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

+ **CRL.REV.P. 728/2016**

RAKESH & ANR

..... Petitioner

Through: Ms. Geeta Luhtra, Sr. Adv. with Ms.
Shivani Lohiya, Adv.

versus

STATE

..... Respondent

Through: Ms. Radhika Kolluru, APP with ASI
Kiran Sethi, PS Anand Parbat

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

ORDER

09.11.2016

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1. The petitioner has preferred the present criminal revision under Section 397 read with Section 401 Cr PC to assail the order dated 05.08.2016 passed by the learned ASJ-01 (West) in case FIR No.14/2014 under Section 323/306 IPC read with Section 23 of Juvenile Justice Act and Section 6/16/19/21 of the Protection of Children from Sexual Offences Act (POCSO Act).

2. The petitioner is an accused in the aforesaid case and the trial is underway. By the impugned order, the learned ASJ has dismissed the second application moved by the petitioner under Section 311 Cr PC seeking

recall of the prosecutrix, who has been examined as PW-2 (she was about 12 years of age on the date of the alleged commission of repeated rape upon her by the petitioner/ accused). The petitioner also seeks recall of PW-3, the landlord of the premises, where the petitioner was a tenant at the time of the incident.

3. The submission of Ms. Luthra, learned senior counsel for the petitioner is that the petitioner is a poor person and could not arrange or afford competent legal assistance at the relevant time when the aforesaid two witnesses were cross examined. When the petitioner engaged a more competent counsel, he realised that the said prosecution witnesses had not been duly cross examined to the grave prejudice of the petitioner.

4. Learned senior counsel submits that the main object of criminal procedure is a fair trial, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. She submits that the petitioner is entitled to a fair and proper opportunity to be represented before the court and to place his/ her defence before the court as this is also a constitutional and human right which cannot be jeopardised in any circumstances. She has placed reliance on the observations of this Court found in *Shiv Kumar Yadav v. State*, 2015 (219) DLJ 76 in support of her aforesaid submission and in particular para 38 of the said decision. In this case as well, this court had permitted the recall of certain witnesses for their examination by the court under Section 311 Cr PC.

5. She further submits that there is no blanket embargo against the recall of the prosecutrix for her cross examination under Section 33(5) of the POSCO Act and for sufficient reasons the prosecutrix could be recalled for

her cross examination. She submits that, in any event, PW-3, the landlord may be permitted to be recall for further cross examination.

6. Ms. Luthra submits that the petitioner/ accused is the mausi of the prosecutrix. The mother of the prosecutrix had died and the father of the prosecutrix had refused to look after her. It was the petitioner and his wife i.e. mausi of the prosecutrix who were looking after her as a child along with their own children. She submits that the mausi of the prosecutrix is a house wife and there was no occasion for the petitioner to commit rape upon the prosecutrix, since she was never left alone at home along with the petitioner and the petitioner's wife/mausi of the prosecutrix was always available at home.

7. A perusal of the impugned order shows that the prosecutrix – a minor girl of about 12 years of age was allegedly repeatedly raped by the applicant, as a consequence whereof he is facing trial. The prosecutrix had been examined and cross examined as PW-2 on 24.09.2014. The impugned order records the submission of the learned APP that the petitioner/ accused had also threatened the prosecutrix PW-2. PW-3 is none other than the landlord of the petitioner/ accused. He too had been examined on 24.09.2014. The petitioner had earlier moved an application under Section 311 Cr PC to seek recall of the prosecutrix for further cross examination and that application had been dismissed by the court on 01.09.2015. The impugned order was passed on the second application moved by the petitioner under Section 311 Cr PC. The earlier application had been moved under Section 311 Cr PC i.e. 11 months after the cross examination of the prosecutrix on 24.09.2014. While dismissing the first application, the court had placed reliance on

Section 33(5) of POSCO Act, which provides “*the special court shall ensure that the child is not called repeatedly to testify in the court*”. It appears that the application was dismissed on the ground that the petitioner/ accused had not provided any cogent reasons for her recall for further cross examination. The court had also held that it would cause great harassment and humiliation to the prosecutrix to be recalled as a witness once again.

