



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL WRIT PETITION NO.1012 OF 2024

(The State of Maharashtra Vs. Bhaurao Yadavrao Tumade)

AND

CRIMINAL WRIT PETITION NO.1013 OF 2024

(The State of Maharashtra Vs. Bhaurao Yadavrao Tumade)

AND

CRIMINAL WRIT PETITION NO.1014 OF 2024

(The State of Maharashtra Vs. Bhaurao Yadavrao Tumade)

AND

CRIMINAL WRIT PETITION NO.1015 OF 2024

(The State of Maharashtra Vs. Bhaurao Yadavrao Tumade)

AND

CRIMINAL WRIT PETITION NO.1016 OF 2024

(The State of Maharashtra Vs. Bhaurao Yadavrao Tumade)

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Ms S.S. Dhote, APP for the State.
Mr. G.B. Mate, Advocate for the respondent.

CORAM:- URMILA JOSHI-PHALKE, J.
DATED :- JANUARY 8, 2025.

By these petitions, the petitioner has challenged the order dated 09.10.2024 passed below Exhibits – 165, 167, 169, 173, 201.

2. By the order passed below Exhibit 169, the learned Sessions Judge, Chandrapur was pleased to reject the application filed by the prosecution for permission to file documents on record whereas by passing order below Exhibits 165, 167, 173 and 201 learned Sessions Judge, Chandrapur rejected the prayer of the prosecution to

examine the witnesses under Section 311 of the Code of Criminal Procedure.

3. As per the contention of the prosecution, the complaint was received on 04.10.2021 from the minor victim which indicated that, the victim was studying in Zilla Parishad Primary School, Kom Tukum, Tq. Ballarsha, Dist. Chandrapur. All the victims were of a minor age and it was alleged that one of the victim who was 11 years of age and when she was in 3rd Standard, the teacher in the said School namely accused Bhaurao Tumade subjected her for the forceful sexual assault. During investigation it further revealed that there are other six girls also came forward with an allegation that they were also subjected for the forceful sexual assault in the nature of molestation.

4. On receiving the said report, the Investigating Officer registered the FIR and the investigation was commenced. During investigation, the various statements of the witnesses as well as the statements of the victim were recorded and collected the documentary evidence as well as the medical evidence and after completion of the investigation, the charge-sheet was submitted.

5. In support of the prosecution case, the prosecution has examined in all 20 witnesses and after examining all the 20 witnesses the prosecution has filed the application for permission to file documents on record as well as to examine the witnesses by filing the application under Section 311 of the Code of Criminal Procedure.

6. The prosecution desires to file the copy of the property register of present crime and relevant entries taken at police station Ballarshah. The documents were filed along with the application as well as the application was also filed to record the evidence of witnesses who carries the muddemal to the forensic laboratory as well as the person who has taken the entry in the muddemal register and the police constables who carried the muddemal to the forensic lab deposited the muddemal in the Court as well as Property room.

7. As per the prosecution, the charge-sheet contains the property receipts mentioned in the property register as the case based on the evidence of the victims as well as on circumstantial evidence, and therefore, the prosecution has to establish the chain of the circumstances, and therefore, the examination of these witnesses is utmost important. It is further the contention of the prosecution that the relevant documents i.e. the muddemal receipts are already on record, therefore, this is not the new fact or the surprising documents to the defence and no prejudice would be caused to the accused if these witnesses are examined. These are the persons who played some role in the investigation, and therefore, their evidence is required. Their names are also reflected in the register. In view of that, their examination before the Court is required for the just decision of the case.

8. Learned APP in all petitions have substantiates the contention by submitting that in all 7 victims are involved in the present crime who are subjected for the sexual assault as well as the molestation in the nature of the sexual harassment at the hands of the teacher. The case of the prosecution is rested on the evidence of the victim as well as the circumstances like seizure of the various articles which are either carried by the police constables to the forensic lab, a constable who deposited the same in the Property room or the constable who has deposited the said property in the Court. The chain of the circumstances is to be established by the prosecution, and therefore, the opportunity is required to the prosecution to establish the said chain, and therefore, the examination of the said witnesses is required. No prejudice would be caused to the accused by examining these witnesses. In view of that, learned Session Judge ought to have considered the applications but the said applications are rejected, and therefore, the petitions are filed before this Court.

