IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.5217 OF 2019

KHAJASAB SULEIMAN PULUJKAR AND ORS.)...PETITIONERS

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Ms.Tanvi Tapkire, Advocate for the Petitioners.

Mr.A.R.Kapadnis, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 16th OCTOBER 2019

ORAL JUDGMENT :

1 Heard. Rule. Rule made returnable forthwith.

2 By this petition, petitioners, who are accused before the learned Additional Sessions Judge, Sangli, in Sessions Case No.182 of 2013 for offences punishable under Sections 498A, 323, 504, 507 of the Indian Penal Code as well as under Section 376 of

the Indian Penal Code and under Section 109 read with 34 of the Indian Penal Code are challenging order dated 16th August 2019 passed by the learned Additional Sessions Judge-2, Sangli, thereby rejecting the application at Exhibit 74. By this application, petitioners/accused had prayed for issuing summons to Dr.D.C.Patil or his representative for adducing evidence. That application came to be rejected by the impugned order.

2 Facts, in brief, are thus :

(a) First Informant who is examined as PW6 before the learned trial court is daughter-in-law of petitioner no1/accused no.1 Khajasab Suleiman Pulujkar. Petitioner no.2/accused no.2 Faijulla Pulujkar is her husband whereas petitioner no.3/accused no.3 Haseena Pulujkar is mother-in-law of the First Informant/PW6. She alleged that these accused persons had subjected her to cruelty, caused hurt to her apart from criminally intimidating her and provoking her. She further alleged that petitioner no.1/accused no.1

Khajasab, who happens to be her father-in-law, had committed rape on her, time and again.

(b) During the course of her evidence, the First Informant/PW6 has deposed that her father-in-law i.e. the petitioner no.1/accused no.1 started raping her on and often when she came back to her matrimonial house and petitioner no.3/accused no.3 mother-in-law was aiding the petitioner no.1/accused no.1 in this act. It is further deposed by the First Informant/PW6 that on 21st October 2012, at about 3.00 p.m., her father-in-law committed rape on her in presence of her mother-in-law and she aided this act by increasing volume of the television.

(c) During the course of recording of their statement under Section 313 of the Code of Criminal Procedure (hereinafter referred to as Cr.P.C. for the sake of brevity), petitioners sought leave of the court to examine the defence witness but subsequently they passed a Pursis and declined to lead any

oral evidence in defence. However, after conclusion of arguments of the prosecution, an application at Exhibit 74 came to be filed by invoking powers of the trial court under Section 311 of the Cr.P.C. It is contended by the defence that evidence of Dr.D.C.Patil or his representative is essential for just decision of the case, on the backdrop of the fact that on 21st October 2012, the First Informant/PW6 had been to the hospital of Dr.D.C.Patil and got herself examined.

(d) After calling say of the prosecution, by the impugned order dated 16th August 2019, the learned Additional Sessions Judge-2, Sangli, was pleased to reject the said application for summoning Dr.D.C.Patil for adducing evidence in the trial.

3 The learned counsel appearing for the petitioner drew my attention to evidence of the First Informant/PW6 and argued that as this witness had claimed that her father-in-law had committed rape on her on and often and that on such dates she was getting herself examined by Dr.D.C.Patil, the defence wants to

bring on record the mental condition of the alleged victim of rape by examining Dr.D.C.Patil. The learned counsel further argued that conduct of the alleged victim is also required to be brought on record as after the alleged incidents of rape on her, by her father-in-law, she was visiting the hospital of Dr.D.C.Patil, but was not disclosing the events which were taking place in her matrimonial life, to this family Doctor. In that view of the matter, according to the learned counsel for the petitioners, for just decision of the case, evidence of Dr.D.C.Patil is necessary. My attention is drawn to the cross-examination of the First Informant/ PW6 wherein she had denied even prescription dated 21st October 2012 issued by Dr.D.C.Patil after examining her.

4 The learned APP opposed the petition by submitting that the application, as framed and filed, was not maintainable, as it was moved belatedly after closure of the defence witness.

5 I have considered the submissions so advanced and also perused the impugned order.

6 At the outset, it needs to be mentioned that power of the court to summon material witnesses has vast amplitude and in exercise of this power, even the trial court can recall any witnesses, who are already examined. The trial court can summon any witness even if evidence of both sides is closed, so long as the court retains seisin of the criminal proceedings. What is required to be demonstrated is, evidence of such witness is essential to the just decision of the case.

