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

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Reserved on : 21.09.2020

Pronounced on: 19.10.2020

+ Crl. M.C. 1615/2020 and Crl. M.A. 10300/2020

VIKAS

.....Applicant

Through Mr. Ashwin Vaish, Mr. Vinod
Pandey and Mr. V. Thomas,
Advocates

versus

STATE

.....Respondent

Through Ms. Meenakshi Dahiya, APP for
State with SI Jitender Singh, PS
Sangam Vihar.
Ms. Tara Narula, Advocate for
Complainant.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

J U D G E M E N T

1. Present petition has been filed assailing the order dated 04.03.2020 passed by the Trial Court whereby the Petitioner's application for recall of the child victim 'A' who testified as PW-1 was dismissed.
2. Briefly put the narrative of facts as averred in the petition are that on 25.12.2018 an FIR was registered under Sections 376, 342 IPC and Section 6 of Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act') for an alleged incident that occurred on 24.12.2018 between 3:00 pm to 4:00 pm. The allegations in

the FIR were that the child victim 'A' aged 6 years, after coming back from school was playing with her friend 'B' when a person called *Chhotu Bhaiyya*, who was residing in the house of 'B', took her to a room, in her *Chachi's* house and closed the room and disrobed himself. He then came near 'A' and disrobed her and committed sexual assault. Friend 'B' in the meantime knocked at the door and *Chhotu Bhaiyya* opened the door, upon which 'A' ran out of the room towards the upper floor. *Chhotu Bhaiyya* told 'A' to come down but 'A' went to her mother and narrated the incident, who in turn told her husband and they then went to the Police Station and lodged a complaint.

3. As per the FIR inquiry was made by the police from 'A' and her statement was recorded in the presence of the mother. 'A' was then taken to the hospital where her counseling was done and thereafter the FIR was registered.

4. Charge sheet was subsequently filed on 23.02.2019 and on 28.05.2019 charges were framed under Sections 376 AB, 342 IPC and Section 6 read with Section 5 (m) of POCSO Act. Between 05.08.2019 and 09.08.2019 deposition of PW-1 i.e. 'A' was recorded. On 09.08.2019 counsel for the Petitioner filed an application alleging prejudice, as according to him he was prevented from effectively cross examining the witness by putting questions to her to test her memory and to bring out material omissions and contradictions. The application is still pending.

5. On 03.09.2019 Petitioner preferred an application seeking recall of PW-1 on the ground that the counsel was not allowed to cross examine and confront PW-1 with her earlier statements. On 20.02.2020 testimony

of the mother being PW-3 was recorded. The application for recall was heard on 04.03.2020 and was rejected vide the impugned order. It is this order rejecting the application for recall which is the genesis of the present petition.

6. Learned counsel for the Petitioner assails the impugned order by contending that the trial Court's refusal to recall PW-1 for effective cross examination under Section 311 Cr.P.C. violates the provisions of the Section which provides that any Court may at any stage of an inquiry, trial or other proceeding under the Cr.P.C. summon or examine or recall and re-examine any person already examined if his evidence appears to be essential for the just decision of the case. He argues that the order impugned violates the law laid down in *State (NCT of Delhi) v. Shiv Kumar Yadav, (2016) 2 SCC 402*; *Shri Vimal Khanna v. State, 2018 SCC Online Del 11796* and *Deva v. The State of Karnataka in Crl. Petition 201325/2019*. In *Vimal Khanna (supra)* the Court has held that denial of opportunity to cross examine the witnesses violates the Constitutional guarantee to an accused and vitiates the trial. The judgment was followed in *Mohd. Gulzar v. The State (GNCTD), 2018,(4) JCC 2291* wherein after recording that the counsel for the accused was not present on three consecutive dates to cross examine the witness, the Court held that since the right of cross examination is a valuable right, the child's right under Section 33 (5) of POCSO Act has to be balanced with the aforesaid rights of the accused and thus permitted one more opportunity to the accused to cross examine the alleged victim. It is argued that in *Deva (supra)* the Court was clearly of the view that the power to recall a witness at the instance of either party

to ensure justice is done, is greater than the provisions set out in Section 33 POCSO Act. The provisions of Section 33 laid down a general principle which must guide the trial Court and is similar to Section 309 Cr.P.C, being in the nature of laws to ensure speedy trial. However, by virtue of Sections 4 and 5 of Cr.P.C, Section 311 Cr.P.C shall prevail as no specific procedure is provided under POCSO Act for recall of a witness. Section 42A of POCSO Act clarifies that the Act is not in derogation of any other Law.

