

2023 SCC OnLine Guj 2802

In the High Court of Gujarat at Ahmedabad  
(BEFORE HASMUKH D. SUTHAR, J.)

Mohammed Iliyas Idrishbhai Mevati

*Versus*

State of Gujarat

R/Criminal Revision Application No. 789 of 2023

Decided on September 2, 2023

Advocates who appeared in this case:

Mr. O.I. Pathan(7684) for the Applicant(s) No. 1  
for the Respondent(s) No. 2

Ms. Divyangna Jhala, Addl. Public Prosecutor for the Respondent(s)  
No. 1

The Order of the Court was delivered by

HASMUKH D. SUTHAR, J.:— RULE. Learned APP waives service of notice of Rule on behalf of the respondent - State of Gujarat.

2. Present Criminal Revision Application under Section 397 read with Section 401 of the Criminal Procedure Code, 1973 (hereinafter referred to as "CrPC") has been preferred by the applicant herein to quash and set aside the impugned order dated 09.05.2023 passed below application Exh.62 by the learned Additional Sessions Judge and Special Judge (POCSO), Court No. 21, City Civil & Sessions Court, Ahmedabad (hereinafter referred to as "learned Special Judge") in in POCSO Case No. 179/2021, whereby the application Exh.62 filed by the applicant under Section 311 of the CrPC for recalling of witness has been rejected.

3. Learned advocate Mr. O.I. Pathan appearing for the applicant has submitted that the learned Special Judge has committed an error in rejecting the application Exh.62, which was filed for recalling of the witness and to cross-examine further. At first point of time, the witness was examined but some questions were not put to her and as Advocate is changed, certain questions are required to be put to the witness and considering the principle of fair trial, opportunity to cross-examine the witness is required to be availed to the present applicant. Learned Special Judge has failed to appreciate the said fact that and denied the right of fair trial to the present applicant - accused and committed an error in not recalling the witness - prosecutrix. The said order of rejection is bad in law. Hence, he has requested to allow the present application and quash and set aside the impugned order passed by the

learned Special Judge.

4. *Per Contra*, learned APP has vehemently opposed the present application and stated that prosecutrix is minor and has already been examined in the year 2022 and merely to fill up the lacuna in the evidence of prosecutrix, such exercise is not permissible. The Court has to consider that the prosecutrix is minor and she should not be recalled time and again and put in trauma. Merely change of Advocate is not a ground to recall the witness. Hence, she requested to dismiss the present application.

5. I have given thoughtful consideration to the arguments canvassed by learned advocates appearing for both the sides. Present accused is facing charge for the offence punishable under Sections 376(2)(F), 376AB and 506(1) of the Penal Code, 1860 as well as under Sections 3, 4, 5(m)(m), 6, 9(m)(n) and 10 of the Protection of Children from Sexual Offences Act, 2012 and under Section 135(1) of the Gujarat Police Act. The prosecutrix is examined as PW-2 at Exh.13 on 30.07.2022. The accused has denied that he does not want to cross-examine the prosecutrix however, once again prosecutrix is recalled after five months on 20.12.2022 after application Exh.27 filed by the applicant to reopen the evidence of prosecutrix is allowed and right of accused to cross-examine the prosecutrix came to be reopened with cost and then opportunity to cross-examine was availed to the applicant-accused and accused has cross-examined the witness on 12.12.2022. Then, another witness i.e. mother of prosecutrix is examined at Exh.10 on 15.12.2022. Thereafter, after a long time, on 09.05.2023 application Exh.62 is filed by the applicant to recall the witnesses wherein the learned Special Judge has clearly opined that the prosecutrix is minor and to recall the prosecutrix time and again is not permissible under the law. Not only that, the accused is facing serious charges and merely based on the compromise that took place between the parties is not a ground to recall the witness and learned Special Judge has come to conclusion that with a view to hostile the witnesses, permission for recalling of witnesses is sought for, which exercise is not permissible.

6. Considering the aforesaid fact, merely to erase earlier evidence or to fill up the lacuna after winning over the witnesses, to recall the witnesses and that too in case of such non-compoundable offences, is not permissible under the law as the same would not be in the interest of justice. Even under Section 33(5) of the POCSO Act, it has been provided that it is the duty of the Court to ensure that the child is not called repeatedly to testify in the Court. Further, change of Advocate is also not a ground to recall the prosecutrix. In this regard, reference is required to be made to the decision of this Court in the case of *Menashi Rajabhai Kathad v. State of Gujarat*, (2017) 2 GLR 1412 wherein

paragraphs 9 and 15, this Court has observed and held as under:

*"9. Thus, the request for recalling of the witnesses for further cross-examination is not to be routinely granted but justifiable reason has to be made out to satisfy the Court that the recalling of the witness for further cross-examination is warranted or has become essential for the just decision of the case. When a party has full opportunity to cross examine the witnesses and availed such opportunity, recall of the witnesses for their further cross examination at the instance of such party only on the ground that during the cross examination of the witnesses, certain questions were missed to be put to the witnesses, can not be permitted especially when request for recall is made after long time.*

*15. The above observations cannot be read as laying down any inflexible rule to routinely permit a recall on the ground that cross-examination was not proper for reasons attributable to a counsel. While advancement of justice remains the prime object of law, it cannot be understood that recall can be allowed for the asking or reasons related to mere convenience. It has normally to be presumed that the counsel conducting a case is competent particularly when a counsel is appointed by choice of a litigant. Taken to its logical end, the principle that a retrial must follow on every change of a counsel, can have serious consequences on conduct of trials and the criminal justice system. Witnesses cannot be expected to face the hardship of appearing in court repeatedly, particularly in sensitive cases such as the present one. It can result in undue hardship for victims, especially so, of heinous crimes, if they are required to repeatedly appear in court to face cross-examination."*

7. In view of above discussion, I do not find any perversity in the order passed by the learned Special Judge. Hence, present criminal revision application is dismissed. Rule is hereby discharged.

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