



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

**3 CRIMINAL APPLICATION NO. 3913 OF 2024**

**RADHAKISHAN JAGANNATH MURUMKAR  
VERSUS  
THE STATE OF MAHARASHTRA**

.....  
Advocate for Applicant : Mr. Suryawanshi Surendra & Vyenkatrao Shivnanda  
APP for Respondents/State : Mr. N.D. Batule  
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**CORAM : Y.G. KHOBRAGADE, J.  
DATE : 21.10.2024**

**P. C.:-**

1. By the present Application under Section 482 of Code of Criminal Procedure, 1973 (for brevity Cr.P.C.) the Applicant has impugned the order dated 03.09.2024 passed below Exh. 19 in Special Case No.100/2023 by the learned Special Court and Additional Sessions Judge, Shrigonda, Dist. Ahmednagar, whereby the learned Additional Sessions Judge has declined to allow the application made under Section 311 of the Cr.P.C. for recalling of PW1-victim.

2. The present Applicant-Accused is facing trial for the offences punishable under Section 376 (2), (f), (i), 363 of the Indian Penal Code 1860 (for brevity I.P.C.) read with Section 4, 6 and 18 of the Protection of Children from Sexual Offences Act, 2012 (for brevity POCSO Act) in Crime No.

262/2023 registered with Jamkhed Police Station, Tq. Jamkhed, Dist. Ahmednagar. On 21-06-2023, the Applicant/Accused came to be apprehended in connection with Crime No. 262/2023. On 16.08.2023, the Investigation Officer has filed a charge-sheet against the Applicant/Accused. On 18.08.2023, the Applicant-Accused filed Exh.3 an application for grant of bail. On 11.10.2023, the learned Special Court passed an order below Exh. 3 and declined to grant bail to the accused. On 06.10.2023, the learned trial Court framed charge at Exh. 7 and posted the matter for list of witnesses. Accordingly, on 30.10.2024, the learned Special Court issued witness summons.

3. On perusal of record it appears that, on 16.10.2023, the matter was posted for recording of evidence of the prosecution witnesses, however, due to non-availability of muddemal property and C.A. Report, the evidence could not be recorded. Subsequently, the matter was adjourned to 08.12.2023, 26.12.2023, 10.01.2024, 30.01.2024, 17.02.2024, 04.03.2024, 20.03.2024, 12.04.2024, 04.05.2024, 24.05.2024, 18.06.2024, 02.07.2024 and lastly it was posted on 15.07.2024.

4. It is a matter of record that, on 15.07.2024, the Victim P.W. 1 entered into the witness box and her examination-in-chief came to be recorded. However, the defence counsel filed Exh.12 an application for adjournment,

but said request was orally declined by the learned trial Court and defence side was called upon to conduct the cross-examination of the victim on the ground that Victim-P.W.1 was attending the Court by traveling 70 kms and another ground that under Section 33 (5) of the POCSO Act, there is bar to call the victim repeatedly in Court. Then the defence counsel thoroughly conducted the cross-examination of the P.W. 1-victim. On completion of cross-examination there was no further examination and cross-examination. Therefore, the evidence of the Victim/PW1 was closed. After cross-examination was over, the learned Special Court passed an order below Exh. 12 application for adjournment.

5. On face of record, it *prima facie* appears that subsequent to cross-examination of the victim P.W.1, the Applicant-Accused engaged another counsel who has filed Vakalatnama. Thereafter, the Applicant-Accused has filed Exh.19, application under Section 311 of the Cr.P.C. and prayed for recalling of Victim-P.W.1 on the ground that the previous counsel did not cross-examine the Victim (PW1) properly and inadvertently suggestions and denial have not been brought on record.

6. It is the contention of the Applicant that previous counsel of the Accused conducted cross-examination of the Victim (PW1) hastily and no fair and proper opportunity of trial was granted to the accused. The learned

counsel for the Applicant/Accused canvassed in vehemence that, the learned Special Court failed to consider the fact that, the previous counsel failed to conduct the cross-examination of the victim properly and inadvertently suggestions and denial were not brought on record. Therefore, it is necessary to quash and set aside the impugned order dated 03.09.2024 passed below Exh. 19 in Special Case No.100/2023 with further prayer to recall the P.W.1-Victim for further cross examination u/s 311 of Cri. P.C.

7. In support of these submissions, the learned counsel for the Applicant has placed reliance on the case of ***Pyarelal Lilaram Tagde V/s. State of Maharashtra; AIR Online 2019 Bom.1307***, wherein, the Co ordinate Bench of this Court has held in Paragraph Nos. 8 and 9 as under:

*“8. The learned counsel for the applicant has correctly relied upon judgment of the Hon'ble Supreme Court in the case of Iddar vs. Aabida (supra), wherein the Hon'ble Supreme Court has laid down in the context of Section 311 of the Cr.P.C. as follows:-*

*"10. The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequence, the first part gives purely discretionary authority to a Criminal Court and enables it at any stage of an enquiry, trial or proceeding under the Code : (a) to summon any one as a witness, or (b) to examine any person present in Court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the Court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the Court the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the Court should be exercised, or with regard to*

*the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a Court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the Court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.*

*11. 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 for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers 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."*

*9. The aforesaid position of law makes it clear that the Courts are expected to adopt a liberal approach while exercising power under Section 311 of the Cr.P.C. to ensure that exercise of such power would assist the Court in arriving at the truth of the matter. Applying the aforesaid yardstick, it becomes clear that the Sessions Court in the present case committed an error in rejecting the application filed by the applicant for recall of witnesses."*

8. The learned counsel appearing for the Applicant further placed reliance on the case of **Varsha Garg V/s. State of Madhya Pradesh; AIR 2022 SC (Criminal) 1253**, wherein the Hon'ble Supreme Court has held that the

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. Section 311 of Cr. P.C 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 Section 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 contrary, the court has a vital role to discharge in ensuring that the cause of discovering truth as an aid in the realization of justice is manifest.