7. Learned counsel contends that the intent behind enacting Section 33 (5) is only to ensure that in a genuine case the child victim is not harassed, but cannot be used as a shield by the trial Court to deprive the accused of a right of proper cross examination and therefore a right of fair trial. The trial Court committed a manifest error in law in treating the contents of the statement of PW-1/victim recorded during investigation as a matter of record resultantly refusing to permit the counsel for the accused to confront the witness with the same. This was in clear violation of the effective right of cross examination and the observations of the Supreme Court in **Deepak Kumar Chaudhary v. State 2019 SCC Online Del 11321** wherein the Court has held that as per Section 145 of the Indian Evidence Act a witness can be contradicted with his previous statement and that omission to mention a fact in the previous statement is a contradiction with which the witness needs to be confronted. Not allowing the accused to do so shall prejudice him in his trial and he will not be in a position to take advantage of the said contradiction. Reliance is also placed for the said proposition on the judgment in the case of **V.K. Mishra & Anr. v. State of Uttarakhand (2015) 9 SCC 588**. Thus, the

trial Court according to the learned counsel abandoned its duty by wrongly presuming that the contents of the complaint and the statements recorded during investigation are a matter of record and in the process also over looked the fundamental principles of law of evidence that statement made to the police cannot be read as substantive evidence except as provided under Sections 145, 155 etc of the Evidence Act and that the FIR and the statements recorded under Section 161 and 164 Cr.P.C are neither gospel truth nor substantive evidence, having been recorded behind the back of the accused or in case of FIR without oath. In such a situation the right of cross examination of the accused becomes very significant.

8. Learned counsel also to substantiate the alleged prejudice caused to the Petitioner formulated certain questions which according to him were crucial and if allowed to put to the victim during cross examination will point to the innocence of the Petitioner and will have a significant bearing on the trial.

9. Learned APP for the State vehemently opposed the present petition and argued that effective opportunity was given to the Petitioner to cross examine PW-1/victim. The application for recall of the six-year old child victim is antithetical to section 33 (5) of POCSO Act which mandates that the child should not be repeatedly called to testify in a Court. It is also argued that prior to the impugned order the Trial Court had disallowed certain questions which were being put to the victim during cross examination on 09.08.2019 but the said order was not challenged by the Petitioner and in the guise of the present application the Petitioner is trying to circuitously put the same questions, which is impermissible

in law. Emphasis has been laid by the learned APP on the age of the victim and the intent of the Legislature in drafting Section 33 (5) of the POCSO Act being to protect the child from victimization and harassment by repeated depositions in a Court by the accused.

10. Learned APP has relied on the following judgments:

- (i) ***S. Sankara Varman vs. State, 2016 SCC Online MAD 5681,***
- (ii) ***State vs. Rahul, ILR (2013) III DELHI 1861,***
- (iii) ***Sant Shri Asharamji Bapu vs. State of Rajasthan, 2017 (3) RLW 1815 (Raj.),***
- (iv) ***State (NCT of Delhi) vs. Shiv Kumar Yadav, (2016) 2 SCC 402,***
- (v) ***Tahsildar Singh vs. State of Uttar Pradesh, 1959 Law Suit (SC) 91 and***
- (vi) ***Jaswant Singh vs. State of Haryana (2000) 4 SCC 484.***

11. I have heard learned counsel for the parties and examined the impugned order.

12. Article 15 of the Constitution of India confers powers upon the State to make special provisions for children. The Protection of Children from Sexual Offences Act, 2012 was enacted on 14.11.2012. The preamble to the POCSO Act is significant and relevant to examine the present controversy and is as follows:

“AND WHEREAS it is necessary for the proper development of the child that his or her right to privacy and confidentiality be protected and respected by every person

by all means and through all stages of a judicial process involving the child.”

13. Section 33 of POCSO Act has been enacted keeping in background the objects and reasons of the POCSO Act and as is evident from a reading of the provisions of the Section, the Legislature in its wisdom has provided a special procedure for recording the evidence of a child witness. Section 33 (2) provides that the questions to be put to the child witness shall be first communicated to the Special Court, who then would put these questions to the witness and Section 33 (5) specifically provides that the child is not to be called repeatedly to testify in Court. The mandate of law clearly is to ensure protection to a child witness from victimization and harassment by repeated appearances in Court.

14. In the case of ***Alakh Alok Srivastava vs. Union of India, (2018) 17 SCC 291*** the Supreme Court issued several directions keeping in mind the purpose and spirit of the POCSO Act and the relevant portion of the judgment is as under:

“25.1 The High Courts shall ensure that the cases registered under the POCSO Act are tried and disposed of by the Special Courts and the Presiding officers of the said courts are sensitised in the matters of child protection and psychological response.

25.2 The Special Courts, as conceived, be established, if not already done, and be assigned by the responsibility to deal with the cases under the POCSO Act.

25.3 The instructions should be issued to the Special Courts to fast track the cases by not granting unnecessary adjournments and following the procedure laid down in the

POCSO Act and thus complete the trial in a time-bound manner or within a specific time-frame under the Act.

25.4 The Chief Justices of the High Courts are requested to constitute a Committee of three Judges to regulate and monitor the progress of the trials under the POCSO Act. The High Courts where three judges are not available the Chief Justices of the said courts shall constitute one Judge Committee.

