

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1495 OF 2023

Ruzan Samir Pathan

...Applicant

vs.

The State of Maharashtra and Anr.

...Respondents

VISHAL
SUBHASH
PAREKAR

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Mr. Pratik Kalantri, for the Applicant.

Mrs. G.P. Mulekar, APP, for the Respondent/State.

Ms. Akshata Desai, for Respondent No. 2.

CORAM : N. J. JAMADAR, J.

DATE : JANUARY 24 2024

P.C.:

1. This is an application under section 482 of the Code of Criminal Procedure, 1973 to quash and set aside an order dated 21st July, 2023 passed by learned Special Judge (POCSO) and Additional Sessions Judge, Nashik on an application (Exhibit 118) whereby the application to examine the victim as a defence witness came to be rejected.

2. The applicant is facing prosecution for the offence punishable under section 376(3) of the Indian Penal Code, 1860 and sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO).

3. The indictment against the applicant is that the applicant had

forcible sexual intercourse with the victim who was then 14 years and 9 months of age. The victim alleged that the applicant had developed proximity with her and on 25th July, 2021 the applicant took her to a guest house at Nashik Road and had forcible sexual intercourse with her. The victim narrated the incident to her parents and eventually the FIR was lodged on 2nd August, 2021.

4. The trial commenced. The victim came to be examined as prosecution witnesses No. 3. She was cross examined. The prosecution, post examination of other witnesses, closed its evidence on 21st May, 2023.

5. The applicant preferred an application to examine the victim as a defence witness. The prosecution resisted the application contending inter alia that the applicant had full liberty to cross examine the victim and there was no provision to examine a person, as a defence witness, who has already been examined as a prosecution witnesses.

6. The learned Judge, Special Court was persuaded to reject the application opining, inter alia, that the applicant had full opportunity to cross examine the victim and did avail the said

opportunity to the fullest, and the applicant had preferred the said application with a view to fill in the lacuna.

7. Mr. Kalantri, learned counsel for the applicant, submitted that the applicant and the victim were friends. The victim had lodged the report against the applicant at the behest of her family members. Later on the victim has realized the mistake and has conveyed the same in a video message. The victim has expressed desire to disclose the truth before the Court. Therefore, it is necessary to again examine the victim. Mr. Kalantri submitted that there is no embargo on the power of the Court under section 311 of the Code. The learned Special Judge lost sight of the fact that the examination of the victim was necessary for a just decision of the case. The impugned order thus deserves to be quashed and set aside.

8. In contrast, learned APP controverted the submissions of the applicant. It was urged that the applicant/accused had availed opportunity to cross examine the victim, at length, and after prosecution closed its evidence, the applicant has made an endeavour to fill in the lacuna by seeking to examine the victim which was impermissible. The victim, learned APP submitted, can

not be subjected to such ordeal especially having regard to the fact that at the time of alleged occurrence the victim was barely 14 years of age.

9. I have perused the application preferred by the applicant/accused before the learned Special Judge, the reply thereto and the impugned order. First and foremost the application (Exhibit 118) singularly lacks any reason much less justifiable one, to examine the victim as a witness in defence. The accused has preferred the application as if the accused intended to examine a witness in a routine course.

10. Mr. Kalantri, the learned counsel for the applicant would urge that the prayer of the applicant to examine the victim was squarely covered by the wide power conferred on the Court under section 311 of the Code and the Special Judge could have legitimately exercised the said power.

11. Section 311 of the Code reads as under :-

311. Power to summon material witness, or examine person present-

Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, 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; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

12. On plain reading, it becomes abundantly clear that the Court is vested with a discretion to summon any person as a witness, or recall and re-examine any person already examined. The discretion is however guided by the consideration of necessity examination of such person for a just decision of the case. The latter part of the said section thus emphasizes that the Court shall summon any person as a witness, 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 the Code thus confers wide power on the Court to examine a witness or recall or re-examine the witness already examined, essentially to advance the cause of just decision of a case. As is evident the words, “at any stage” give wide discretion to the Court and the stage of the proceeding does not constitute an inhibiting factor in the exercise of the said power. It is not the stage of the proceedings but the necessity of the examination of the witness for a just decision of the case which is a decisive factor.