9. Per contra, the learned APP supported the impugned order and canvassed that the previous counsel of the accused thoroughly cross-examined the Victim-P.W. 1 and merely the Applicant-Accused engaged another counsel cannot be a good and substantial ground for recalling the witness, so also, lacuna which has been left by the Accused cannot be permitted to fill up by recalling the witness.

10. The learned APP further canvassed that after cross-examination of the victim-PW1, the Applicant-Accused changed the counsel, he filed an application (Exh. 19) on the ground that his previous counsel inadvertently has not conducted the cross-examination properly. No suggestions and denial have been brought on record. Therefore, the Applicant-Accused is seeking recalling of P.W.1-Victim to fill up the lacuna. Merely the accused engaging

another counsel is not a sufficient ground to recall the witness under Sec. 311 of Cri. P. C. Therefore, prayed for dismissal of the application.

11. In support of these submissions, the learned APP placed reliance on the case of **AG V/s. Shiv Kumar Yadav & Anr.; 2015 Cri.L.J. 4640**, wherein the Hon'ble Supreme Court in paragraph No. 15 held as under:

*“15. The above observations cannot be read as laying down any inflexible rule to routinely permit a recall on the ground that cross-examination was not proper for reasons attributable to a counsel. While advancement of justice remains the prime object of law, it cannot be understood that recall can be allowed for the asking or reasons related to mere convenience. It has normally to be presumed that the counsel conducting a case is competent particularly when a counsel is appointed by choice of a litigant. Taken to its logical end, the principle that a retrial must follow on every change of a counsel, can have serious consequences on conduct of trials and the criminal justice system. Witnesses cannot be expected to face the hardship of appearing in court repeatedly, particularly in sensitive cases such as the present one. It can result in undue hardship for victims, especially so, of heinous crimes, if they are required to repeatedly appear in court to face cross-examination.”*

12. In the case in hand, it *prima facie* appears that, on 15.07.2024 the evidence of the Victim-P.W.1 was recorded, but just to kill the time or to avoid the cross-examination, initially, the counsel for the Accused filed Exh. 12 application of adjournment, but when the trial Court orally declined to adjourned the matter because, the Victim-P.W.1 minor attended the Court by traveling 70 kms and as per the provisions of Section 33 (5) of the POCSO Act the minor-victim cannot be repeatedly called in the Court for evidence. Thereafter, the counsel for the Applicant/Accused thoroughly conducted cross

examination of the victim and application for adjournment came to be filed. Thereafter, the Applicant-Accused engaged another counsel and filed Exh.19 application under Section 311 of the Cr.P.C., for recalling of Victim-P.W.1.

13. On perusal of Exh.19 application for recalling of witness, it appears that the Applicant-Accused set out a ground that his previous counsel has not properly cross-examined the victim and inadvertently some major cross-examination, suggestions and denial were remained to be brought on record. On 03.09.2024, the learned Special Court passed the impugned order considering the law laid down in case of ***Madhab Chandra Pradhan and Ors. V/s. State of Odisha in Special Leave Petition (Cri.) No.10082/2024 judgment dated 05.08.2024***, wherein it has been held that, when the victim has been examined and cross-examined at length twice already, mechanically allowing an application for recalling the victim, especially in trial of offences under the POCSO Act would defeat the very purpose of the statute.

14. In case of ***AG V/s. Shiv Kumar Yadav*** cited (supra), the Hon'ble Supreme Court has held that, the witness cannot be recalled merely on the ground that the cross-examination was not properly conducted.

15. In ***Popatlal Jethabhai Shah V/s. State of Maharashtra; 2002 Cri.L.J. 794***, the Coordinate 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 alt 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.P.C. 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."*

16. Therefore, considering the law laid down by this Court in **Popatlal Jethabhai Shah, AG V/s. Shiv Kumar Yadav** cited (supra), the witness whose cross-examination has not been properly conducted by previous counsel cannot be recalled if the Accused engages another counsel. In the case in hand, the learned trial Court passed the impugned order and rejected the application of the Applicant-Accused on the ground that, the victim PW1 cannot be recalled after her cross-examination was previously conducted by the counsel for the Accused at length.

17. Needless to say that, if the Accused has left any lacuna in the cross-examination of any witness, the said witness cannot be recalled to fill up the lacuna left by the Accused by invoking powers conferred under Section 311 of Cr.P.C. Therefore, I do not find any substantial grounds to interfere with the findings recorded by the Special Court. In view of above discussion, this application is hereby dismissed.

[Y.G. KHOBRADE, J.]