25.5 The Director General of Police or the Officer of equivalent rank of the States shall constitute a Special Task Force which shall ensure that the investigation is properly conducted and witnesses are produced on the dates fixed before the trial courts.

25.6 Adequate steps shall be taken by the High Courts to provide child-friendly atmosphere in the Special Courts keeping in view the provisions of the POCSO Act so that the spirit of the Act is observed.”

15. Learned APP has rightly relied upon the judgment of the Supreme Court in ***Shiv Kumar (supra)*** where the Court held that recall is not a matter of course and discretion given to the Court has to be exercised judiciously to prevent failure of justice, keeping in mind that the plea of recall has to be bonafide and then to balance it carefully with other relevant considerations including uncalled hardship to witnesses and delay in trial. A mere plea that recall was necessary for ensuring fair trial is not enough unless there are tangible reasons to show how fairness of trial would suffer without a recall. The Court observed that fairness of trial should not only be from the point of view of the accused but also of the victim and the society. Relevant paras are as under:

“11. It is further well settled 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. The accused is entitled to be represented by a counsel of his choice, to be provided all relevant documents, to cross-examine the prosecution witnesses and to lead evidence in his defence. The object of provision for recall is to reserve the power with the court to prevent any injustice in the conduct of the trial at any stage. The power available with the court to prevent injustice has to be exercised only if the court, for valid reasons, feels that injustice is caused to a party. Such a finding, with reasons, must be specifically recorded by the court before the power is exercised. It is not possible to lay down precise situations when such power can be exercised. The legislature in its wisdom has left the power undefined. Thus, the scope of the power has to be considered from case to case. The guidance for the purpose is available in several decisions relied upon by the parties. It will be sufficient to refer to only some of the decisions for the principles laid down which are relevant for this case.

12. In Rajaram case [Rajaram Prasad Yadav v. State of Bihar, (2013) 14 SCC 461 : (2014) 4 SCC (Cri) 256] , the complainant was examined but he did not support the prosecution case. On account of subsequent events he changed his mind and applied for recall under Section 311 CrPC which was declined by the trial court but allowed by the High Court. This Court held such a course to be impermissible, it was observed: (SCC pp. 468-69, paras 13-14)

“13. ... In order to appreciate the stand of the appellant it will be worthwhile to refer to Section 311 CrPC, as well as Section 138 of the Evidence Act. The same are extracted hereunder:

Section 311, Code of Criminal Procedure

‘311. Power to summon material witness, or examine person present.—Any court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.’

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Section 138, Evidence Act

‘138. Order of examinations.—Witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination.—The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter.’

14. A conspicuous reading of Section 311 CrPC would show that widest of the powers have been invested with the courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression ‘any’ has been used as a prefix to ‘court’, ‘inquiry’, ‘trial’, ‘other proceeding’, ‘person as a witness’, ‘person in attendance though not summoned as a witness’, and ‘person already examined’. By using the

said expression 'any' as a prefix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the court was only in relation to such evidence that appears to the court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the court. The order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 CrPC and Section 138 of the Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 CrPC. It is, therefore, imperative that the invocation of Section 311 CrPC and its application in a particular case can be ordered by the court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined is concerned, the court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution."

(emphasis in original)

13. After referring to the earlier decisions on the point, the Court culled out the following principles to be borne in mind: (Rajaram case [Rajaram Prasad Yadav v. State of Bihar, (2013) 14 SCC 461 : (2014) 4 SCC (Cri) 256] , SCC pp. 473-74, para 17)

“17.1. Whether the court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the court for a just decision of a case?

17.2. The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.

17.3. If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.

17.4. The exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

17.5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

17.6. The wide discretionary power should be exercised judiciously and not arbitrarily.

17.7. The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

17.8. The object of Section 311 CrPC simultaneously imposes a duty on the court to determine the truth and to render a just decision.

17.9. The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

17.10. Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified.

17.11. The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

17.12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

17.13. The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

17.14. The power under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and

circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.”

14. In *Hoffman Andreas* case [Hoffman Andreas v. Inspector of Customs, (2000) 10 SCC 430 : 2001 SCC (Cri) 1488] , the counsel who was conducting the case was ill and died during the progress of the trial. The new counsel sought recall on the ground that the witnesses could not be cross-examined on account of the illness of the counsel. This prayer was allowed in peculiar circumstances with the observation that normally a closed trial could not be reopened but illness and death of the counsel was in the facts and circumstances considered to be a valid ground for recall of witnesses. It was observed: (SCC p. 432, para 6)

“6. Normally, at this late stage, we would be disinclined to open up a closed trial once again. But we are persuaded to consider it in this case on account of the unfortunate development that took place during trial i.e. the passing away of the defence counsel midway of the trial. The counsel who was engaged for defending the appellant had cross-examined the witnesses but he could not complete the trial because of his death. When the new counsel took up the matter he would certainly be under the disadvantage that he could not ascertain from the erstwhile counsel as to the scheme of the defence strategy which the predeceased advocate had in mind or as to why he had not put further questions on certain aspects. In such circumstances, if the new counsel thought to have the material witnesses further examined the Court could adopt latitude and a liberal view in the interest of justice, particularly when the Court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible.”

