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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPLICATION (APL) NO.754 OF 2025

Samiullah Khan Abdul Hamid Khan,
Aged about 30 years, Occupation : Cleric,
R/o. Anand Nagar, Ward No. 25,
Wardha, Taluka and District Wardha.

.... APPLICANT

// VERSUS //

1. State of Maharashtra,
through Police Station Officer,
Police Station (Ramnagar),
Wardha.
2. XYZ Victim,
Crime No.682/2021
PSO, Police Station (Ramnagar), Wardha. **RESPONDENTS**

Mr. M. N. Ali, Counsel for the applicant.
Mr. Nitin Rode, APP for the respondent No.1/State.

CORAM : URMILA JOSHI-PHALKE, J.
DATED : 22.07.2025

ORAL JUDGMENT :

1. Heard.
2. **Admit.**
3. The applicant is prosecuted for the offence punishable under Section 377 of Indian Penal Code under Section 3(a), 4, 5(m), 6, and 11(iv) along with Section 12 of the Protection of Children from Sexual Offences Act. As per the allegation levelled against the present applicant on the basis of report lodged by the mother of the victim on an allegation that her minor son was

(2)

subjected for the forceful sexual assault by the present appellant. On the basis of the said report, police have registered the crime. During the investigation, the Investigating Officer has visited the alleged spot of incident, drawn the spot panchnama, collected the samples and victim boy was referred for medical examination. After completion of investigation, he has submitted the charge-sheet against the present applicant. The learned Special Judge has framed the charge and in support of the charge, the prosecution has examined 13 witnesses including PW – 5 Medical Officer, who had examined the victim boy as well as the accused. Subsequently, the applicant has changed his Counsel and the Counsel has filed an application under Section 311 of the Code of Criminal Procedure (for short 'the Cr.P.C.') for the cross-examination of PW-5 Medical Officer. The learned trial Court has rejected the application filed under Section 311 of the Cr.P.C. for recalling of witnesses on the ground that after perusal of the entire case record and charge-sheet the earlier defence Counsel has not cross-examined the Medical Officer. The opportunity is to be granted to the present applicant to recall the witness for just decision of the case.

4. After hearing both the sides and on perusal of the application, the Special Court has rejected the application by observing that Section 311 of Cr.P.C cannot be used for filling up the lacuna. It is further observed that at the stage of final

(3)

argument, Advocate of the accused intends to recall witnesses which are already cross-examined. Considering the nature of the defence, merely because something remained to be asked by earlier Advocate is not sufficient to permit recall of witnesses. Test is whether recall is necessary for just decision of case and in view of legal position, he rejected the application.

5. Being aggrieved and dissatisfied with the same, present application is preferred by the applicant on the ground that in the interest of justice and for the just decision of the case that opportunity is to be granted to the present applicant. It is further submitted that the applicant is under obligation to rebut the presumption under Section 29 of the Protection of Children from Sexual Offences Act and therefore, the opportunity is required to be given. In support of his contention he placed reliance on **Rajaram Prasad Yadav Vs State of Bihar and another** in **SLP (Crl.) No.2400 of 2011** wherein the scope of Section 311 of Code of Criminal Procedure is discussed by the Hon'ble Apex Court. He further reliance on the decision of the Apex Court in **State (NCT of Delhi) Vs. Shiv Kumar Yadav and another** reported in **(2016) 2 SCC 402**.

6. Learned APP strongly opposed the said application on the ground that Section 311 of Cr.P.C. operates in two parts, the first part clothes the Court with a power to summon or examine any

(4)

person in attendance or recall or re-examine any person already examined. The second part mandates that the Court shall summon and examine or recall and re-examine such person, if his evidence appears to be essential to the just decision of the case. It is further submitted by the learned APP that considering that the witness cannot be recall or reexamine only to fill up the lacuna and therefore, the application deserves to be rejected.

7. After hearing both sides and on perusal of the entire record, it reveals that now the applicant has restricted his application only to the extent of cross-examination of the PW-5 Medical Officer. I have perused the evidence of the Medical Officer, admittedly, the material cross-examination is not carried out by the earlier defence Counsel by cross-examining the said witness. There is no dispute as to the legal position is concerned, that the Section 311 cannot be used for filling up the lacuna. The witness can only be recalled if there are tangible reasons to show how fair trial could suffer without such record and therefore, that aspect needs to be considered.

8. Section 311 of the Code of Criminal Procedure which deals with recalling of the witness. It states about the power of the Court to summon material witness or examine the person present. It states that any Court may at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness

(5)

or to examine any person in attendance, though not summoned as a witness; recall and re-examine any person who has already been examined and the Court shall summon and re-examine or recall or examine any such person if his evidence appears to it to be essential to the just decision of the case. Thus, Section 311 states about the power of the Court and the Court is amply empowered to summon any person as a witness or to examine any person in attendance though not summoned as a witness and recall and 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 Code. The latter part of Section 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 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. The Hon'ble Apex Court in **Ratanlal Vs. Prahlad Jat**, reported in **(2017) 9 SCC 340** dealt with this issue and observed, "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

(6)

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 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.”

Thus, “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, enquiries 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

(7)

expression that occurs is "at any stage of any inquiry or trial or other proceeding under this Code".

9. Thus, in view of the object which is underlined under Section 311 that power is to be exercised judicially and not arbitrary. As far as the case in hand is concerned, the learned Counsel has pointed out from the documents as well as from the evidence that the Medical Officer is not thoroughly cross-examined and the entire issue revolves around the medical evidence as the allegation against the present applicant is regarding the sexual assault of the victim. It further reveals from the record that the presumption will attract the prosecution establish the case and therefore, the accused is under obligation to rebut the presumption on the basis of the preponderance of the probabilities. In view of that the cross-examination of the Medical Officer is just and required for the just decision of the case. In view of that, the application deserves to be allowed. Accordingly, I proceed to pass following order:

ORDER

(i) The application is allowed.

(ii) The order passed by the Special Judge and Additional Sessions Judge, Wardha, in Special Case No.130/2021 below Exhibit 153 dated 26.05.2025 is hereby quashed and set aside.

(iii) The application filed by the applicant below Exh.153 is hereby allowed. The accused is permitted to recall the

(8)

witness and opportunity is to be granted to the defence Counsel to re-examine and cross-examine PW-5.

(iv) The defence Counsel to make every endeavour to cross-examine the witness without seeking any further adjournment.

(v) Both the parties shall co-operate with the Court to record the evidence of PW-5 after he is recalled before the Court.

The application is disposed of.

(URMILA JOSHI-PHALKE, J.)

Sarkate.