



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

940 CRIMINAL APPLICATION NO. 4301 OF 2023

RAJ SANTOSH KOLI
VERSUS
THE STATE OF MAHARASHTRA

...
Advocate for Applicant : Mr. Niranjn Vasant Dhake
APP for Respondent/State : Mr.S.A. Gaikwad
Advocate for Respondent No.2 : Ms. Patil P.A (appointed)

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CORAM : SANJAY A. DESHMUKH, J.
DATED : 19th JANUARY, 2024.

PER COURT :-

1. This application is moved for following reliefs :-

“B. Be please to quash and set aside the order below Exh.144, dtd.30/10/2023, passed by the Id. Special Sessions Judge (POCSO), Jalgaon in Special Sessions Case (POCSO) no.221/2021.

C. Be please to allow the application for recall of witness PW-3, i.e. Exh.144 in Special Sessions Case (POCSO) no.221/2021, pending before the Id. Special Sessions Judge (POCSO), Jalgaon.”

2. Heard learned advocates for the parties. The impugned order passed below Exhibit-144 in Special Sessions Case (POCSO) no.221/2021 pending before the learned Special Sessions Judge (POCSO), Jalgaon, is at page 16.

3. The applicant herein prayed for recording material omissions, that prayer was not allowed. Therefore, the applicant moved application under section 311 of the Code of Criminal Procedure and prayed for allowing to ask three questions. The learned trial Court turned down that relief and observed as under :-

“5. It is pertinent to note that the matter is time bound by the Hon’ble High Court. Till date in all three witnesses have been examined. Earlier then too, the defence had moved application for recalling PW-1, who is the mother of the victim no.1. However, the said application was rejected which appears to be similar to the present application. In such circumstances, when the defence was given full opportunity to cross-examine the witness then it will be not just and proper to recall the said witness to put certain questions, when particularly, the material omissions were put to the witness during the cross-examination as mentioned above. In such circumstances, I do not find substance in the application which deserves no consideration. With this I proceed to pass following order:

ORDER

i) The application stands rejected.”

4. The learned advocate for the applicant pointed out that some questions were not earlier asked, however, the trial Court did not allow the application and rejected the application without legal justification. The learned advocate is relying upon the judgment in the

case of **Mr. Wasudeo S/o Gulabrao Dhoke (in Jail) Vs State of Maharashtra** reported in 2017(1) Mh.L.J. 579. The paras 9 and 10 of the said judgment reads as under :-

“9. In the case of Netasha Singh, the Hon’ble Apex Court has reiterated the view taken by the Hon’ble Apex Court in the case of **Rajendra Prasad v. Narcotic Cell, through its Officer-in-Charge, Delhi, reported in AIR 1999 Supreme Court 2291**. The view is to the effect that the lacuna in the prosecution is something which is inherent weakness or a latent wedge in the prosecution case, the advantage of which ordinarily must go to the accused and that there is a difference between inherent weakness i.e. lacuna in the prosecution case and a mistake or oversight in asking certain questions as a part of management of the prosecution case. The later category of mistake or over sight does not fall in the category of inherent weakness or fundamental lacuna in the prosecution case and that, it is a curable defect.

10. Thus, it is clear to us that when the witnesses can be recalled to correct the errors occurred in the management of the prosecution case, same principle can be applied to the defence case as well. In the instant case, certain questions, due to inadvertence, were not put to PW 3 as well as PW 7 and a look at these questions, as detailed in the Pursis dated 22.09.2016, would reveal that they are not in the nature of any attempt to fill up the lacuna as understood in law, in the defence case. These questions and

suggestions are as follows :

“Question to Witness No.3 :

Question - It is true that deceased was of quarrelsome nature and due to same she was on inimical terms with the other villagers ?

Question to PW-7 (Investigating Officer) :

Question – Can you tell during course of investigation statement of how many witnesses along with their names, were recorded ?

Question – On which date statements were recorded ? Suggestion – You have not sent any weapon for examination and without sending the weapons got prepared the report from Doctor.”

Even otherwise, there is a difference between what is called as an attempt to fill up the lacuna in the prosecution case and what is called as an attempt to strengthen the defence. While the former, if allowed, may cause prejudice to the accused, the later, if allowed would not cause any prejudice to the prosecution and would only strengthen the right of the accused to fair trial.”

5. The learned advocate for respondent strongly objected the application and submitted that those questions are already put to the said witness, who is child below the age of 7 years, and therefore, the

applicant has no right to recall the witness for cross-examination.

6. The learned advocate for respondent is relying upon the judgment in the case of ***Rakesh V/s State of NCT of Delhi and another in CRL.M.C. 5032 of 2023 dated 31.07.2023***. The paras 21, 22 and 23 of the said judgment reads as under :-

21. While this Court cannot dispute that the right to fair trial is a crucial and precious right of the accused, so is the complainant's right to a fair trial which requires that they should not unnecessarily be harassed, especially in the cases of sexual assault-. This Court notes that at times, people may not even report such cases of sexual assault of children of tender age as in this case, she was only seven years of age for fear of being harassed by continuous visits to the Courts or fear of embarrassment and traumatic cross-examination. It would have been a different decision in case the record would have revealed that the witnesses' cross-examination consisted of only asking few formal questions and not of the incident, but in the present case, to the contrary, as already observed above, the cross-examination had been conducted at length and all relevant aspects had been covered by the previous counsel for the petitioner. **In view of the same, though the accused has to be granted and ensured a fair trial, it cannot mean being afforded unjustified repeated opportunities of cross-examination in every case to indicate fair trial.** The case of an accused has to be meritorious where a relief as prayed for in the present case, can be granted.

22. The other contention that in case the present application is not allowed, the case may end into conviction is also without merit since, at the cost of repetition, it is to be taken note of that the previous counsel has cross-examined the witnesses at length and only due to apprehension or fear of the accused that cross-examination did not result in answers that would have helped him, cannot be a ground to recall the witnesses after six years of conclusion of their testimony.

23. While balancing the right of the accused to a fair trial and upholding the intent of the legislation, the courts are duty bound to remain sensitive to the plight of the seven-year-old sexual assault victim. She and her mother cannot be recalled to relieve the entire trauma only because the new counsel is dissatisfied with the elaborate cross-examination of these witnesses. Thus, this Court also has a duty to ensure an expeditious and fair trial, preventing misuse of such applications for delaying the proceedings before the learned Trial Court.”

7. Nobody will dispute the ratio laid down in the above authorities cited by both sides. However, facts of each case are decisive.

8. Perused the impugned order, the chief-examination as well as cross-examination of the prosecution witness no.3 and the proposed three questions.

9. Cross-examination of PW-3 shows that first question out of proposed question was asked. But the proposed question nos.2 and 3 were not asked. Therefore, the permission to ask such these questions must be granted to the applicant as it is a part of fair trial. The learned trial Court failed to consider the principle of fair trial. The application, therefore, deserves to be allowed. The impugned order deserves to be set aside. Hence the following order :

ORDER

- i) The application is allowed as to prayer clause "A" and partly in respect of prayer clause "B" with permission to ask the proposed question nos.2 and 3 only.
 - ii) The Special Sessions Judge (POCSO), Jalgaon is requested not to grant adjournment, if the learned advocate for the applicant is not cross-examining the child witness (PW-3) on settled date.
10. The application is disposed of accordingly.
11. The fees of the appointed counsel be paid through the High Court Legal Services Sub-Committee, Aurangabad as per Rules.

(SANJAY A. DESHMUKH, J.)

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