



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

CRIMINAL APPLICATION [APL] NO. 294 OF 2025

X.Y.Z. IN CR. NO. 255 OF 2022 REGISTERED AT P.S., GITTIKHADAN, NAGPUR

VERSUS

STATE OF MAH., THRU. P.S.O., P.S., GITTIKHADAN, NAGPUR

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

Court's or Judge's Order

Mr. R. M. Daga, Advocate for the applicant.
Ms. Prachi T. Joshi, A.P.P. for non-applicant no.1
Mr. P. K. Sathianathan, Advocate for non-applicant no.2

CORAM : M. W. CHANDWANI, J.
DATE : APRIL 29, 2025.

1. Heard the learned counsel for the parties.
2. The petition challenges the order passed by the learned Extra Joint Additional Sessions Judge, Nagpur in Special Case (Child Protection) No. 313/2022, thereby rejecting the application (Exh.94) filed by the prosecution for recall of the witness i.e. the victim.
3. Brief background of the case is necessary to dispose of the application.
4. Prosecution came to be launched at the instance of the applicant/victim, who alleges to be a minor, against non-applicant no.2 alleging penetrative sexual assault on her. FIR has been lodged for the offences punishable under Sections 376 and 506-B of the Indian Penal Code and under Sections 4, 5 and

6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as “the POCSO Act” for short).

5. After filing of the charge-sheet, the learned Additional Sessions Judge framed the charge against non-applicant no.2 and examined one witness i.e. the applicant/victim. Thereafter, an application (Exh.94) was filed by the learned APP for recalling the witness i.e. victim on the ground that the word ‘*rape*’ after the word ‘*jabardasti*’ was missing in her deposition. Learned Judge did not appreciate the application and rejected the same. Feeling aggrieved by the impugned order, the applicant/victim is before this Court.

6. Learned counsel appearing for the applicant vehemently submitted that the victim had uttered the words ‘*jabardasti rape*’. However, since there was noise in the Court and the victim was deposing in a low tone, the word ‘*rape*’ could not be recorded by the learned Judge, which resulted in the omission of that word in her deposition. When it came to the notice of the victim, she approached learned APP and at her behest the application (Exh.94) came to be filed. Learned counsel further submitted that if the victim is not recalled for re-examination, it will affect her case and serious prejudice will be caused to the victim. It is contended that it was the case of the victim since the beginning that she was raped by non-applicant no.2 and in light of the FIR, the learned Judge ought to have allowed the application. Learned counsel submitted that since the trial is under the provisions of the POCSO Act, it is to be conducted sensitively and cautiously. He vehemently submitted that it is

the duty of the Court to take care that all the ambiguities are removed from the case, which can be done in the present case by recalling the victim in the witness box for re-examination by taking recourse under Section 311 of the Code of Criminal Procedure. To buttress his submission, the learned counsel placed reliance on the judgment of the Hon'ble Supreme Court in ***Mina Lalita Barua .vs. State of Orissa and others***¹, wherein the Hon'ble Supreme Court in paragraphs 17 to 19 has held as under :-

“17. Having perused the said evidence with particular reference to the issue brought to the notice of this Court, we are of the firm view that the inability of the trial Court in failing to take appropriate action as and when it was brought to its notice about the fallacy in the oral version, would certainly cause a serious miscarriage of justice, if allowed to remain. Unfortunately, in our considered view, the High Court appears to have adopted a very casual approach instead of attempting to find out as to the appropriate procedure which the trial Court should have followed in a situation like this. The High Court also committed a serious illegality in merely stating that under [Section 301 Cr.P.C.](#) there is no scope for a victim as a private party to take any effective step to rectify a serious fallacy committed by a statutory witness who is supposed to maintain cent per cent neutrality while giving evidence before the Criminal Court. Where the said witness is a Judicial Officer whose version before the Court carries much weight, by virtue of his status as a Judicial Officer while acting as a statutory witness, namely, as an officer who was authorized to hold a test identification parade, it was incumbent upon such witness to maintain utmost truthfulness without giving any scope for any party to gain any advantage by making a blatantly wrong statement contrary to records. We, therefore, find serious irregularity in the orders impugned in this appeal.

1. (2013) 6 SCC 173

18. We are convinced that the grievances as projected by the appellant as a victim, who was a victim of an offence of such a grotesque nature, in our considered view, the trial Court as well as the High Court instead of rejecting the application of the appellant by simply making a reference to [Section 301 Cr.P.C.](#) in a blind folded manner, ought to have examined as to how the oral evidence of PW-18 which did not tally with Exhibit-8, the author of whom was PW-18 himself, to be appropriately set right by either calling upon the Special Public Prosecutor himself to take necessary steps or for that matter there was nothing lacking in the Court to have remedied the situation by recalling the said witness and by putting appropriate Court question. It is well settled that any crime is against the society and, therefore, if any witness and in the case on hand a statutory witness happened to make a blatantly wrong statement not born out from the records of his own, we fail to understand why at all the trial Court, as well as the High Court, should have hesitated or adopted a casual approach instead of taking appropriate measures to keep the record straight and clear any ambiguity in so far as the evidence part was concerned and also ensure that no prejudice was caused to any one. In our considered view, the Courts below should have made an attempt to reconcile [Sections 301 and 311 Cr.P.C.](#) in such peculiar situations and ensured that the trial proceeded in the right direction.

