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

% Judgment delivered on: 11.10.2018

+ CRL.M.C. 4811/2018

MOHD. GULZAR

..... Petitioner

versus

THE STATE (GOVT. OF NCT DELHI) Respondent

Advocates who appeared in this case:

For the Petitioners : Mr. Murari Tiwari with Mr. Rahul
Kumar, Advocates.

For the Respondents : Ms. Neelam Sharma, APP for the State.
SI Pushpendra, PS Bara Hindu Rao.

CORAM:-

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

11.10.2018

SANJEEV SACHDEVA, J. (ORAL)

Crl.M.A.32553/2018 (exemption)

Exemption is allowed subject to all just exceptions.

CRL.M.C. 4811/2018 & Crl.M.A.32554/2018 (stay)

1. Issue notice. Notice is accepted by the learned APP for the State.

2. With the consent of the parties, petition is taken up for hearing today.

3. Petitioner impugns order dated 26.05.2018, whereby, the application of the petitioner under Section 311 Cr.P.C. for recall of PW-2 for cross-examination on behalf of the petitioner accused was dismissed. Petitioner also impugns order dated 12.04.2018, whereby, the right of the petitioner to cross-examine the prosecutrix PW-2 was closed.

4. Learned counsel for the petitioner submits that counsel for the petitioner being a candidate was engaged in the counting process of the Bar Council Elections and, as such, could not be present before the Court. He further submits that the Trial Court also did not appoint a defence counsel for representing the accused for conducting the cross examination and, as such, valuable right of the accused to cross-examine the prosecutrix was violated.

5. Perusal of orders dated 10.04.2018, 11.04.2018 and 12.04.2018 shows that the counsel for the petitioner was not present for the purpose of cross-examination. The right of cross-examination is a valuable right provided to an accused. No doubt, a child under Section 33(5) of Chapter VIII POCSO also has rights of not being harassed at trial but a balance has to be achieved between the two rights.

6. However, it was obligatory on the part of the Trial court to have a defence counsel appointed for the petitioner in case the counsel for the petitioner did not appear for the purposes of cross-examination. The fact that the Trial Court failed to appoint a defence counsel to defend the petitioner, the valuable right of the petitioner to cross-examine the prosecutrix was defeated.

7. Reference may be had to the judgment dated 01.10.2018 of this court in *Crl.M.C. 4996/2018* titled *Vimal Khanna Versus State* wherein it has been held that denial of an opportunity to the accused to cross examine the witnesses violates the constitutional guarantee to an accused. Such denial also vitiates the trial. Where accused does not have assistance of a lawyer or his lawyer fails to defend the case in accordance with law, it is the duty of the court to provide a lawyer to the accused, unless the accused voluntarily makes an informed decision to defend himself personally without assistance of a lawyer. Failure to provide a lawyer to the accused would vitiate the trial.

8. In the facts of the present case, it was incumbent upon the Trial Court to appoint a legal aid counsel for the purposes of defending the accused.

9. Accordingly, impugned orders dated 26.05.2018 and 12.04.2018 are set aside. The Trial Court is directed to recall the prosecutrix PW-2 and afford one opportunity to the petitioner to cross-examine the prosecutrix. It is clarified that the petitioner shall

conclude his cross-examination within one day. Further, since the prosecutrix is now been sent from the Children Home to her relatives, petitioner or his relatives shall not contact the prosecutrix or her family.

10. The petition is disposed of in the above terms.

11. Order Dasti under the signatures of the Court Master.

OCTOBER 11, 2018
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SANJEEV SACHDEVA, J