9. Learned Counsel for the accused who submitted that these petitions were filed by the State only to fill up the lacuna, and therefore, the Sessions Judge rightly rejected the applications. There is no relevancy of such documents or relevancy of examining these witnesses, and therefore, no interference is called for. In view of that, all the petitions deserve to be dismissed.

10. I have heard learned Counsel for both the parties. On perusal of the record it reveals that the accused is charge-sheeted for the offence punishable under Sections 376AB, 376(2)(f) of IPC and under Sections 4, 6, 8 and 12 of the Protection of Children from Sexual Offences Act, 2012. The report is lodged by the minor girl on an allegation that when she was studying in 3rd standard, the accused Bhaurao Tumade subjected her for the forceful sexual assault and subsequently thereto on various occasions she was subjected for the forceful sexual assault. On the basis of the said report, police have registered the crime and during investigation, the other six girls came forward making an allegations that they were also sexually harassed and molested by the accused. During investigation, the Investigating Officer has seized various articles. The victims were taken for the medical examination. The investigation papers further shows that one Gajanan Totawar, Police Constable has carried the muddemal to CA office, another Police Constable Rahul Dudase has also carried some muddemal to the forensic lab. Their names are already appearing at serial Nos.41 and 42 as a witness in the charge-sheet. Besides them, some Police Constables have deposited the muddemal either in the Malkhana (property room) or in the Court, and therefore, they are the material witnesses. It further reveals that the muddemal receipts are already placed on record and by filing application the prosecution intends to file attested copy of the muddemal register along with the

original register, and therefore, filed an application to seek permission to file the said documents on record. However, the Sessions Judge while rejecting the application considered that the prosecution wants to file the copy of the property register maintained in Ballarpur police station; however, the record shows that the property receipts mentioned in the property register are already placed on record and it would be the repetition of the documents if the application is allowed and rejected the application. While the rejecting the application under Section 311 of Cr.P.C., the Court observes that the application below Exhibit 169 is already rejected and the prosecution has not properly explained the reason for examining the witnesses under Section 311 of Cr.P.C. and rejected the applications.

11. Before entering into the merits of the case, it is necessary to see the object of Section 311 of the Cr.P.C. On reading of Section 311 of Cr.P.C. the widest of the powers have been invested with the courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. The provision clearly states that all that is required for exercising the powers is that such evidence must be essential for just decision. It is therefore, imperative that the invocation of Section 311 Cr.P.C. and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case. The power vested

under the said provision is made available to any Court may, at any stage of any inquiry, trial or other proceeding initiated under this Code, summon any person as a witness or examine any in attendance, though not summoned as a witness, or recall and re-examine any person already examined. Insofar as recalling or reexamination of any person already examined, the Court must necessary consider and ensure that such recall or reexamination of any person appears in the view of the Court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the court, it is needless to state that exercise of such power should be made judicially and not arbitrarily.

12. While dealing with an application under Section 311 of Cr.PC. read with Section 138 of the Evidence Act, the principles to be borne in mind is that :

(i) Whether the court is right in thinking that the new evidence is needed by it?

(ii) The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.

(iii) If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.

(iv) The exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

(v) The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

13. The Hon'ble Apex Court in the case of ***Rajaram Prasad Yadav vs. State of Bihar [(2013) 14 SCC 461]*** in paragraph No.13 considered the provision Section 311 Cr.PC. along with 138 of the Evidence Act and laid down the guidelines and it is held by referring its earlier judgment in the case of ***Jamatraj Kewalji Govani vs. State of Maharashtra [AIR 1968 SC 178]*** wherein it is held as under :

“It would appear that in our criminal jurisdiction, statutory law confers a power

in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in court or to recall a witness already examined, and makes this the duty and obligation of the Court provided the just decision of the case demands it. In other words, where the court exercises the power under the second part, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new evidence is needed by it for a just decision of the case. If the court has acted without the requirements of a just decision, the action is open to criticism but if the court's action is supportable as being in aid of a just decision the action cannot be regarded as exceeding the jurisdiction."

14. While considering the object of the provision it is observed by the Hon'ble Apex Court that 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."