16. Relevant would be in this regard to rely on a passage from the judgment of High Court of Madras in ***S. Sankara Varman vs. State represented by the Inspector of Police W-18, M.K.B. Nagar Police Station, M.K.B. Nagar, Chennai, 2016 SCC Online Mad 5681*** as follows:

“23. The POCSO Act is a special act which mandates that a child victim should not be called repeatedly to testify in the Court. Thus, in the considered opinion of this Court, the Trial Court was very correct in placing reliance upon Section 33(5) of the POCSO Act and dismissing the petition of the accused in respect of recall of the girl victim (P.W.1) on the ground that he failed to avail of the opportunity to cross-examine her on 05.02.2014, when she was examined in chief and even subsequently, on 23.02.2016, when she was recalled at his request. One has to suffer the consequences of one's conscious actions.”

17. In ***Sant Shri Asharamji Babu v. State of Rajasthan, (2017) 3 RLW 1815 (Raj.)*** the Rajasthan High Court while examining the provisions of Section 311 Cr.P.C and the nature of power of the Court under the said provision observed as under:

“40. A cumulative reading of Section 311 Cr. P.C. and upon construing true nature of power with which a criminal Court is endowed therein, as adumbrated in all the judicial precedents, it has come to the fore that Section is bifurcated into two parts. In the first part, Legislature has used the word “may” so as to confer discretion on the Court for resorting to such power whereas in juxtaposition to it, the second part uses “shall”, indicating its mandatory nature to confer power on a criminal Court enabling it at any stage of

the trial to take any of the aforementioned steps with certain riders. Thus, the power under second part of Section 311 Cr. P.C. is of wide amplitude and dimension but with caution/restriction to exercise the same when new evidence is essential to the just decision of the case. This being the position, power under second part of Section 311 Cr. P.C. cannot be exercised in a routine manner by a criminal Court for ordering retrial or filling lacuna and gaps in the evidence tendered either by the prosecution or by accused. If these parameters and yardsticks are objectively applied in the facts and circumstances of the present case, then without any reservation or demur, in my opinion, learned trial Court has not at all scuttled the path to secure ends of justice. My this view also find support from a decision of Supreme Court in case of Rajaram Prasad Yadav v. State of Bihar(2013) 14 SCC 461. Speaking for the Bench, F.M.I. Kalifulla, J. explained the proposition as follows:

“It is, therefore, imperative that the invocation of Section 311 Cr. P.C. and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any Court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the Court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the Court to be essential for the just decision of the case.”

41. As such, upon analysis of ambit and scope of Section 311 Cr. P.C., adumbrated by the authoritative legal precedents, in the backdrop of peculiar facts and

circumstances of the instant case, I am afraid, the impugned order cannot be categorized as infirm or perverse. The learned trial Court has taken pain to examine all the pros and cons while declining prayer of the accused-petitioner in the light of trite law on the subject and criminal delinquency of the petitioner. Therefore, viewed from any angle, learned trial Court has not committed any manifest error of law in passing the impugned order warranting interference in exercise of inherent jurisdiction of this Court. In totality, indisputably, instant one is not a case wherein learned trial Court has abused the process of any Court or otherwise committed any patent error which has resulted in miscarriage of justice.

The upshot of above discussion is that the instant petition fails and the same is hereby dismissed.”

18. Relevant in this regard is also a judgment of Madhya Pradesh High Court in ***Irfaan @ Imran @ Chhotu vs. The State of Madhya Pradesh, 2016 SCC Online MP 10624***, wherein it was held as under:-

“5. The impugned order has been challenged on behalf of learned counsel for the petitioners mainly on the grounds that the trial Court had dismissed their application mainly on the ground that the petitioners had ample opportunity to cross-examine aforesaid two witnesses and they were indeed extensively cross-examined and the Act seeks to protect the victims of the sexual offences from undue harassment under the garb of cross-examination. However, it has nowhere observed in the impugned order that further cross-examination on the points raised by the petitioners is not necessary for just decision of the case.

6. In the case of A.G. v. Shiv Kumar Yadav, (2016) 2 SCC 402 : AIR 2015 SC 3501, the Supreme Court has held that where the accused had appointed a counsel of his choice, and the earlier counsel was given due opportunity and had duly conducted cross-examination, accused persons were

under no handicap. No finding could be recorded that the counsel appointed by the accused earlier were incompetent, particularly behind the back of such counsel. Expeditious trial in a heinous offence as is involved in the present case, is in the interests of justice. The Court has to keep in mind not only the need for giving fair opportunity to the accused but also the need for ensuring that the victim of the crime is not unduly harassed. Mere change in counsel cannot be ground to recall witnesses.

