

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**R/SPECIAL CRIMINAL APPLICATION NO. 10133 of 2022**

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**DHAVAL BIJALJI THAKORE**

**Versus**

**STATE OF GUJARAT**

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Appearance:

MR. NISARG N JAIN(8807) for the Applicant(s) No. 1

MR JK SHAH, APP the Respondent(s) No. 1

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**CORAM:HONOURABLE MR. JUSTICE ILESH J. VORA**

**Date : 10/01/2023**

**ORAL ORDER**

1. Rule. Learned APP waives service of rule for the respondent  
- State. With the consent, the matter is taken up for final disposal.
2. By way of this application filed under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973, the applicant has invoked extraordinary jurisdiction of this Court challenging the order dated 08.09.2022 passed below Exhs.40 and 44 in Special POCSO Case No.324 of 2019, by the Special POCSO Judge, City Civil and Sessions Judge, Ahmedabad, whereby the Court did not grant permission to the accused-applicant to ask certain questions and closed the right of cross-examination of the victim.

3. The applicant herein has been charged with Sections 363, 366 and 376(2) of the IPC and Sections 5(L), 6 and 17 of the POCSO Act.
4. This Court has heard learned advocate Mr.Niraj Jain appearing for and on behalf of the applicant-original accused and on advance copy, learned APP Mr.J.K. Shah.
5. Mr.Jain, learned counsel for the applicant would submit that the learned Trial Court failed to provide sufficient opportunity to the applicant to prove his defence. He would further submit that at the relevant time, the victim had informed the applicant that her mother wanted to get marry with the person who is elder than her and therefore, she does not want to marry him and had asked for necessary help for which repeatedly she had called the applicant through mobile and whatsapp call. It is in this context, he submitted that during the cross examination of the victim, the defence counsel asked some relevant and necessary questions which directly impact on the truthfulness, veracity of the witness. He would further submit that the identity of the husband of the victim would not fall under Section 33 of the POCSO Act. He would further submit that in order to establish the factum of

mobile calls made by the victim, the cell number from which calls were made is required to be brought to the notice of the Court so that the accused can examine calling the service provider of the cell phone. He would further submit that while refusing the permission to ask some questions to the victim, the Trial Court should not have closed the right of the cross examination which is the fundamental right of the accused to establish his defence.

6. In the aforesaid contentions, learned counsel for the applicant would submit that the impugned order passed below Exh.40 is contrary to the principle of law and fundamental right of the applicant to defend his case.
7. On the other hand, learned APP Mr.J.K. Shah for the respondent-State, contended that the learned Trial Court has properly interpreted the mandatory provisions of Section 33(7) as it is mandatory on the part of the Trial Court to ensure that the identity of the child is not disclosed at any time during the trial. He would further submit that denial to ask certain questions as referred by learned counsel for the applicant would not in any way prejudice the right of the accused and therefore, no any grounds exist to interfere with the impugned order.

8. Heard at length learned advocates for the respective parties and perused the impugned order.
9. In the facts of the present case, the applicant – accused is facing the charges of abduction and rape. The victim at the relevant time was below 18 years. Section 33 of the POCSO Act, 2012 provides for procedure and powers of the Special Court while conducting the trial of the case. Sub-section (7) of Section 33 cast a duty upon the Court to ensure that the identity of the child is not disclosed at any time during the course of investigation or trial. In such circumstances, the question with regard to husband's name of the victim and recording the cell number of the victim having been rightly rejected by the Trial Court. It is open for the applicant – accused to examine the witnesses of the service provider by citing the cell number which was used by the victim so as to establish the facts of the CDR. In such circumstances, this Court is of the opinion that two questions asked by the defence counsel would certainly disclose the identity of the victim and therefore, considering the mandatory provisions of the Act, the Trial Court has not committed any error of law while rejecting the application.

10. Mr.Jain, learned counsel submitted that in order to establish the conduct of the victim, the question with regard to filing of another FIR by the mother of the victim was also rejected by the Court without assigning any reason and therefore, so far question with regard to another FIR lodged by the mother of the victim is necessary to show the conduct of the parties.
11. In the case of **Kartarsingh Vs. State of Punjab (1994(3) SCC 569)**, the Apex Court explained the purpose of cross examination of the witness. The Apex Court has observed in Para-278 of the said judgment as under:

*“Section 137 of the Evidence Act defines what cross-examination means and Sections 139 and 145 speak of the mode of cross-examination with reference to the documents as well as oral evidence. It is the jurisprudence of law that cross-examination is an acid-test of the truthfulness of the statement made by a witness on oath in examination-in-chief, the objects of which are:*

*(1) to destroy or weaken the evidentiary value of the witness of his adversary;*

*(2) to elicit facts in favour of the cross-examining lawyer's client from the mouth of the witness of the adversary party;*

*(3) to show that the witness is unworthy of belief by impeaching the credit of the said witness;*

*and the questions to be addressed in the course of cross-examination are to test his veracity; to discovery who he is and what is his position in life; and to shake his credit by injuring his character.”*

12. Keeping in view of the facts of the present case and applying the principles laid down by the Apex Court, I am of the view that the Trial Court could not have refused the permission to ask necessary questions with respect to earlier complaint and/or case. Even otherwise, the closure of the right of cross examination of the victim is also against the statutory right of the accused to cross examine witnesses.
13. In view of the above, the applicant – accused is permitted to ask the questions with respect to the complaint and/or FIR registered in the year 2022. The learned Trial Court shall recall the victim and fix the date for further cross examination of the victim. The applicant – accused is directed to complete the cross examination on the date fixed by the Court. If the accused does not cooperate with the trial proceedings on that day, no further date and/or opportunity shall be granted.

14. With the aforesaid observations, the application is ***partly allowed***. Rule is made absolute to the aforesaid extent.

Rakesh

**ILESH J. VORA,J)**