

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Reserve: 16th September, 2010

Date of Order: September 21, 2010

+CRL.M.C. NO. 1994 OF 2010

%

21.09.2010

HARI PRASAD MEENA

... Petitioner

Through: Mr. R.N. Mittal, Sr. Adv. with Mr. Manoj Kumar, Advocates.

Versus

STATE

... Respondents

Through: Mr O.P. Saxena, APP for State

JUSTICE SHIV NARAYAN DHINGRA

- | | |
|--|------|
| 1. Whether reporters of local papers may be allowed to see the judgment? | Yes. |
| 2. To be referred to the reporter or not? | Yes. |
| 3. Whether judgment should be reported in Digest? | Yes. |

JUDGMENT

1. The petitioner is aggrieved by the order dated 21st January, 2010, passed by learned Additional Sessions Judge (ASJ) on an application of Prosecution under Section 311 Cr. P.C. whereby she directed for summoning of witness Baby Shruti for her examination in the case.

2. Brief facts relevant for the purpose of deciding this petition are that the petitioner is facing charges of rape of the child Shruti aged around 5 and a half years. The rape was, allegedly, committed on 29th January, 2007. The petitioner was arrested soon thereafter and put to trial. Baby Shruti was summoned to appear as a witness in the Court and she appeared in the Court on 22nd September, 2007 i.e. after eight months of the incident. The learned

ASJ, looking at the tender age of the child, who at that time was around 6 years and few months of age, asked her certain questions to determine her capacity to depose in the Court. After asking questions to determine the capacity, the learned ASJ came to conclusion that she was not capable of giving rational answers to the questions put to her and discharged her. The prosecution later, after about two years, moved an application for re-summoning of Baby Shruti under Section 311 Cr. P.C. after material witnesses had been recorded in the case and the learned ASJ allowed this application observing that Trial court should endeavour to reach the truth and the victim/prosecutrix even if could not be examined on earlier occasion due to incapacity in answering to the Court queries rationally, she could later on be examined and this would not prejudice the accused as the accused would have ample opportunity to cross examine her. She dispelled the fear expressed by the accused that the child can be tutored by observing that this would be considered at appropriate stage.

3. Section 118 of Indian Evidence Act provides that all persons are competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answer due to tender age, extreme old age, disease (whether of body, mind or any other cause). By virtue of this Section whenever a witness appears before a Court for testifying and if the Court finds that the witness was a child or a person of very old age or infirm or suffering from a mental deprivation, it is the duty of the Court to first ascertain the capacity of such person to be a witness. In the case of a child witness, the Court has a duty to ascertain her capacity and

understanding and if she was able to give rational answers and if the Court was satisfied that the witness was a competent witness, able to understand questions and able to give answers rationally, then the Court can proceed to examine the witness. But if the Court comes to conclusion, after a preliminary examination that the witness was not able to give rational answers, then the Court after recording its opinion about the incapacity of the witness, has to discharge the witness.

4. The question arises if the child was incapable of deposing due to tender age and unable to understand the meaning of questions and had been discharged, can such a child witness be again summoned to depose in the Court after few years, in the present case after more than two years. It is well known fact that a child witness can be made to believe the things which he himself has not seen and this belief once gets hold of the child, a child witness can be tutored much better than adults. Once the court comes to conclusion that the child witness was incapable of giving rational answers to the questions and was not a competent witness, re-summoning the same child witness, after some years get added to her age and she becomes little more mature, is fraught with dangers since the child witness can be tutored by the parents or by the Investigating Officer to depose in a particular fashion. No doubt, the tool of cross examination is available with the defence to test the veracity of deposition of every witness, but, the issue is whether such a witness can be permitted under law to be re-summoned or not. I consider that the answer is in negative. In the present case, the child was summoned to the Court after about 8 months of the alleged incident. At that time the child

was not capable to answer whether she should speak truth or lie in the Court and the child was not able to make distinction between truth and lie, as is clear from the preliminary questions asked to her. If the child who has now grown to 9 years of age is asked to depose, it is obvious that this deposition of the child would not be natural but would be one tutored to her. The child witness, after the incident, was not produced before the Court of MM for recording statement under Sec. 164 Cr. P.C. when the incident was very fresh in the mind of the child. She was found incapable of deposing by ASJ in September, 2007, now summoning the child witness, in fact, would amount to summoning a tutored witness. That tutoring is being done in this case, is clear from the testimony of PW-3, who during cross examination had stated that she, her husband and her daughter were being tutored by the I.O. on each and every date of hearing and the I.O. used to tell them that they have to make the same statement in the Court as tutored to them. She admitted in her testimony that she and her husband used to tell the daughter to depose in the court on the same line as her statement was recorded by the police. In view of this testimony of PW-3, I consider that the order passed by learned ASJ of again summoning the child witness, who was found incompetent to depose, was beyond the scope of Section 311 Cr. P.C.. I, therefore, allow this petition and order dated 21st January, 2010 of learned ASJ is set aside.

September 21, 2010
acm

SHIV NARAYAN DHINGRA, J.