15. In another judgment *Zahira Habibullah Sheikh & anr. Vs. State of Gujarat & ors. [2006 (3) SCC 374]*. While considering the principles of rule of law and due process the Hon'ble Apex Court has also considered the provision under Section 311 of Cr.PC. and held that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crime being public wrong in breach and violation of public rights and duties, which affect the whole community as a community and are harmful to the society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interests of society is not to be treated completely with disdain and as persona non grata. Courts have always been considered to have an over-riding duty to maintain public confidence in the

administration of justice - often referred to as the duty to vindicate and uphold the 'majesty of the law'. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a Court of law in the future as in the case before it. If a criminal Court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves.

16. In the light of the above observations, if the provision under Section 311 of Cr.PC. along with Section 165 of the Evidence Act is considered confers vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record but something which is relevant is to be brought on record for the just decision of the case. The section consists of two parts i.e. (i) giving a discretion to the Court to examine the witness at any stage and (ii) the mandatory portion which compels the Courts to examine a witness if his evidence appears to

be essential to the just decision of the Court. Thus, the discretion is given to the Court to permit either to the parties or at its own to use the said provision to examine or recall any witness for the just decision of the case. It is to be done with an object of getting the evidence in aid of a just decision and to uphold the truth.

17. Learned Prosecutor rightly relied upon the decision of *Manju Devi vs The State Of Rajasthan [2019 (6) SCC 203]* wherein also while considering the provision under Section 311 of Cr.PC. it is held by the Hon'ble Apex Court that the discretionary powers like those under Section 311 Cr.PC. are essentially intended to ensure that every necessary and appropriate measure is taken by the Court to keep the record straight and to clear any ambiguity in so far as the evidence is concerned as also to ensure that no prejudice is caused to anyone. It is further observed that though it is Though it is expected that the trial of a sessions case should proceed with reasonable expedition and pendency of such a matter for about 8-9 years is not desirable but then, the length/duration of a case cannot displace the basic requirement of ensuring the just decision after taking all the necessary and material evidence on record. In other words, the age of a case, by itself, cannot be decisive of the matter when a prayer is made for examination of a material witness.

18. In the light of the said observation of the Hon'ble Apex Court and in the given set of facts and circumstances the trial Court ought to have considered that the 7 girls are subjected for the sexual assault as well as the molestation and prosecution intending to place on record the register of the muddemal and its certified copies which is not prejudicial to the accused. From the order of the trial Court or the reply filed by the accused nothing is revealed to show that in what manner the prejudice would cause to the accused, and therefore, the learned trial Court ought to have exercise its jurisdiction by allowing the prosecution to recall the witnesses as well as to produce the said documents on record, and therefore, the applications ought to have allowed by the Sessions Judge.

19. Considering the gravity of the offence and considering the fact that besides the direct evidence of the victims the prosecution placed reliance on the circumstances like the articles which are sent for the chemical analysis as well as the articles were deposited and attempt of the prosecution is to establish that since the depositing of the articles with the muddemal till it was sent to the forensic lab and thereafter to the Court, the every care and caution was taken, and therefore, the opportunity is to be granted to the prosecution to establish the said fact before the Court and no prejudice would be caused to the accused by allowing the same. On the contrary, in my opinion, it would be helpful to

the defence also to cross examine the witness as to the genuineness of the seizure of the articles and to ascertain whether the articles were kept in a proper custody or not and whether it was sent in a proper manner to the forensic lab. Thus, permitting the prosecution to examine these witnesses and placing the documents on record is not only helpful to the prosecution but it would be helpful to the defence also. In view of that, all the petitions deserve to be allowed, and therefore, I proceed to pass following order :

(i) All the petitions are allowed.

(ii) The order passed by the learned Sessions Judge, Chandrapur below Exhibit 169 rejecting the application for seeking permission to file the documents on record is hereby quashed and set aside. The learned Sessions Judge, Chandrapur shall permit the prosecution to place on record the documents.

(iii) The order passed by the learned Sessions Judge, Chandrapur below Exhibits 165, 167, 173 and 201 is quashed and set aside.

(iv) Learned Sessions Judge shall permit the prosecution to call the witnesses which are named in the relevant applications and

the sufficient opportunity is to be granted to the defence also to cross examine the said witnesses.

(v) The prosecution shall furnish the copies of the documents to the defence in advance.

20. All the petitions are disposed of in the above terms.

(URMILA JOSHI-PHALKE, J.)

**Divya*