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

DECIDED ON : 5th MAY, 2016

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CRL.M.C.4358/2015

RAHIL ANWAR

..... Appellant

Through : Mr.Krishan Kumar, Advocate with
Ms.Vidushi Sharma & Ms.Sunita
Arora, Advocates.

versus

THE STATE

..... Respondent

Through : Mr.Tarang Srivastava, APP.
SI Ranveer, PS New Ashok Nagar.

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

S.P.GARG, J. (Oral)

CRL.M.A.No.15414/2015 (Exemption)

1. Exemption allowed subject to all just exceptions.
2. The application stands disposed of.

CRL.M.C.4358/2015

1. Present petition under Section 482 Cr.P.C. has been filed by the petitioner to challenge the legality and correctness of an order dated 09.10.2015 of learned Addl. Sessions Judge by which the application under Section 311 Cr.P.C. to recall the prosecutrix was dismissed. Status report is on record.

2. I have heard the learned counsel for the parties and have examined the file. Petitioner's counsel urged that cross-examination of the prosecutrix is essential to ascertain the veracity of the allegations levelled by her. She has gone missing again for which FIR No.121/2012 PS Ashok Nagar under Section 366 IPC has been lodged by her mother. The prosecutrix was partly examined on 09.04.2012. She could not be cross-examined by the petitioner's counsel due to compelling circumstances. Reliance has been placed on '*Natasha Singh vs. CBI (State)*', 2013 (5) SCC 741, '*Mohanlal Shamji Soni vs. Union of India*', 1991 (0) Supreme (SC) 19578 and '*P.Sanjeeva Rao vs. State of A.P.*', 2012 (3) Crimes (SC) 64.

3. On perusal of the record, it reveals that the petitioner along with Shama Khatoon, Mahboob Ali, Shahiba and Kanwar Pal is facing trial in case FIR No.91/2011 registered under Sections 363/366/368/376/34 IPC at PS Ashok Nagar since 2011. On 09.04.2012, statement of the prosecutrix was partly recorded. On 21.08.2012 after her examination-in-chief was complete, she was cross-examined at length by learned counsel for co-accused Kanwar Pal. However, at the request of the petitioner that his counsel was not available X's cross-examination was deferred. On 18.10.2012, on the adjourned date, the prosecutrix appeared before the Court for cross-examination. Again, petitioner's counsel was not available and request for adjournment was made. The Trial Court observed that since the prosecutrix was a child witness and the petitioner was interested to delay her examination, no further opportunity to cross-examine the witness could be afforded to cause harassment to her. On 21.11.2012, an application under Section 311 Cr.P.C. was filed to recall PW-5 (Lukman), PW-11 'X' and PW-16 (IO / SI Narender) for cross-examination. The Trial Court after

considering the facts and circumstances permitted the petitioner only to recall PW-16, the Investigating Officer, for cross-examination for 17.12.2012. The Petitioner, thereafter, remained mum and did not challenge the said order declining his request to recall 'X'. Record further reveals that statements of the remaining prosecution witnesses have been recorded subsequent to that. Statements of the accused persons under Section 313 Cr.P.C. therein have also been recorded. The case was fixed for final hearing / arguments on 30.08.2014. Order dated 09.10.2015 reveals that even part arguments have been addressed by co-accused who happens to be in judicial custody. The application in question was filed on 09.10.2015 again to recall the prosecutrix when the case was at its fag end. Obviously, the Trial Court did not entertain it and declined to review the order dated 23.11.2012.

4. The petitioner has not given any compelling reasons not to cross-examine the prosecutrix on the relevant dates. The prosecutrix had repeatedly appeared before the Trial Court for examination. At one stage, her examination was deferred at the petitioner's request as his lawyer was not available. Similar request was made again on the adjourned date which was declined by the Court in 2012. The petitioner did not challenge the said order for around three years. The instant application has been filed on 09.10.2015, after a delay of more than three years, to recall the prosecutrix when the case was fixed for final disposal. The petitioner's conduct not to cross-examine the witness and to remain mum for about three years is unexplained. The prosecutrix who was aged around 16 years on the day of incident and was a student of 6th standard cannot be compelled to appear for examination before the Trial Court time and again on the petitioner's

convenience. The co-accused Kanwar Pal is in custody. Any further delay in disposal of the case on account of recording the prosecutrix' evidence undoubtedly would enlarge his period of detention.

5. 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.

6. In the instant case, the witness was examined at length by the co-accused. Merely because the previous counsel allegedly did not opt to cross-examine the witness despite availing adjournment, the victim examined long back cannot be recalled. It will be an unending affair.

7. The petition lacks merit and is dismissed. Copy of the order be sent to the Court concerned for information.

(S.P.GARG)
JUDGE

MAY 05, 2016 / tr