7. In the backdrop of aforesaid legal position as enunciated by the Supreme Court in the case of Shiv Kumar (supra), the provisions of the Protection of Children from Sexual Offences Act, 2012 may also be profitably referred to as both the witnesses sought to be recalled for further cross-examination after having once already undergone grueling cross-examination, are child witnesses. Sub-sections 2 to 7 of section 33 of the Act read as hereunder:

Section 33. Procedure and powers of Special Court

(2) The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child.

(3) The Special Court may, if it considers necessary, permit frequent breaks for the child during the trial.

(4) The Special Court shall create a child-friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court.

(5) The Special Court shall ensure that the child is not called repeatedly to testify in the court.

(6) The Special Court shall not permit aggressive questioning or character assassination of the child and

ensure that dignity of the child is maintained at all times during the trial.

(7) The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial:

Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

Explanation.— For the purposes of this sub-section, the identity of the child shall include the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed.

8. It is clear from aforesaid provisions that the legislature seeks to protect a child witness who is victim of an offence under the Act and Courts are duty-bound to ensure that the child witness who is victim of an offence under the Act is not repeatedly called to the Court to prevent harassment.”

19. In the background of these judgments I may now examine the impugned order passed by the trial Court. The trial Court has recorded a finding that PW-1 was cross examined at length by the counsel for the Petitioner and an effective and fair opportunity of cross examination of the victim was given to the defence. It observed that the victim aged 7 years was cross examined effectively by the counsel for the accused on 09.08.2019, on which date she was examined from 11:30 am to 01:10 pm and thereafter again from 2:05 pm to 03:49 pm and thus cross examined at length. It also observed that the order passed earlier, by which certain questions were disallowed during cross examination of the victim, was not challenged by the accused and under the guise of the application for recall, the Petitioner could not be permitted to do what

was disallowed by the predecessor court. Trial Court records that the cross examination conducted by the Petitioner reveals that all relevant and legal questions were allowed to be put to PW-1 by the defence. Certain questions were disallowed as they were not age appropriate. The victim being barely 7 years of age, it was the responsibility of the Court to see that the child victim of sexual abuse was not harassed or confused by posing questions which she was unable to understand due to her tender age and were otherwise not material to the defence of the accused. Trial Court has also given a finding that the accused is not prejudiced due to the questions that were disallowed. Counsel was allowed to bring out the contradictions/omissions in the testimony of the child victim with her statement recorded under Section 161 Cr.P.C and Section 164 Cr.P.C. Having so observed and found as a matter of record that enough opportunity was given for cross examination including confrontation of the victim with the earlier statements as also that the child had been extensively cross examined, the trial Court keeping in mind the provisions of Section 33 (5) of POCSO Act and the intent behind the enactment of the Section, exercised its discretion and rejected the application.

20. This Court does not find any infirmity with the said observations and finding, once ample opportunity has been given to the Petitioner to cross examine the child victim. In fact having perused the evidence, I find that the record substantiates the stand of the learned APP that the defence counsel indeed extensively cross examined PW-1. Thus this Court does not find any reason to permit the Petitioner to recall the child witness who is barely 7 years of age. I am fortified in my view by a

judgment of a Coordinate Bench in *Jaidev vs. State* in *Crl M.C. 4412/2019* and *Bimla Devi vs. GNCTD, 2017 SCC Online Del 11425*.

21. In so far as the judgments relied upon by the counsel for the Petitioner are concerned suffice would be to state that there cannot be a debate on the proposition enunciated in the said judgments that the power of the Court to recall a witness is discretionary and there is no gain saying that in the interest of a fair trial as and when necessary the Court may permit recall of a witness. However, the discretion under Section 311 Cr.P.C would have to be balanced with the provisions of Section 33 (5) of POCSO Act, in the interest of the child witness so that she does not have to relive the trauma by subjecting her to appearing in Courts for repeated testimonies and volley of questions at the hand of the accused. Counsel for the Petitioner has been unable to point out any law that mandates the trial Court to recall a child victim for cross examination in a trial under POCSO Act, where the defence has extensively cross examined the child victim. The judgments relied upon are on the general provisions of Section 311 Cr.PC and peculiar to the facts of the cases therein.

22. At this stage it is also important to examine the exact nature of relief sought by the Petitioner in his application under Section 311 Cr.P.C. Paras 2 & 3 of the application are as follows:-

“2. The applicant was denied the right to confront PW-1 with her previous statements such as complaint/FIR, statement under section 161 and 164 of CrPC. The same is a right which flows from section 145, 155(3) of the Indian Evidence Act and denial of the same by this Hon’ble Court

has created an apprehension that the accused is not receiving a fair trial.

3. This Hon'ble Court did not permit the counsel for the applicant to ask questions which would squarely fall within the scope of section 146(1) of the IEA. The counsel was prevented from testing the memory of the witness on the possible understanding that fact stated in the examination-in-chief are the gospel truth. It is humble submitted that it is well settled principle of law that scope of cross-examination is not limited to the examination-in-chief and to expose falsity and tutoring of child witness, the counsel is well within his right to test witness-memory and his/her veracity by putting them from which already have been stated in examination-in-chief. This right was denied. As a result several others questions on similar lines within the parameters of aforesaid sections could not be asked."

