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

DECIDED ON : 9th DECEMBER, 2015

+ **CRL.M.C. 4997/2015**

AMZAD

..... Petitioner

Through : Mr.Ritesh Kr.Bahri with Mr.Vinay
Kr.Gupta and Mr.Randeep,
Advocates.

versus

THE STATE OF NCT DELHI

..... Respondent

Through : Mr.Sudershan Joon, APP with
W/SI Chanchal, PS Mayur Vihar.

**CORAM:
HON'BLE MR. JUSTICE S.P.GARG**

S.P.Garg, J. (Oral)

CRL.M.A.No.17983/2015 (Exemption)

Exemption allowed subject to all just exceptions.

The application stands disposed of.

CRL.M.C. 4997/2015

1. The instant petition has been preferred by the petitioner to challenge the legality and propriety of an order dated 10.08.2015 of

learned Addl. Sessions Judge, by which application under Section 311 Cr.P.C. to recall the prosecutrix was dismissed.

2. I have heard the learned counsel for the petitioner and have examined the record. The petitioner is facing trial in case FIR No.89/2013 registered under Sections 363/342/376 IPC and Sections 4/6 POCSO Act at PS Mayur Vihar. Order dated 10.08.2015 reveals that the prosecution has already completed its evidence. Statement of the accused was recorded under Section 313 Cr.P.C. When the case was fixed for defence evidence, the instant application to recall the prosecutrix was moved to confront her statements recorded under Sections 161 & 164 Cr.P.C. Learned counsel for the petitioner would urge that X's cross-examination is necessary for the just decision of the case as certain questions regarding the statements given by her under Sections 161 & 164 Cr.P.C. were not put to her in the cross-examination by the previous counsel. Reliance has been placed on '*P.Sanjeeva Rao vs. State of A.P.*', 2012 (7) SCC 56.

3. The prosecutrix / victim was examined on 28.09.2013. On that day, she was partly cross-examined. On 04.02.2014, she was again cross-examined at length. Apparently, the petitioner did not move any application to recall her at the earliest. The instant application has been filed when statement of the petitioner has been recorded under Section

313 Cr.P.C. and the trial is at its fag end. Statements under Sections 161 & 164 Cr.P.C. were available to the petitioner at the time of her cross-examination on previous two dates. She cannot be compelled to appear time and again for examination merely because a new counsel has been engaged by the petitioner who intends to put certain more questions to her in the cross-examination.

4. In a recent judgment '*AG vs. Shiv Kumar Yadav and ors.*', 2015 X AD (S.C.) 165, decided on 10.09.2015, Supreme Court categorically and affirmatively held that fairness of trial has to be seen not only from the point of view of the accused, but also from the point of view of the victim and the society. In the name of fair trial, the system cannot be held to ransom. It further held that while advancement of justice remains the prior 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 he is appointed by choice of a litigant. It further held that mere change of counsel cannot be a ground to recall the witnesses. Mere fact that the accused was in custody and that he will suffer by the delay could be no consideration for allowing recall of witnesses particularly at the fag end of the trial.

5. In the instant case also the victim was examined at length on two dates. Merely because the previous counsel allegedly did not put certain questions, the victim examined long back cannot be recalled. It will be an unending affair. This Court cannot comment upon the questions which the previous counsel allegedly failed to put in his wisdom to this witness in the cross-examination at the relevant time. This Court in ‘*Raminder Singh vs. State*’, CrI.M.C.8479/2006 in its order dated 20.02.2008 (finding reflection in ‘*AG vs. Shiv Kumar Yadav*’ (supra), held:

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“In the first place, it requires to be noticed that scope of Section 311 Code of Criminal Procedure does not permit a court to go into the aspect whether material portions of the evidence on record should have been put to the witness in cross-examination to elicit their contradictions. If the court is required to perform such an exercise every time an application is filed Under Section 311 then not only would it be pre-judging what according to it are ‘material portions’ of the evidence but it would end up reappraising the entire cross-examination conducted by a counsel to find out if the counsel had done a competent job or not. This certainly is not within the scope of the power of the trial court under Section 311 Code of Criminal Procedure. No judgment has been pointed out by the learned Counsel for the Petitioner in support of such a contention. Even on a practical level it would well nigh be impossible to ensure expeditious completion of trials if trial courts

were expected to perform such an exercise at the conclusion of the examination of prosecution witnesses every time.”

6. The petition lacks merit and is dismissed in limini.
7. Trial Court record (if any) be sent back forthwith with the copy of the order.

(S.P.GARG)
JUDGE

DECEMBER 09, 2015 / *tr*