13. The Supreme Court expounded the scope and ambit of section

311 of the Code in the case of **Vijay Kumar vs. State of U.P.**¹ as under:-

17. Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said Section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of the Code and the principles of criminal law. The discretionary power conferred under Section 311 has to be exercised judicially for reasons stated by the Court and not arbitrarily or capriciously.

14. In the case of **Zahira Habibullah Sheikh vs. State of Gujrat**² the Supreme Court emphasized that though section 311 confers wide discretion yet, it is required to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.. The observations in paragraph 27 read as under:-

27. 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

1 (2011) 8 SCC 136.

2 (2006) 3 SCC 374.

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.

15. A useful reference in this context can be made to the judgment of the Supreme Court in the case of **Ratanlal vs. Prahlad Jat and Others**³ wherein a somewhat identical fact situation had arisen. In the said case two witnesses were examined as prosecution witness Nos. 4 and 5. In all 28 witnesses were examined. Thereafter, those prosecution witnesses No. 4 and 5 preferred an application for re-examining them purportedly on the ground that their earlier evidence was adduced under the influence of police. The learned Sessions Judge had rejected the application. The High Court set aside the order of the learned Sessions Judge and allowed the application of the witnesses to re-examine them. The Supreme Court in the backdrop of the aforesaid fact situation observed, inter alia, as under:-

17. In order to enable the court to find out the truth and render a just decision, the salutary provisions of [Section 311](#) are enacted whereunder any court by exercising its discretionary authority at any stage of inquiry, trial or other proceeding can summon any person as witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute. The object of the provision as a

3 (2017) 9 Supreme Court Cases 340.

whole is to do justice not only from the point of view of the accused and the prosecution but also from the point of view of an orderly society. This power is to be exercised only for strong and valid reasons and it should be exercised with caution and circumspection. Recall is not a matter of course and the discretion given to the court has to be exercised judicially to prevent failure of justice. Therefore, the reasons for exercising this power should be spelt out in the order.

... ..

22. Coming to the facts of the present case, PWs 4 and 5 were examined between 29.11.2010 and 11.3.2011. They were cross-examined at length during the said period. During the police investigation and in their evidence, they have supported the prosecution story. The Sessions Judge has recorded a finding that they were not under any pressure while recording their evidence. After a passage of 14 months, they have filed the application for their re-examination on the ground that the statements made by them earlier were under pressure. They have not assigned any reasons for the delay in making application. It is obvious that they had been won over. We do not find any reasons to allow such an application. The Sessions Judge, therefore, was justified in rejecting the application. In our view, High Court was not right in setting aside the said order.

16. The aforesaid decision appears to be on all four with the facts of the case at hand. The victim (PW.3) was duly examined and cross examined, at length, on behalf of the applicant/accused. The prosecution examined further witnesses and closed its evidence. Thereafter, the instant application came to be preferred as if the accused desired to examine a formal witness. Even on the touchstone of the principles governing the exercise of the powers of the Court under section 311 of the Code, the further examination of

the victim does not appear essential for a just decision of the case. It appears that an effort has been made to win over the victim and thus the endeavour to examine her in defence.

17. The matter can be looked at from another perspective. Section 33 of the POCSO Act, 2012 prescribes special procedure with a view to insulate the child from the ordeals which the child would have otherwise faced in a trial. Sub section (5) of section 33 inter alia provides that the Special Court shall ensure that the child is not called repeatedly to testify in the Court. In a case where the re-examination of the child becomes absolutely essential for the just decision of the case, the procedure prescribed under the POCSO Act, may not override section 311 of the Code, 1973, yet, the Court cannot lose sight of the fact that the child, in this case, has already been examined and also cross examined at length. And the case at hand does not seem to be of such a nature as to invoke the power under section 311 of the Code and recall the victim for cross examination or further examination.

18. The conspectus of the aforesaid consideration is that the learned Special Judge committed no error in declining to accede to the prayer to call the victim as a defence witness. Hence, the instant

application, being devoid of substance, deserves to be rejected.

Thus, the following order.

ORDER

The application stands rejected.

(N. J. JAMADAR, J.)