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

+ CRL.M.C. 4401/2018 and Crl.M.A.31027-31028/2018

ROHIT

..... Petitioner

Through: Mr. Sumit Choudhary, Advocate with
Ms. Aaknksha Bansal, &
Mr. Gagan Bhatnagar, Advocates

versus

THE STATE

..... Respondent

Through: Mr. Ashish Dutta, APP for the State
with ASI Rajender, PS Alipur.

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

ORDER

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30.08.2018

The petitioner is facing trial in Sessions Case (No.57712/2016) in the Court of Sessions on the charge for offences punishable under Sections 109/363/366-A/376/506 of Indian Penal Code, 1860 (IPC) on the basis of report under Section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C.) submitted upon conclusion of investigation into First Information Report (FIR) No.409/2011 of Police Station Alipur.

It appears that the case had reached the stage of defence evidence when witness Yogesh (D1W1) was examined by the petitioner on 12.07.2018. The testimony of the said witness, copy whereof has been submitted, upon perusal would indicate that the witness claimed to be a neighbour of the petitioner, he seeking to refer certain past transactions involving father of the prosecutrix, the latter allegedly having taken a loan

from the father of the petitioner, the claim of the borrower having allegedly resulted in a settlement ten days prior to the arrest of the petitioner in this case. The said witness was cross-examined by the Public Prosecutor and at the fag end of the deposition, during the stage of cross-examination, following sentence came to be recorded:-

“It is correct that the instant case has been correctly instituted against Rohit.”

Against the above backdrop, the petitioner through counsel moved an application under Section 311 Cr.P.C. for recall of the said witness (D1W1) for availing the opportunity to re-examine, referring in this context to Section 138 of the Indian Evidence Act, 1872. The prayer was declined by the trial court, by order dated 01.08.2018, with the observations that the effort was to fill in lacunae which, if allowed, would lead to “*mockery of law*”, it being impermissible for the clock to be rewound on the whims and fancies of the accused.

The learned Additional Public Prosecutor has accepted notice.

Learned counsel for the petitioner, on being called upon, has shown the copy of the charge sheet on the basis of which trial is being held. Upon perusal, it is found that there is no reference to D1W1 (Yogesh) being connected to any of the circumstances on the basis of which the prosecution has rested its case. D1W1 has not spoken directly or indirectly about any of the facts or circumstances leading to the charge being framed against the petitioner. His deposition, taken on its face value, seems to indicate the possibility of some “*motive*” for false implication. From this perspective, it is indeed jarring that he would confirm, upon inquiry by the public

prosecutor, that the prosecution case against the petitioner was correct. There is nothing in the cross-examination from which any such fact could be brought out as could even remotely show that D1W1 was privy to any of the acts of commission or omission alleged against the petitioner.

Indeed, the petitioner is entitled to bring clarity to the deposition of the said witness and, for this, the only method known to law is by exercising the right of re-examination. Undoubtedly, such right should have been exercised on the very day the witness was examined, *i.e.*, 12.07.2018. But, as is explained by the counsel for the petitioner, the import and effect of the above quoted line finding its place in the deposition apparently escaped the notice. Since there is otherwise nothing in the testimony of the witness to show the basis of his knowledge, if any, of the facts and circumstances of the case for prosecution, the trial court should itself have sought clarity on above quoted sentence in deposition. It is not a case of lacunae being filled in.

In above view, the petition is allowed. The impugned order is set aside. The prayer for recall of the witness D1W1 (Yogesh) under Section 311 Cr.P.C. is permitted, though with caution that re-examination will be restricted to above mentioned sentence forming part of the deposition at the stage of cross-examination.

The petition and the applications filed therewith stand disposed with these observations.

Dasti under the signature of Court Master.

R.K.GAUBA, J.

AUGUST 30, 2018

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