23. Keeping this in the background it is suffice to state that the exact issue had come up for consideration before the Supreme Court in ***Tahsildar Singh (supra)***. The controversy in the said case can be reflected by extracting para 6 of the judgment as under:-

"6. Learned counsel for the appellants raised before us the following points: (1)(a) Section 162 of the Code of Criminal Procedure by its own operation attracts the provisions of Section 145 of the Evidence Act and under the latter section, the whole vista of cross-examination on the basis of the previous statement in writing made by the witnesses before the police is open to the accused; to illustrate the contention: a witness can be asked whether he made a particular statement before the police officer; if he says "yes", the said assertion can be contradicted by putting to him an earlier statement which does not contain such a statement. (1)(b). The word "contradiction" is of such wide connotation that it takes in all material

omissions and a court can decide whether there is one such omission as to amount to contradiction only after the question is put, answered and the relevant statement or part of it is marked, and, therefore, no attempt should be made to evolve a workable principle, but the question must be left at large to be decided by the Judge concerned on the facts of each case. (2) The High Court erred in holding that only two questions were intended to be put in cross-examination to the prosecution witnesses whereas the advocate for the accused intended to put to the witnesses many other omissions to establish that there was development in the prosecution case from time to time but refrained from doing so in obedience to the considered order made by the learned Sessions Judge. (3) Even if only two questions were illegally disallowed, as it was not possible to predicate the possible effect of the cross-examination of the witnesses on the basis of their answers to the said questions on their reliability, it should be held that the accused had no opportunity to have an effective cross-examination of the witnesses and therefore they had no fair trial. (4) The learned Judges committed an illegality in testing the credibility of the witnesses other than the witness who gave the first information report by the contents of the said report.”

24. After considering at length the provisions of Section 162 Cr.P.C. as also the historic retrospective of the Section, the Supreme Court observed as follows:-

“16. The object of the main section as the history of its legislation shows and the decided cases indicate is to impose a general bar against the use of statement made before the police and the enacting clause in clear terms says that no statement made by any person to a police officer or any record thereof, or any part of such statement or record, be used for any purpose. The words are clear

and unambiguous. The proviso engrafts an exception on the general prohibition and that is, the said statement in writing may be used to contradict a witness in the manner provided by Section 145 of the Evidence Act. We have already noticed from the history of the section that the enacting clause was mainly intended to protect the interests of accused. At the state of investigation, statements of witnesses are taken in a haphazard manner. The police officer in the course of his investigation finds himself more often in the midst of an excited crowd and babel of voices raised all round. In such an atmosphere, unlike that in a court of law, he is expected to hear the statements of witnesses and record separately the statement of each one of them. Generally he records only a summary of the laments which appear to him to be relevant. These statements are, therefore only a summary of what a witness says and very often perfunctory. Indeed, in view of the aforesaid facts, there is a statutory prohibition against police officers taking the signature of the person making the statement, indicating thereby that the statement is not intended to be binding on the witness or an assurance by him that it is a correct statement.

17. At the same time, it being the earliest record of the statement of a witness soon after the incident, any contradiction found therein would be of immense help to an accused to discredit the testimony of a witness making the statement. The section was, therefore, conceived in an attempt to find a happy via media, namely, while it enacts an absolute bar against the statement made before a police officer being used for any purpose whatsoever, it enables the accused to rely upon it for a limited purpose of contradicting a witness in the manner provided by Section 145 of the Evidence Act by drawing his attention to parts of the statement intended for contradiction. It cannot be used for corroboration of a prosecution or a defence witness or even a court witness. Nor can it be used for contradicting a defence or a court witness. Shortly stated,

there is a general bar against its use subject to a limited exception in the interest of the accused, and the exception cannot obviously be used to cross the bar.

18. If the provisions of the section are construed in the aforesaid background, much of the difficulty raised disappears. Looking at the express words used in the section, two sets of words stand out prominently which afford the key to the intention of the legislature. They are: “statement in writing”, and “to contradict”. “Statement” in its dictionary meaning is the act of stating or reciting. Prima facie a statement cannot take in an omission. A statement cannot include that which is not stated. But very often to make a statement sensible or self-consistent, it becomes necessary to imply words which are not actually in the statement. Though something is not expressly stated, it is necessarily implied from what is directly or expressly stated...”

19. “Contradict” according to the Oxford Dictionary means to affirm to the contrary. Section 145 of the Evidence Act indicates the manner in which contradiction is brought out. The cross-examining counsel shall put the part or parts of the statement which affirms the contrary to what is stated in evidence. This indicates that there is something in writing which can be set against another statement made in evidence. If the statement before the police officer — in the sense we have indicated — and the statement in the evidence before the court are so inconsistent or irreconcilable with each other that both of them cannot coexist, it may be said that one contradicts the other.

