order passed by the learned Special Court. Hence, the Criminal Application is rejected.

(Y. G. KHOBRAGADE, J.)

JPChavan