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

+ CRL.REV.P. 502/2023

BIGAN SHAH

..... Petitioner

Through: Mr.Kartik Yadav, Advocate (through
VC)

versus

STATE (GOVT. OF NCT OF DELHI)

..... Respondent

Through: Mr.Raghvinder Verma, APP for the
State.
Insp.Arvind Kr., PS Anand Vihar.

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Date of Decision: 03.05.2023

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

DINESH KUMAR SHARMA, J. (Oral)

CRL.M.A. 11798/2023 (exemption)

Exemption is allowed subject to all just exceptions.

Application stands disposed of.

CRL.REV.P. 502/2023 & CRL.M.A. 11797/2023 (interim relief)

1. Present revision petition has been moved assailing the order dated 15.02.2023, passed in SC No. 171/2018, whereby, the Ld. Sessions Court has dismissed the application of the petitioner/accused under section 311 Cr.P.C seeking recall of the complainant for cross



examination. Thus, aggrieved the petitioner has preferred the present petition.

2. Briefly stated the facts are that the complainant registered an FIR No. 0119/2018 at PS Anand Parbat against the petitioner under sections 376/506 IPC & section 6/17 of POCSO Act, alleging therein that the petitioner in collusion with his wife seduced her and sexually assaulted her by threatening to kill her family. At the time, she was only a minor. It has been further alleged that the petitioner is HIV positive and has infected the complainant with HIV owing to the alleged incidents. It has been further alleged that the petitioner raped her under the false pretext of marriage and has ruined her life.
3. Ld. Counsel submits that the chargesheet has been filed and charges have been framed against the petitioner under sections 376/506 of IPC and section 6 POCSO Act. Thereafter petitioner was granted regular bail by the Ld. ASJ vide order dated 25.09.2018.
4. Ld. Counsel for the petitioner submits that on 05.12.2018, 28.03.2019, 22.07.2019 & 04.11.2019 the matter was adjourned owing to some extenuating circumstances or the other. Thereafter, on 27.01.2020 the prosecutrix/complainant was examined at length till 5 PM as PW 1, however her cross examination was deferred due to paucity of time. It has been submitted that on 07.04.2020, 07.07.2020, 22.09.2020 & 01.12.2020, the matter was adjourned due to Covid-19 pandemic. On 16.02.2021 & 27.07.2021 the matter was adjourned as PW1 was not present as process was not issued in the wake of Covid. Further, on 04.05.2021, 12.10.2021, 22.01.2022 & 07.04.2022 the matter was



adjourned again owing to different reasons. Ld. Counsel submits that on 04.06.2022 fresh summons were issued to the Prosecutrix/PW1 to conclude her part evidence. Thereafter, on 04.08.2022, the remaining Evidence of PW1 was concluded by the Ld. APP and the Ld. Proxy appearing on behalf of the accused sought an adjournment to cross-examine the complainant as the main counsel was not available.

5. It has been submitted that however, Ld. Sessions Court closed petitioner's opportunity to cross-examine the complainant as she is HIV positive and cannot be called upon repeatedly to the witness box. Aggrieved, the petitioner moved an application u/s 311 Cr.P.C. for recalling the complainant/PW1 for cross examination which was summarily dismissed vide order dated 15.02.2023 mainly on the ground that opportunity was granted to the Petitioner. Whereas, Ld. Counsel for the petitioner submits that in fact the opportunity to cross-examine PW1 was closed the very same day when her examination-in-chief was actually concluded by the Ld. APP.
6. Ld. Sessions Court after perusing the record noted that PW1 was examined on 27.01.2020 when her cross-examination was deferred and thereafter she was again recalled for cross examination on 04.08.2022, on which date, the counsel for accused was not available. Ld. Sessions Court observed that the complainant is HIV positive due to the incident and that the matter is of 2018 and part evidence of the complainant has been already been recorded on 27.01.2020. Ld. Court held that it would cause great hardship for the complainant who is



HIV positive to be recalled for examination and thus dismissed the application of the petitioner.

7. I have considered the submissions and perused the records. While empathising with the complainant who is stated to be suffering from HIV, it is also the bounden duty of this Court to see whether the principles of law and natural justice are followed.
8. Section 311 Cr.P.C. reads as under:

*“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.**”*

9. The power under Section 311 Cr.P.C. is very wide and empowers the Courts to summon any person as witness at any stage of inquiry, trial or other proceedings under the Code. The only pre-requisite being that the evidence of such person should appear to be essential to the just decision of the case. While it is correct that the discretionary power under Section 311 Cr. P. C can be invoked at any stage of the trial and it should be invoked with great caution and circumspection. However, the basis of the criminal trial is fairness to both the parties. In a criminal trial principles of fairness and natural justice are of paramount importance.
10. It is settled law that if evidence of any witness appears to the court to be essential to the just decision of the case it is the duty of the court to summon and examine or recall and re-examine any such person



under section 311 Cr.P.C. The determinative factor is whether it is essential to the just decision of the case.

11. In *P. Sanjeeva Rao vs. State of A.P.*, AIR 2012 SC 2242, the scope of Section 311 Cr.P.C. was highlighted by referring to an earlier decision of the Supreme Court. The relevant excerpt reads as under:

“13. Grant of fairest opportunity to the accused to prove his innocence was the object of every fair trial, observed this Court in Hoffman Andreas v. Inspector of Customs, Amritsar (2000) 10 SCC 430. The following passage is in this regard apposite:

“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. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined-in-chief about an incident that is nearly seven years old. Delay takes a heavy toll on the human memory apart from breeding cynicism about the efficacy of the judicial system to decide cases within a reasonably foreseeable time period. To that extent the apprehension expressed by Mr. Rawal, that the prosecution may suffer prejudice on account of a belated recall, may not be wholly without any basis. Having said that, we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. **Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would***



justify denial of a fair opportunity to the accused to defend himself.”

12. In **Rajaram Prasad Yadav vs. State of Bihar & Anr.**, SLP (CRL.) No. 2400 of 2011, the Hon’ble Supreme Court laid down the following principles pertaining to section 311 Cr.P.C.:

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- a. 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?*
- b) The exercise of the widest discretionary power under Section 311 Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.*
- c) 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.*
- d) The exercise of power under Section 311 Cr.P.C. 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.*
- e) 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.*
- f) The wide discretionary power should be exercised judiciously and not arbitrarily.*
- g) 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.*
- h) The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.*
- i) 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.

j) Exigency of the situation, fair play and good sense should be the safe guard, 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.

k) 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.

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

m) 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.

n) The power under Section 311 Cr.P.C. 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.”

13.The perusal of the abovesaid judgments makes it clear that power under Section 311 Cr.P.C. has to be exercised liberally. The end object of the trial is to reach the justice. Any request which may help



the court in proper adjudication of the matter in dispute in accordance with law should be allowed. Record reveals that due to covid the matter was adjourned several times. It is to be borne in mind that the Covid-19 pandemic period were difficult times. The matter is still at the stage of prosecution evidence.

14. Without going into the contentions and taking into account the totality of facts and circumstances of the case, this Court considers that in the interest of justice and for proper adjudication, the present petition be allowed subject to a cost of Rs.35,000/- to be paid to the complainant/victim. Accordingly, the impugned order dated 15.02.2023 passed in SC No. 171/2018 is set aside.
15. The parties are directed to appear before the learned Trial Court on 11.05.2023.

DINESH KUMAR SHARMA, J

MAY 3, 2023

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