

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

Date of decision: 21.10.2020

IN THE MATTER OF:

+ CRL. REV. P. 336/2020

NARINDER SINGH

..... Petitioner

**Through: Mr. Dhananjay Singh Sehrawat,
Advocate**

versus

STATE

..... Respondent

Through: Mr. Mukesh Kumar, APP for State

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

(VIA VIDEO CONFERENCING)

MANOJ KUMAR OHRI, J. (ORAL)

1. The present criminal revision petition has been filed under section 397 & 401 r/w Section 482 Cr.P.C. assailing the order dated 29.09.2020 passed by Addl. Sessions Judge-01, (POCSO), Distt. North, Rohini Courts, Delhi.
2. By the impugned order, the trial court dismissed the petitioner's application under Section 311 Cr.P.C. seeking recall of PW-1 (victim) and PW-4 (father of victim) in FIR No.404/2017, under Section 354 IPC & Section 8 POCSO Act, P.S. K.N. Katju Marg, New Delhi.
3. Learned counsel for the petitioner submits that on earlier occasion, cross-examination could not be conducted due to the non-availability of the main counsel and subsequently when the opportunity was granted the petitioner could not brief his new counsel properly and as such certain

essential and material questions regarding the presence of other persons at the spot could not be put in the cross-examination of PW-1. He further submits that PW-1 and PW-4 are material witnesses and their proper cross-examination is essential for just decision of the case.

4. Lastly, it was contended that the denial for recall of the aforesaid witnesses is an irreparable injury to the defence of the petitioner.

5. Per contra, learned APP for the State supported the impugned order and submitted that the present application is a second application filed under Section 311 Cr.P.C. on behalf of the petitioner seeking recall of the very same witnesses. It was also submitted that the present application has been filed only with a view to delay the trial.

6. I have heard learned counsels for the parties. Briefly, the FIR came to be registered on 04.09.2017 under Section 354 IPC read Section 8 POCSO Act on the complaint of the victim child where it was stated that she was taking the tuition from the present petitioner. On some occasion, she took tuition at the house of the petitioner. On 04.09.2017 at about 2:00 P.M. when she went for the tuition to the house of the petitioner, her inserted his hand under cloth of the victim and touched her private parts.

7. The victim as well as her father were first examined on 31.08.2018 when the examination-in-chief was recorded. The opportunity to cross-examine could not be availed as the counsel was not present. Subsequently, the petitioner engaged new counsel Mr. Mukul Sharma and an application under Section 311 Cr.P.C. was filed seeking recall of PW-1. The said application was allowed and the child victim was recalled and permitted to be cross-examined. The cross-examination was partly conducted on 04.09.2019 and remaining cross-examination was conducted on 30.10.2019.

PW-4 was cross-examined on 05.02.2020.

8. On 19.09.2020, another application under Section 311 Cr.P.C. was filed on behalf of the petitioner seeking recall of PW-1 and PW-4 on the ground that the petitioner has again engaged a new counsel and that only previous occasion he could not himself present on the date of the cross-examination and thus could not brief his previous counsel properly.

9. A perusal of the impugned order would show that the child victim has already appeared thrice for cross-examination before the trial court. The petitioner's first counsel did not appear and avail the opportunity of cross-examining the child victim. The petitioner's second counsel moved an application under Section 311 Cr.P.C. which came to be allowed and the child victim was cross-examined on 04.09.2019 and 31.10.2019 when the child victim's cross-examination was completed and she was discharged. The petitioner again changed his counsel and his third counsel conducted the cross-examination of child victim's father on 05.02.2020.

10. The present application has been filed by the petitioner's third counsel seeking recall of the very same witnesses. The issue regarding recall of child witness came before this court on earlier occasion in the case of Jaidev v. State in **CRL.M.C. 4412/2019** wherein it was held as under:-

“9. The Trial Court while passing their impugned order also noted the following guidelines issued by this Court and which were later notified for recording of evidence of vulnerable witnesses in criminal matters.

“15. It is worthwhile to mention that as per the guidelines for recording of evidence of vulnerable witnesses in criminal matters prepared by Hon'ble High Court of Delhi which is also notified that:

7. Identification of Stress causing factors of adversarial Criminal Justice System-

Factors which cause stress on child witness, rendering them further vulnerable witnesses, and impeding complete disclosure by them shall, amongst others, include:

(ii) Delays and continuances.

(iii) Testifying more than once.

And in pursuance to the same the duty is casted on the criminal court judge which as follows:

28. Directions for Criminal Court Judges-

(i) Vulnerable witnesses shall receive high priority and shall be handled as expeditiously as possible, minimizing unnecessary delays and continuances. (Whenever necessary and possible, the court schedule will be altered to ensure that the testimony of the child victim or witness is recorded on sequential days, without delays.)”

10. Article 15 of the Constitution confers upon State powers to make special provision for children. The Protection of Children from Sexual Offences Act, 2012 came into effect on 14.11.2012. The preamble notes:-

“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”

11. Chapter 8 of the POCSO Act specifies the procedure and powers of Special Courts and recording of evidence. A bare

reading of Section 33 of the POCSO Act would show that keeping in view the objects and reasons of the POCSO Act, a special procedure has been adopted for recording of evidence of the child witness. Under Section 33(2), it is required that the questions to be put to a child witness shall be first communicated to the Special Court, who then, in turn, would put those questions to the child witness. Section 33(5) specifically provides that child is not to be called repeatedly to testify in the Court.”

11. The Supreme Court in Ag vs. Shiv Kumar Yadav reported as **(2016) 2 SCC 402**, held that change of a counsel is not a ground to recall the witness.

12. In the present case, the new counsel had already cross-examined PW-4 but no such question was put.

13. By way of the present application, the petitioner has sought not only recall of PW-1 but also of PW-4. It is pertinent to note that now newly appointed counsel was the same counsel who had cross-examined on 05.02.2020. It is thus apparent that the present application has been filed only with a view to delay proceedings.

14. Accordingly, the present application is dismissed.

(MANOJ KUMAR OHRI)
JUDGE

OCTOBER 21, 2020

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