22. As Section 162 of the Code Criminal Procedure enables the prosecution in the re-examination to rely upon any part of the statement used by the defence to contradict a witness, it is contended that the construction of the

section accepted by us would lead to an anomaly, namely, that the accused cannot ask the witness a single question, which does not amount to contradiction whereas the prosecution, taking advantage of a single contradiction relied upon by the accused, can re-examine the witness in regard to any matter referred to in his cross-examination, whether it amounts to a contradiction or not. I do not think there is any anomaly in the situation. Section 145 of the Evidence Act deals with cross-examination in respect of a previous statement made by the witness. One of the modes of cross-examination is by contradicting the witness by referring him to those parts of the writing which are inconsistent with his present evidence. Section 162, while confining the right to the accused to cross-examine the witness in the said manner, enables the prosecution to re-examine the witness to explain the matters referred to in the cross-examination. This enables the prosecution to explain the alleged contradiction by pointing out that if a part of the statement used to contradict be read in the context of any other part, it would give a different meaning; and if so read, it would explain away the alleged contradiction. We think that the word "cross-examination" in the last line of the first proviso to Section 162 of the Code of Criminal Procedure cannot be understood to mean the entire gamut of cross-examination without reference to the limited scope of the proviso, but should be confined only to the cross-examination by contradiction allowed by the said proviso.

25. From the foregoing discussion the following propositions emerge: (1) A statement in writing made by a witness before a police officer in the course of investigation can be used only to contradict his statement in the witness box and for no other purpose; (2) statements not reduced to writing by the police officer cannot be used for contradiction; (3) though a particular statement is not expressly recorded, a statement that can be deemed to be part of that expressly recorded can be used for

contradiction, not because it is an omission strictly so-called but because it is deemed to form part of the recorded statement; (4) such a fiction is permissible by construction only in the following three cases: (i) when a recital is necessarily implied from the recital or recitals found in the statement; illustration: in the recorded statement before the police the witness states that he saw A stabbing B at a particular point of time, but in the witness box he says that he saw A and C stabbing B at the same point of time; in the statement before the police the word "only" can be implied i.e. the witness saw A only stabbing B; (ii) a negative aspect of a positive recital in a statement: illustration in the recorded statement before the police the witness says that a dark man stabbed B, but in the witness box he says that a fair man stabbed B; the earlier statement must be deemed to contain the recital not only that the culprit was a dark complexioned man but also that he was not of fair complexion; and (iii) when the statement before the police and that before the court cannot stand together: illustration: the witness says in the recorded statement before the police that A after stabbing B ran away by a northern lane, but in the court he says that immediately after stabbing he ran away towards the southern lane; as he could not have run away immediately after the stabbing i.e. at the same point of time, towards the northern lane as well as towards the southern lane, if one statement is true, the other must necessarily be false.

26. The aforesaid examples are not intended to be exhaustive but only illustrative. The same instance may fall under one or more heads. It is for the trial Judge to decide in each case, after comparing the part or parts of the statement recorded by the police with that made in the witness box, to give a ruling, having regard to the aforesaid principles, whether the recital intended to be used for contradiction satisfies the requirements of law.

27. The next point is what are the omissions in the statement before the police which the learned Sessions Judge did not allow the accused to put to the witnesses for contradicting their present version. The learned counsel for the appellants contends that the accused intended to put to the witnesses the following omissions, but they did not do so as the learned Sessions Judge disallowed the two questions put to PW 30 and made a considered order giving his reasons for doing so, and that the learned counsel thought it proper not to put the same questions or other questions in regard to omissions to PW 30 or to the other witnesses that followed him. The said omissions to are: (1) The warning by the members of the gang on their arrival to the audience at the music party not to stir from their places; (2) the presence of a gas lantern; (3) the chase of Bharat Singh by the assailants; (4) the scrutiny of the dead bodies by the gang; and (5) the return of the gang in front of the house of Bankey. The learned counsel for the respondent contests this fact and argues that only two omissions, namely, the presence of a gas lantern and the scrutiny of the dead bodies by the gang, were put in the cross-examination of PW 30 and no other omissions were put to him or any other witness, and that indeed the order of the learned Sessions Judge did not preclude him from putting all the omissions to the witnesses and taking the decision of the Judge on the question of their admissibility. He further contends that even before the learned Judges of the High Court, the advocate for the appellants only made a grievance of his not having been allowed to put the aforesaid two omissions and did not argue that he intended to rely upon other omissions but did not do so as he thought that the learned Sessions Judge would disallow them pursuant to his previous order. Before the High Court an application was filed for summoning eight eyewitnesses on the ground that the learned Sessions Judge did not allow the counsel for defence to put the omissions amounting to material contradiction to them, but no mention was made in that application of the number

