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Court : Mumbai Goa

Decided On : Jul-09-2015

Judge : C.V. Bhadang

Appeal No. : Criminal Writ Petition No. 81 of 2015

Appellant : Abdul Chapparban

Respondent : State

Judgement :

Oral Judgment:

1. Rule. Rule made returnable forthwith.

2. Shri Amonkar, the learned Additional Public Prosecutor waives service on behalf of the respondent.

3. Heard finally with consent.

4. By this petition, the petitioner/ accused is challenging the order dated 30/04/2015, passed by the President, Children's Court at Panaji, whereby the President, Children's Court has refused to recall the prosecution witnesses PW1 and PW2.

5. The brief facts are that the petitioner is facing prosecution for the offences punishable under Sections 376 and 506 of Indian Penal Code (I.P.C., for short)

read with Section 8 of the Goa Children's Act, 2003 and Section 5(n) of Protection of Children from Sexual offence Act, 2012, before the Children's Court at Panjim.

6. According to the prosecution, the petitioner was staying along with the mother of the victim. The victim girl is said to be 11 years old. As per the complaint dated 26/02/2013, lodged by the complainant PW1 Roshan, who is the mother of the victim, on 25/02/2013 at about 11.00 a.m., two unidentified persons had approached her informing that on 24/02/2013 at around 12.20 hours, the petitioner had raped the victim near Pernem Railway Station. On such a complaint, an offence came to be registered and on investigation, the petitioner is facing prosecution before the Children's Court.

7. It appears that the petitioner was earlier represented by Advocate Vengurlekar and he had cross-examined the prosecution witnesses, PW1 Roshan and PW2 the victim. Thereafter, the petitioner engaged another Counsel, whereupon an application under Section 311 of Criminal Procedure Code (Cr.P.C.) came to be filed for recall of PW1 and PW2. It was contended that the petitioner is not the step father of the victim as there was no marriage between PW1 i.e. the mother of the victim and the petitioner. It was contended that this aspect was not brought on record during cross-examination. It is next contended that the petitioner is already married and is having two children. It was contended that PW1 was having an affair with the petitioner. It was contended that on 23, 24 and 25th February, 2013, the petitioner was present in his house at Pernem. It was contended that the reason for lodging of the complaint was a dispute between the petitioner and PW1, as according to the petitioner, the complainant was annoyed as the petitioner was visiting his family at Chimbel. It was contended that all these relevant aspects were not put to the witnesses and there is no effective cross-examination and therefore, the witnesses need to be recalled.

8. The application was opposed on behalf of the prosecution.

9. The learned President, Children's Court, by the impugned order, found that PW1 and PW2 were already subjected to cross-examination at length and the powers under Section 311 of Cr.P.C. cannot be exercised to allow a party to fill in lacuna. The learned President of the Children's Court found that unless and until

the Court is of the opinion that the recall of the witness is necessary for just decision of the case, the witness cannot be recalled only because the accused wants to bring on record some additional circumstances. In that view of the matter, the application came to be rejected.

10. I have heard Shri Teles, the learned Counsel for the petitioner and Shri Amonkar, the learned Additional Public Prosecutor for the respondent. With the assistance of the learned Counsel, I have perused the impugned order as also the complaint and the evidence of PW1 and PW2.

11. It is submitted on behalf of the petitioner that the material and relevant aspects were not put to the witnesses, when there was cross-examination by the earlier Counsel. It is submitted that they related to the fact about there being absence of marriage between the petitioner and the PW1 as also about the presence of other family members in the house, which would have obviated the occurrence of any such incident, in which the victim had claimed that the petitioner had repeatedly exploited her sexually for a period of two years prior to the lodging of the complaint. It is submitted that these aspects would be material. The learned Counsel would submit that there is discrepancy between the complaint and the evidence of PW1 and she needs to be cross-examined on these aspects also. Reliance is placed on the decision of the Hon'ble Supreme Court in the case of **Rajaram P. Yadav Vs. State of Bihar**, reported in 2013(3) B Cr C 338 (SC), in order to submit that the Hon'ble Apex Court has laid down guidelines for the exercise of the powers under Section 311 of Cr.P.C. in paragraph 23 of the judgment and in the face of such guidelines, the application under Section 311 of Cr.P.C. is required to be allowed. Reliance is also placed on the decision of this Court in the case of **Narayan G. Gadekar Vs. State**, reported in 2013(1) Bom. C.R.(Cri.) 627. He, therefore, submitted that the petition be allowed.

12. On the contrary, it is submitted by Shri Amonkar, the learned Additional Public Prosecutor that mere change of Counsel would not entitle a party to seek recall of the witnesses. It is submitted that the witnesses have been cross-examined in detail and no ground for recall has been made out.

13. On hearing the learned Counsel for the parties and on perusal of the record, I do not find that a case for interference is made out. A perusal of the application under Section 311 of Cr.P.C., filed by the petitioner, would show that the material ground for recall is the change of Counsel. It is contended that there was no effective cross-examination of the witnesses, particularly on the point of absence of any marriage between PW1 and the petitioner (paragraph 2 of the application) and about the possibility of presence of the family members in the house, in the wake of the allegation that the victim was sexually exploited for a period of two years prior to filing of the complaint. A bare perusal of the evidence of PW1 would show that the said witness has been cross-examined on these aspects. PW1 has admitted that she was not married to the petitioner. That she has not separated from her husband, however she was residing with the petitioner with her daughter. Even as far as the aspect about the presence of other family members is concerned, PW2 has admitted that the house consisted of only one room. Her mother and two brothers used to sleep in the same room. Thus, a bare perusal of the evidence would show that these witnesses have been cross-examined on the aspects on which, it is now claimed that there is no cross-examination. It further appears that these witnesses have also been cross-examined on the point of reason for lodging of the complaint, namely according to the petitioner, the complainant was annoyed on account of the fact that the petitioner used to visit his wife and children at Chimbel. That has also come in the cross-examination of these witnesses.

14. In the case of **Rajaram P. Yadav**, (supra), the Hon'ble Apex Court, after taking a survey of decisions holding the field, has held thus:

23. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

a) Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?

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

c) 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.

d) The exercise of power under Section 311 Cr.P.C. 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.

e) 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.

f) The wide discretionary power should be exercised judiciously and not arbitrarily.

g) The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

h) The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

i) The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

j) Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.

k) The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

m) The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

n) The power under Section 311Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.?

15. These are the principles to be kept in mind while appreciating the individual facts and circumstances, in order to find out whether recall of the witness is necessary. There cannot be any straitjacket formula for exercise of such discretion, which is judicial in nature. The court has to find that recall of the witness is necessary for the just decision of the case which is a sine qua non for exercise of such discretion. The learned President, Children's Court, on consideration of the evidence of these witnesses, has come to the conclusion, and to my mind rightly so, that such a recall would not be necessary. In the case of **Narayan Gadekar** (supra), the concerned Advocate had accepted his inadvertence in not putting contradictions to the witnesses, because of which, it was found that recall of the witness was necessary. I, thus, find that the said case would be distinguishable on facts. It is trite that mere change of Counsel would not be a ground for recall of any witnesses. The test would be whether such a recall is necessary for the just

decision of the case. In that view of the matter, I do not find any case for interference. Consequently, Writ Petition is dismissed, with no order as to costs.

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