7 In the case in hand, impugned order shows that the learned trial court got swayed by the fact that eight witnesses were examined by the prosecution and those were thoroughly and extensively cross-examined by the defence. The learned trial court had noted that the First Informant/PW6 was cross-examined by putting her various questions in respect of treatment at the hospital of Dr.D.C.Patil. The learned trial court noted the fact that the First Informant/PW6 denied the prescription issued by Dr.D.C.Patil after examining her on 21st October 2012. However, the learned trial court took a shortcut in the matter by holding

that the prescriptions dated 7th June 2012, 16th August 2012 and 21st October 2012 issued by Dr.D.C.Patil after examining the victim can be exhibited for the purpose of identification, and therefore, it is not necessary to examine Dr.D.C.Patil or any authorized person on his behalf. Other reason given by the learned trial court for rejection of the application for summoning the defence witness is to the effect that the application is moved to fill up the lacuna and to prolong the trial.

8 In her chief-examination, the First Informant/PW6 has categorically stated that her father-in-law had committed rape on her frequently and even once in presence of her mother-in-law. On this backdrop, it has come in cross-examination of the victim that she was regularly visiting the nursing home of Dr.D.C.Patil and was taking treatment. In the chief-examination, the First Informant/PW6 has categorically stated that one such incident of rape on her, by her father-in-law, took place at 3.00 p.m. of 21st October 2012 and that too, in presence of her mother-in-law. According to the defence, on this date itself, the First

Informant/PW6 had been to the hospital of Dr.D.C.Patil and had taken treatment from him for common cold and cough. Other prescriptions issued by Dr.D.C.Patil after examining the First Informant/PW6 are also relied by the defence. This is obviously done in order to show that though the victim was visiting the nursing home of Dr.D.C.Patil for taking treatment and on some occasions, even on the dates of alleged incidents of rape on her by her father-in-law, she had not disclosed commission of such heinous offence to the family Doctor. It is, for this purpose, the defence wants to examine Dr.D.C.Patil. However, the learned trial court has not considered this aspect. The learned trial court is apprehensive of the fact that by examining Dr.D.C.Patil, the defence wants to fill in the lacuna. It appears that the learned trial court has not understood the purport of the term “lacuna” in criminal jurisprudence. Way back in the matter of **Rajendraprasad vs. Narcotic Cell**[1] the Hon'ble Apex Court has explained what it means by a “lacuna” in the prosecution case. It is held by the Hon'ble Apex Court that a “lacuna” in the prosecution case is not to be equated with the fall out of an oversight committed by the

1 (1996) 6 SCC 110

Public Prosecutor during the trial either in producing relevant material or in eliciting relevant answers from witnesses. Laches or mistakes during conducting of a case, as held by the Hon'ble Supreme Court, cannot be understood as a “lacuna” which the court cannot fill up. “Lacuna” must be understood as an inherent weakness in the case of prosecution or latent wedge in the matrix of the prosecution case. However, an oversight in management of the prosecution by the learned Public Prosecutor cannot be treated as a “lacuna”. Some analogy applies even in case of the defence. Delay in applying for summoning the defence witness cannot be termed as “lacuna” in the defence.

9 Similarly, the learned Additional Sessions Judge also erred in holding that by marking the prescriptions as exhibits for the purpose of identification, the purpose is served. The defence is not harping upon proving the contents of the prescriptions. On the contrary, the defence wants to demonstrate conduct of the prosecutrix which is not compatible with the alleged happenings in her matrimonial life. Even otherwise, marking the documents

as exhibits only for the purpose of identification, does not serve any purpose. Merely placing the document in original for perusal of the court would not be adequate to prove the event embodied within the contents of such document. For proving the contents of that document, a witness to execution of the document is required to be examined. The document is required to be proved by examining the author thereof and not by marking it as an Exhibit for the purpose of identification. Therefore, even if prescriptions of Dr.D.C.Patil's Nursing home are exhibited for the purpose of identification, the learned trial court cannot look into such hearsay evidence by making it admissible in a circuitous way, by exhibiting the same.

10 The net result of foregoing discussion requires me to hold that the impugned order cannot be sustained and the defence has made out a case for summoning Dr.D.C.Patil, as his evidence is necessary for just decision of the case. Hence, the order :

ORDER

i) The petition is allowed.

ii) Rule is made absolute in terms of Prayer Clause (a).

(A. M. BADAR, J.)