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

% Judgment delivered on: 04.07.2023

+ CRL.M.C. 2595/2023

SUSHIL KUMAR

..... Petitioners

versus

THE STATE GNCTD THROUGH SHO & ANR..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Devendra Kumar, Advocate

versus

For the Respondent : Mr. Shoaib Haider, APP with SI Rakesh Kumar, P.S. Tigri

CORAM:

HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

JUDGMENT

TUSHAR RAO GEDELA, J. (ORAL)

[The proceeding has been conducted through Hybrid mode]

CRL.M.A. 9811/2023 (Exemption)

1. Exemption is allowed, subject to all just exceptions.
2. Application stands disposed of.

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3. This is a petition under Section 482 of the Cr.P.C., 1973 seeking setting aside of the order dated 03.01.2023 passed by the learned Trial Court in CIS SC No.80/2020 arising out of the FIR No.92/2019, Police Station Tigri, for the offences under Section 354/354A/354D IPC, 1860



and Section 12 POCSO Act challenging the dismissal of the application under Section 311 Cr.P.C. seeking recall of PW1 for the purposes of cross examination.

4. Mr. Kumar, learned counsel appearing for the petitioner submits that PW1 was present for recording of evidence on 17.12.2021, however, due to the inability of the counsel for the petitioner from appearing on 17.12.2021 and also for the reason that though the proxy counsel was present before the learned Trial Court seeking adjournment, the learned Trial Court did not grant adjournment and proceeded to record the evidence and closed the evidence of PW1. Learned counsel submits that after 17.12.2021, the other witnesses had appeared, who have been examined, cross examined and discharged by the learned Trial Court.

5. Learned counsel submits that since PW1 is the main witness, the denial of right to cross examination would seriously prejudice the case of the petitioner as also be violative the principals of natural justice. Learned counsel appearing for the petitioner thus submits that this would directly strike the roots of Article 21 of the Constitution of India therefore, the opportunity to cross examine the star witness ought to be made available.

6. *Per contra*, Mr. Haider, learned APP submits that a number of opportunities were afforded to the petitioner to conduct the cross examine despite which the petitioner did not avail of those opportunities.

7. Learned APP also submits that since the issue is also in respect of



the offence under POCSO Act, the sensitivity with which the issue has to be handled by the Trial Court is paramount. Mr. Haider further submits that the learned Trial Court has also recorded in its order that 17.12.2021 was the second date for recording of evidence of PW1 and despite such opportunity, the petitioner did not avail of the same.

8. Mr. Haider also submits that an application under Section 311 Cr.P.C. is also filed with inordinate delay of almost one year and in the meanwhile, as it is apparent from the record, as also from the submissions of learned counsel appearing for the petitioner, almost six witnesses other than PW1 have already been examined.

9. Mr. Haider, learned APP also submits that the petitioner cannot be given continuous opportunities for such examination and the petition deserves to be dismissed.

10. This Court has considered the arguments addressed by learned counsel as also perused the impugned order passed by the learned Trial Court.

11. There is no doubt that in offences relating to security of women are concerned, the criminal courts are under an obligation to ensure that the witnesses are not harassed. However, keeping in view the fact that under Section 29 of the POCSO Act, there is presumption which is against the petitioner, which needs to be rebutted by way of proper opportunity to cross examine the witnesses. This right is indelible.

12. That apart, no doubt, that the petitioner had approached the learned Trial Court with an application under Section 311 after an inordinate delay of one year, however, that by itself that may not be the



reason for depriving the petitioner from cross examining PW1. The offences are of a very serious in nature and considering the fact that the offences under POCSO Act prescribe very harsh punishment, it would not be out of place to hold that the right to cross examine would be all the more at a higher pedestal.

13. In that view of this matter, this Court is of the considered opinion that the petitioner can be afforded an opportunity to cross examine PW1 on one single date.

14. It is informed that the matter is now listed before the Special Court on 07.08.2023.

15. The counsel is directed to present PW1 for cross examination by the petitioner on 07.08.2023. Petitioner shall ensure that the cross examination commences and is completed on 07.08.2023. No further opportunity of any kind will be given or afforded to the petitioner other than 07.08.2023.

16. The learned Trial Court thereafter is at liberty to proceed with the recording of the evidence of the remaining witnesses.

17. The petitioner shall pay a sum of Rs.10,000/- to the witness as a pre condition for the opportunity granted today to be paid within one week from today.

18. If there is any infraction in the above conditions, the opportunity so granted today, shall automatically stand vacated.

19. The petition stands disposed of.

TUSHAR RAO GEDELA, J .



JULY 4, 2023/ms

