

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CRIMINAL APPLICATION NO. 1206 of 2023

ANANDBHAI BHARATBHAI VAGHELA

Versus

STATE OF GUJARAT

Appearance:

MR. JAY G THAKER(9944) for the Applicant(s) No. 1

ROSHANKUMAR S PARMAR(9538) for the Applicant(s) No. 1

MS MOXA THAKKAR, APP for the Respondent(s) No. 1

CORAM:HONOURABLE MR. JUSTICE ILESH J. VORA

Date : 24/01/2023

ORAL ORDER

1. By way of this writ application, filed under Article 226 of the Constitution of India read with Section 482 of Cr.P.C, the applicant herein challenges the order below Exh.62, dated 09.12.2022 passed by the Additional Sessions Judge, City Sessions Court, Court No.24, Ahmedabad, by which, the request made by the applicant-accused to examine the defence witness one Mr. K.G. Zala, Police Inspector, Naranpura Police Station, who has recorded the statement of the victim in connection with the offence registered for the offences punishable under Sections 323 and 307 etc.
2. Facts and circumstances giving rise to filing of present application are that, pursuant to the FIR dated 05.03.2021, registered with Vadaj Police Station, Ahmedabad, for the offences punishable under Sections 376, 376(2)(n), the applicant herein was apprehended

and after completion of investigation, charge-sheet came to be filed against him and the same has been culminated into Sessions Case being registered as 213 of 2021. The City Sessions Court, Ahmedabad framed the charge and accordingly, trial began and after completion of prosecution evidence, the applicant-accused called upon on his defence and adduce evidence in support thereof. The applicant-accused moved an application Exh.62, for the issuance of process upon witness P.I., Mr. K.G. Zala, who had recorded the statement of the victim in connection with the offence registered with Naranpura Police Station for the offences under Section 307 of the IPC. The reason for examination of the witness is that, the victim in her statement recorded under Section 161 of Cr.P.C., made certain admission with regard to consensual physical relationship and the same has been mentioned in the application. It is averred that, the factum of statement dated 24.11.2020, recorded by Mr. Zala, was referred to the victim in her deposition and same has been denied. Thus, in order to contradict the evidence of the victim and impeach her credibility, the witness Mr. Zala is necessary to ascertain the truth.

3. The learned trial Court after giving opportunity of being heard to both the sides, rejected the application vide its order dated 09.12.2022, observing that, in the offence registered under Section 307 has no any co-relation with the offence registered under Section 376 of the IPC. It is further observed that, the victim has not examine in the

offence registered under Section 307 and therefore, admission unless and until she be not examined by the Court, the statement recorded under Section 161 of Cr.P.C. is not relevant fact. It is further observed that, the statement recorded under Section 161 of Cr.P.C. shall not be used for any purpose except to contradict a witness in the manner prescribed in the proviso to Section 162(1) of the Cr.P.C. and that too, in the trial of Section 307 of the IPC.

4. Aggrieved with the order, the applicant-accused preferred instant writ application, inter alia, challenging the validity and sustainability of the order.
5. Mr. R.S. Parmar, learned counsel appearing for and on behalf of the applicant-accused would submits that, the learned trial Court failed to appreciate the facts that, the applicant has been charged with serious offence of rape and at the relevant time, the victim was major aged about 29 years and before registration of offence of rape, the brother of the victim lodged an FIR dated 23.11.2020, registered with Naranpura Police Station for the offences punishable under Section 307 of the IPC etc. wherein the investigating officer Mr. K.G. Zala recorded the statement of the victim and in that statement, the elements of consent of the alleged act of sexual relationship has been referred and mentioned by her. In such circumstances, in order to impeach the credibility of the witness and to contradict her statement stated on oath before the Court, the witness Mr. K.G. Zala is

required to be examined.

6. In view of the aforesaid contentions, Mr. Parmar would submits that, it is mandatory on the part of the trial Court to issue process upon the witness to establish the defence of the accused. It is not the case of the prosecution that, the application Exh.62 having been filed with intend to delay the trial. The learned trial Court ought to have held that, for fair trial and to prove the innocence of the accused, the witness sought to be examined is necessary to ascertain the truth.
7. On the other hand, Ms. Moxa Thakkar, learned APP on advance copy vehemently opposed the application and contended that, the learned trial Court has properly appreciated the facts of the case and assigned proper reasons and arrived at a conclusion that, the witness sought to be examined is not necessary as in the trial of the offence registered under Section 307 of the IPC, the victim's statement has not been recorded by the Court concerned. Thus, the impugned order does not warrant any interference by this Court.
8. Having regard to the facts and circumstances of the present case and upon consideration of the contentions raised by learned counsel and on perusal of the impugned order, this Court is of opinion that, the learned trial Court failed to appreciate the true purport and object of Section 233 of the Cr.P.C. It provides that, if the accused applies for issuance of any process for

compelling the attendance of any witness, the Court shall issue such process, unless, the Court considers that such application should be refused on the ground that, it is made for the purpose of vexation or delay or for defeating the ends of justice. On perusal of the impugned order, the trial Court mainly considered the evidentiary value of the statement recorded by police under Section 161 of Cr.P.C. and held that, the statement recorded is not relevant as it has been recorded for the distinct and different offence. This Court is of considered opinion that, the statement dated 24.11.2020, alleged to have been recorded by the P.I., K.G. Zala having direct bearing on the incident of rape for which the applicant-accused tried to prove his defence of consensual relationship, as the FIR, registered under Section 307 of the IPC is prior in point of time and the victim in her statement dated 24.11.2020, had categorically referred the alleged act of rape and same has been confronted by the defence counsel in the cross-examination of the victim. It is no doubt true that, a statement under Section 161 of Cr.P.C. is not substantive piece of evidence and it can be used only for the limited purpose of contradicting the maker thereof in the manner laid down in the proviso to Section 162(1) of the Cr.P.C.

9. On the facts of the present case, prior to registration of offence of rape, the offence under Section 307 of the IPC was registered wherein the alleged act of forceful rape committed on the part of the applicant-accused disclosed

in the form of police statement recorded by witness Mr. K.G. Zala. The defence wants to use the previous statement of the witness to contradict the version of the victim stated on oath. In such circumstances, this Court is of the considered view that, fair trial includes fair and proper opportunities to prove the innocence and considering the mandate of Section 233 of the Cr.P.C. which imposes the duty upon the Court to summon any witnesses to be examined to prove the innocence of the accused, unless the Court considers that, such application should be refused for any reasons specified in the sub-section. The trial Court is not of the view that, the application has been tendered with malafide intention with a view to delay the trial of the case.

10. For the foregoing reasons, the impugned order is not sustainable in law and the same is quashed. The application Exh.62 is allowed. The learned trial Court shall issue process upon the witness and fix one effective date for examination. The applicant-accused directed to cooperate with the trial proceedings and complete the evidence on the date fixed by the Court.
11. The present application is allowed accordingly. The observations made hereinabove for a limited issue raised in the present proceedings and shall not be construed on the merits of the case.