19. In criminal jurisprudence, while the offence is against the society, it is the unfortunate victim who is the actual sufferer and therefore, it is imperative for the State and the prosecution to ensure that no stone is left unturned. It is also the equal, if not more, the duty and responsibility of the Court to be alive and alert in the course of trial of a criminal case and ensure that the evidence recorded in accordance with law reflect every bit of vital information placed before it. It can also be said that in that process the Court should be conscious of its responsibility and at times when the prosecution either deliberately or inadvertently omit to bring forth a notable piece of evidence or a conspicuous statement of any witness with a view to either support or prejudice the case of any party, should not hesitate to interject and prompt the prosecution side to clarify the

position or act on its own and get the record of proceedings straight. Neither the prosecution nor the Court should remain a silent spectator in such situations. Like in the present case where there is a wrong statement made by a witness contrary to his own record and the prosecution failed to note the situation at that moment or later when it was brought to light and whereafter also the prosecution remained silent, the Court should have acted promptly and taken necessary steps to rectify the situation appropriately. The whole scheme of the [Code of Criminal Procedure](#) envisages foolproof system in dealing with a crime alleged against the accused and thereby ensure that the guilty does not escape and innocent is not punished. It is with the above background, we feel that the present issue involved in the case on hand should be dealt with.”

7. Reliance is also placed on the decision in the case of ***Varsha Garg .vs. State of Madhya Pradesh and others²***, more particularly paragraph 32 thereof, in which the Hon’ble Supreme Court has held as under :

“32. The 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 under Section 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.

8. Learned APP appearing for the non-applicant/State has supported the submissions made by learned counsel for the applicant/victim.

9. Learned counsel appearing for respondent no.2/ accused objected to the submissions advanced by the learned counsel for the applicant. According to him, the evidence of the victim was conducted in an in-camera proceeding. The counsel for the victim as well as the learned APP were present in the Court. Learned Judge recorded the evidence of the victim which has been uttered by her. According to him, no immediate action was taken by the victim. The issue of cancellation of bail was pending before the Hon'ble Supreme Court wherein the victim was represented by her counsel. Even before the Supreme Court, the victim did not complain about the same. According to him, the learned Judge has rightly rejected the application of the victim. He further submitted that allowing such an application will seriously prejudice the right of the accused in a criminal trial. Hence, he sought rejection of this application.

10. Perusal of the impugned order reveals that the learned Judge has recorded that no objection was taken by the learned APP and the evidence of the victim was recorded in the presence of her counsel and the counsel for the accused and his associates. It was conducted in-camera. The learned Judge rejected the application by holding that it may amount to filling of a lacuna.

11. There is no dispute that the evidence of the victim was recorded in-camera. Apart from learned APP who was conducting the examination-in-chief of the victim and the counsel for the accused along with and his associates, even the

counsel for the victim was present before the Court. Some more events are required to be noted here. The learned Judge had granted bail to non-applicant no.2 in the said case. The order granting bail was questioned before this Court and this Court, by order dated 03.04.2024, cancelled the bail granted to non-applicant no.2. The order of this Court was assailed by non-applicant no.2/accused before the Hon'ble Supreme Court. The Supreme Court by order dated 28.08.2024 adjourned the matter for a month so that the victim could be examined and granted interim relief to non-applicant no.2. The evidence of the victim was recorded by the learned Special Judge on 19.09.2024.

12. Notably, the matter pertaining to cancellation of bail was listed before the Hon'ble Supreme Court on 23.09.2024 i.e. 4 days after recording of the evidence of the victim by the learned Judge. The victim was represented there through her counsel. The Hon'ble Supreme Court recorded the factum of completion of the evidence of the victim by the learned ASJ. No grievance was raised with regard to discrepancy even at that time. Rather, considering the evidence of the victim, the Hon'ble Supreme Court set aside the order of this Court cancelling the bail of non-applicant no.2/accused. No doubt, crimes against a minor have to be dealt with sensitively and cautiously. The offences under the POCSO Act are against society wherein, the victim is the actual sufferer and the Court must be alive and alert in the course of trying the offence under the POCSO Act to ensure that the evidence is recorded in accordance with law. However, in the present case, the applicant/victim has filed the application

on the premise that she deposed the word '*rape*', which was not recorded by the Judge.

13. As stated above, the learned Judge has recorded the reason while rejecting the application that her evidence was recorded in the presence of her counsel, the learned APP and the counsel for the accused. More particularly, the evidence of the victim was recorded in a closed Court room. That apart, the application for recalling the victim has been made after a month of recording of her evidence and as stated above, during the said period, the petition challenging the order of cancellation of bail was listed before the Hon'ble Supreme Court, but no grievance was made by the victim, even though she was represented by the counsel.

14. There can be no doubt that the Court must try to remove all ambiguity while administering justice but the premise on which the application (Exh.94) was made by the victim is not a convincing one, more particularly when the application is not supported by an affidavit of any of the persons who were present, including the victim. Therefore, the learned Additional Sessions Judge has rightly rejected the application (Exh.94) for recalling the victim in the witness box. In view of the facts of this case, the reliance placed by the learned counsel for the applicant on *Mina Lalita Baruwa* (supra) and *Varsha Garg* (supra) is misplaced.

15. The writ petition is devoid of merits. It is accordingly dismissed.

(M.W.Chandwani, J.)

Diwale