8. While passing the impugned order, the learned ASJ has relied upon the earlier order dated 01.09.2015 dismissing the first application of the petitioner under Section 311 Cr PC, and for the same reasons the second application under Section 311 Cr PC has been dismissed.

9. Having heard learned senior counsel for the petitioner and perused the record, I am of the view that there is absolutely no merit in this petition. The petitioner is facing a serious charge of child rape of a 12 year old minor girl, who is his own niece. She had been subjected to cross examination way back on 24.09.2014 i.e. over two years ago. The first application moved by the petitioner for recall had been dismissed on 01.09.2015 i.e. after about 11 months of her cross examination. It appears that the petitioner, only with a view to delay the trial, moved the second application after the passage of another 11 odd months of the first application. Merely because the petitioner claimed that his earlier counsel had not cross examined PW-2 and PW-3 is no ground to recall them for further cross examination. The cross examination of PW-2/ prosecutrix has been placed on record, which runs into over 2 ½ pages. A perusal of the same shows that the petitioner sought to portray her as a spoilt child who was in the habit of running away from the house; whose name had been struck off from the

school; who had ran away from the house 3-4 times with a boy. A perusal of the cross examination further shows that it was directly suggested to her that the accused had not committed rape upon her, and she had denied the said suggestion.

10. The questions now sought to be put to PW-2 and PW-3 could and ought to have been put to them at the relevant time of their cross examination. Section 33(5) of the POSCO Act casts a duty on the special court to ensure that the child is not called repeatedly to the court to testify. The purpose of introducing such a provision is clearly to save the minor child from being subjected to repeated trauma and harassment of facing cross examination and re-living the incident. The endeavour of the petitioner appears to be, primarily, to put the prosecutrix to the same trauma and harassment.

11. The impugned order shows that the petitioner is also reported to have threatened the prosecution witnesses and it cannot be ruled out that his repeated attempt to seek recall of the prosecution witnesses is a result of the prosecution witnesses being pressurised. The petitioner accepted the first order of rejection of the application dated 01.09.2015 and did not assail that order. There is no reason disclosed as to why he moved the second application before the Trial Court rather than assailing the said order, if he was aggrieved thereby.

12. Reliance placed by Ms. Luthra on *Shiv KumarYadav* (supra) is, to say the least, unfortunate. The said decision has been overruled by the Supreme Court in *State v. Shiv Kumar Yadav*, (2016) 2 SCC 402. In that case, the accused – a cab driver hired by the victim to return to her home from office

was alleged to have raped her. After prosecution evidence was closed; witnesses duly cross examined by the counsel for the accused, and; statement of the accused under Section 313 Cr PC had been recorded, application for recall of the prosecutrix and a formal witness was made, but the same was rejected and the said order was never challenged. Thereafter, the accused engaged another counsel, who filed another application under Section 311 Cr PC for recall of prosecution witnesses. That application was dismissed by the Trial Court, but allowed by this court. The Supreme Court held that the recall of certain witnesses was not proper. The hardship that would be caused to the witnesses and the undue delay in recalling the witnesses would entail – without any other cogent reasons, could not be permitted merely by observing that it was only the accused who would suffer by the delay as he was in custody. The Supreme Court held that recall of prime witness could be considered if essential for just decision, but not on the considerations adopted by the High Court. The mere observation that recall of a witness was necessary “for ensuring fair trial” is not enough unless there are tangible reasons to show how the fair trial would suffer without recall. The Supreme Court held that mere incompetence of the earlier counsel in cross examining the prosecution witnesses was not a ground available to seek recall of witnesses.

13. As noticed above, in the present case, the situation is even more grave inasmuch, as, the petitioner is seeking recall of the prosecutrix who was merely 12 years of age at the time of the commission of the alleged offence and the POSCO Act itself mandates that the special court shall ensure that the child is not called repeatedly to testify in the court.

14. For the aforesaid reasons, there is absolutely no merit in this petition and the same is dismissed. The Trial Court is directed to expedite the recording of the remaining prosecution evidence without any delay and the parties shall not be granted any undue adjournment on any account whatsoever.

VIPIN SANGHI, J

NOVEMBER 09, 2016

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