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

Date of decision: 10.01.2020

+ CRL.M.C. 6513/2019 & Crl.M.A.42877/2019

ASHISH MALHOTRA

..... Petitioner

Through: Mr. Alok Bhachawat and Mr. Uday
Singh, Advs.

versus

STATE OF N.C.T OF DELHI

..... Respondent

Through: Mr.Panna Lal Sharma, APP for State.
SI Sanjeev Kumar, PS Mandawali

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

J U D G M E N T (O R A L)

Crl. M.A. 42876/2019

1. Allowed, subject to all just exceptions.
2. Application is disposed of.

CRL.M.C. 6513/2019 & Crl.M.A.42877/2019

3. Vide the present petition, the petitioner seeks direction thereby to set aside the order dated 03.09.2019 passed by learned ASJ in case SC no. 542/16 arising out of FIR no. 1103/14 registered at Police Station Mandawali for the offence punishable u/s 6 of POCSO Act.
4. It is stated in the present petition that on 22.04.2017, PW-2, D. Sunita

Patnaik, mother of the victim was examined by the prosecution and her examination in Chief was recorded before the Ld. ASJ. During her examination-in-chief PW-2, produced one copy of complaint dated 02.07.2014 before the Ld. ASJ. which was allegedly given by her in the police station- Mandawali in respect of present incident, without giving any advance copy to the petitioner/accused or his counsel and the same was taken on record by the court of Ld. ASJ and exhibited as Mark PW2/X.

5. Counsel for the petitioner submits that neither there was any whisper about the complaint dated 02.07.2014 by any witness in any of the statements nor the said complaint was made part of the charge sheet. The counsel for the petitioner/accused objected to the taking of the said complaint on record, however, Court of Ld. ASJ was not inclined to accede to his request. Left with no option, the counsel for the accused prayed for deferring the cross examination of PW-2 so as to enable him to go through the contents of the said complaint and accordingly conduct her cross examination. Apart from this, the counsel for the accused wanted to check the veracity of the said document/complaint dated 02.07.2014 as the said witness categorically stated in her statement under section 161 Cr.P.C. that "she has not got any copy of complaint given by her against Ashish.",

therefore a doubt was created in respect of the said document produced at the belated stage. However, Ld. ASJ declined the prayer of the counsel for the petitioner and closed the right of cross examination of the petitioner to PW-2. On 20.07.2017, the petitioner moved an application under section 311 Cr.P.C. to recall the PW-2/mother of the victim for cross examination and same was allowed vide order dated 31.01.2019 and PW-2 was cross examined by the counsel for the petitioner.

6. Further submitted that thereafter on 09.11.2017, the petitioner moved another application under Section 311 Cr.P.C. to recall PW- 1/Victim for the further cross examination.

7. However, vide order dated on 03.09.2019, learned Special Judge (POCSO Act), dismissed the application under Section 311 Cr.P.C. filed by the petitioner/accused observing as under:-

"7. In the present case, the statement of PW-1 was recorded prior to recording statement of PW-2 and the complaint dated 02.07.2014 was proved by PW-2 in her examination in chief and not by PW-1. As PW-2 has already been recalled for cross examination after allowing application u/s 311 Cr.P.C. vide order dated 31.01.2019 and Ld. Counsel for accused has cross examined PW-2 mother of victim on 16.03.2019. I am of the view that no ground is made out for recalling of PW-1 i. e. Victim on the basis of complaint dated 02.07.2014 proved by PW-2 during her examination in chief.

8. I have also perused the cross examination of PW-1 in

the entire cross examination of PW-1 no permission was sought by the counsel for the accused for to confront her with her previous statement nor my Ld. Predecessor had denied the Ld. Counsel to confront PW-1 with her previous statement.

9. In view of the above discussions, the application u/s 311 Cr.P.C. filed by the accused for recording of PW-1 is hereby dismissed as same is without any merits."

8. The fact remains that the statement of PW1 was recorded prior to recording the statement of PW2 and the complaint dated 02.07.2014 was proved by PW2 in her examination in chief and not by PW1.

9. As per prosecution case, PW2 went to the police station along with PW1 to lodge FIR and apart from this, the complaint was given by PW2 on the basis of incident stated by PW1 to PW2.

10. It is not in dispute regarding the incident PW1/victim is the right person to establish the facts mentioned in complaint dated 02.07.2014, thus, in my considered view, learned Trial Court ought to have granted opportunity to cross examine the PW1.

11. Accordingly, the impugned order dated 03.09.2019 is hereby set aside to that extent and Ld. Trial Court is directed to allow the petitioner to cross examine PW1.

12. The petition is, accordingly, allowed and disposed of accordingly.

13. It is made clear that cross examination of PW1 shall be confined only to the complaint dated 02.07.2014.

14. Order dasti under signatures of the Court Master.

(SURESH KUMAR KAIT)
JUDGE

JANUARY 10, 2020
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