of omissions which the accused intended to put to the eyewitnesses if they were summoned. That application was filed on 1-5-1957, but no attempt was made to get a decision on that application before the arguments were heard. Presumably, the court as well as the parties thought that the application could more conveniently be disposed of after hearing the arguments. On 30-7-1957 i.e. after the appellants were fully heard, that application was dismissed and the detailed reasons for dismissing it were given in the judgment, which was delivered on 11-9-1957. The judgment of the learned Judges of the High Court clearly indicates that what was argued before then was that two omissions sought to be put to PW 30 were disallowed and therefore the accused did not put the said omissions to the other witnesses. It was not contended on behalf of the accused that other omissions were intended to be used for contradiction, but were not put to the witnesses as the advocate thought that in view of the order of the learned Sessions Judge they would not be allowed automatically. The learned Judges held that the said two omissions amounted to material contradiction and that the learned Sessions Judge was wrong in disallowing them, but they ignored those two circumstances and based their findings on matters of greater certainty. If really the Judges had made a mistake in appreciating the arguments of the learned counsel for the appellants in the context of omissions, one would expect the accused to mention the said fact prominently in their application for special leave. Even if they omitted to mention that fact in the application for special leave, they could have filed an affidavit sworn to by the advocate, who appeared for them before the learned Judges of the High Court, mentioning the fact that in spite of the argument specifically directed to the other omissions the learned Judges by mistake or oversight failed to notice that argument. The learned counsel who argued before us did not argue before the High Court, and, therefore, obviously he is not in a position to assert that the Judges committed a mistake in omitting to

consider the argument advanced before them. But he made strenuous attempts before us to persuade us to hold that there must have been a mistake. He would say that the learned counsel had in fact relied upon all the aforesaid omissions in support of his contention that there was development of the case of the prosecution from time to time and therefore he must have also relied upon the said omissions in the context of the statements made under Section 162 of the Code of Criminal Procedure; on the other hand, the fact that the learned Judges considered all the alleged omissions in connection with the said contention and only considered two omissions in regard to the contention based on Section 162 of the Code is indicative of the fact that the learned counsel, for reasons best known to him, did not think fit to rely upon all the alleged omissions. The deposition of PW 30 also shows that only two omissions in the statement before the police viz. the existence of a gas-lantern and the scrutiny of the dead bodies by the gang, were put to him in cross-examination and the learned Sessions Judge disallowed those questions on the ground that the learned counsel was not able to show any law entitling him to put the said questions. Though the witness was examined at some length, no other alleged omissions in the statement before the police were sought to be put to him. It would be seen from the short order made by the learned Sessions Judge at the time each one of the two questions were put, that the learned Sessions Judge did not give a general ruling that no omissions in a statement before the police could be put to a witness. The rulings were given, having regard to the nature of the omissions relied upon. But after the entire evidence of PW 30 was closed, the learned Sessions Judge gave a considered order. Even in that order, he did not rule out all omissions as inadmissible, but clearly expressed the view that if what was stated in the witness box was irreconcilable with what was omitted to be stated in the statement, it could go in as material contradiction. Even after this order, it was open to the appellants to bring

out all such omissions, but no attempt was made by them to do so. These circumstances also support the impression of the learned Judges of the High Court that what was argued before them was only in respect of the two specified omissions put to PW 30 in his cross-examination. We, therefore, hold that only two omissions relating to the existence of the gas-lantern and the scrutiny of the faces of the deceased by the appellants were put to PW 30 and were intended to be put to the other witnesses, but were not so done on the basis of the ruling given by the court.”

25. In the light of the aforesaid judgement I may state at the cost of repetition that no doubt Section 311 Cr.P.C. gives the power to the Court to recall any witness to serve the ends of justice, however, the said Section in my view would be subject to Section 33 (5) of POCSO Act on the principle of *generalia specialibus non-derogant*. As held by the Trial Court and rightly so, the child victim was extensively examined for several hours and any recall at this stage would fall foul of the provisions of Section 33 (5) and the intent behind enacting the Section. It is equally true that Courts have to balance the conflicting rights and claims and do substantial justice by permitting the Accused to cross-examine in a given case but the Court cannot lose site of the facts of the present case which are different inasmuch as even after extensive cross-examination the counsel for the Petitioner did not elicit which according to him he now wants to ask in cross-examination.

26. At this stage I may again usefully allude to the judgement of the Supreme Court in *Shiv Kumar Yadav (supra)* relied upon by both sides. Court held that where the accused had appointed a counsel of his choice, who was given due opportunity and had duly conducted the cross-

examination, the accused persons were under no handicap. No finding could be recorded that the counsel appointed were incompetent. Likewise in the present case it is not the case of the Petitioner that the counsel appointed by him was not available or was incompetent or disabled in any manner from carrying out effective cross-examination. Record in fact speaks to the contrary and is pointer to an extensive cross-examination of PW-1 by the Petitioner.

27. For all the aforesaid reasons the Petitioner cannot succeed and the petition is dismissed being devoid of merits. Pending application is also dismissed.

JYOTI SINGH, J

OCTOBER 19th , 2020

sr/yo



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