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

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Reserved on: 24.07.2023

Pronounced on: 31.07.2023

+ **CRL.M.C. 5032/2023**

RAKESH

..... Petitioner

Through: Mr. Hitesh Thakur, Advocate

versus

STATE OF NCT OF DELHI & ANR.

..... Respondents

Through: Mr. Manoj Pant, APP for State
with Insp. Mahesh Kumar,
P.S. Keshav Puram

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The instant petition has been filed by the petitioner under Section 482 of the Code of Criminal Procedure, 1973 ('Cr.P.C') for quashing of order dated 23.05.2023 passed by learned Additional Sessions Judge (FSTC), POCSO, North-West, Rohini Courts, New Delhi ('Trial Court') in Sessions Case 53715/2016 arising out of FIR bearing no. 669/2016, registered at Police Station Keshav Puram, Delhi for offences punishable under Sections 376/506 of the Indian Penal Code, 1860 ('IPC') and Section 6 of Protection of Children from Sexual Offences Act, 2012 ('POCSO Act').



2. Briefly stated, the facts of the case are that the petitioner/accused had allegedly committed rape upon respondent no. 2/prosecutrix, following which, an FIR was registered on 20.10.2016. The examination-in-chief and cross-examination of the prosecutrix and of the complainant i.e. mother of the prosecutrix was concluded on 20.10.2018. Thereafter, on 30.08.2019, the doctor who had proved the contents of MLC was examined and discharged. The petitioner had moved an application under Section 311 Cr.P.C. seeking directions to re-call the prosecutrix and her mother on the ground that the cross-examination which had been conducted earlier was conducted just for the sake of formality without discussing the charge leveled against the petitioner/accused. However, the same was dismissed by the learned Trial Court *vide* order dated 23.05.2023. Aggrieved by the same, the petitioner has approached this Court.

3. Learned counsel for the petitioner states that a bare perusal of the cross-examination of the prosecutrix would reveal that it was conducted in a routine manner, neglecting the gravity of the allegations leveled against the petitioner as no questions had been put to her in the entire cross-examination regarding the alleged incident i.e. the mode and manner in which it had taken place, to ascertain as to whether the incident had actually taken place or was just a cooked up story at the instance of the complainant/mother of prosecutrix. It is also stated that the mother of the prosecutrix also needs to be again cross-examined to ascertain as to how and when she had come to know that her daughter had gone missing, how she had searched for the prosecutrix, etc. It is also argued that the medical examination in



this case was conducted and it is essential to ascertain whether there were any injuries or other symptoms on the body of the prosecutrix to corroborate the story of prosecution, therefore, the doctor concerned PW 9 be called for cross examination.

4. Learned APP for the State, on the other hand, argues that the witnesses were thoroughly examined and the prosecutrix was just seven years old at the time of the incident and nine years old when she was examined and cannot be subjected to the trauma of re-living the entire incident.

5. This Court has heard arguments on behalf of both sides and perused the material available on record.

6. After going through the case file, this Court is of the opinion that there are specific allegations leveled in the FIR that the present petitioner/accused had taken the victim, who was a minor, to the roof of building and had committed sexual assault on her. The petitioner had moved an application before the learned Trial Court under Section 311 Cr.P.C. for recalling of the prosecutrix and the complainant i.e. the mother of prosecutrix as well as PW-9 i.e. doctor who had medically examined the victim.

7. The operative portion of the order impugned before this Court reads as under:

“By way of the present application, the recalling of PW4/victim and PWS/mother of the victim is being sought on the ground that the cross-examination which had been conducted earlier was conducted just for the sake of formality and no questions were put to the said witnesses to test the veracity of the alleged incident.

As per record, the victim was just 7 years old at the time of



the incident and she was 9 years old when she was examined. Almost 6 & ½ years have elapsed from the date of the incident and about five years have elapsed since the date when the victim was cross-examined at length on 30.05.2018 on behalf of the accused.

The application as filed is vague and does not specify any aspect on which the victim was not cross-examined. It cannot be overlooked that when the witnesses are called for evidence, they re live the entire incident and only on the basis of vague averments, the victim cannot be recalled as it would likely cause her further trauma.

It is further noted that the present application as filed is highly belated. Though in paragraph no.5 of the application it has been stated that the application has been moved at the first available opportunity, however, as already noted that victim and her mother had been examined in the year 2018-19, fresh vakalatnama on behalf of the accused filed by the Ld. Counsel was attested way back in July 2021 and the counsels have been appearing in this case regularly since March 2022 whereafter six witnesses have been examined but no application was filed till now when the matter was listed for recording statement of accused and it appears that the application has only been filed only to delay the present matter which pertains to the year 2016.

The reliance of the Ld counsel for the accused on the judgment of Hon'ble High Court of Delhi in Vinod Rawat (Supra) is misplaced and clearly distinguishable on the facts of this case in as much as in the cited case, while one witness i.e. the victim had already been cross-examined and the other witness was not cross-examined despite opportunity and even in the cross-examination of the victim no question was put regarding charge framed against the accused, whereas in the present case the witnesses sought to be recalled have been extensively cross-examined on behalf of the accused.

It is further noted that while fair trial demands that Opportunity to defend the accused be afforded yet in case the cross-examination would have been concluded extensively, it would have against the mandate of law to re-summon the witness especially in a case of sexual offence as also observed by the Hon'ble High Court of Delhi in the judgment cited by Ld counsel for the accused himself at paragraph no. 16.

In these facts and circumstances, no ground is made out for recalling the PW4 and PW5 at this belated stage.



The application as filed is dismissed and disposed off accordingly.

Matter be put up for recording statement of accused under Section 313 Cr.P.C.on 17.07.2023.”

8. Further, Section 33(5) of POCSO Act, which is relevant for the adjudication of present case, reads as under:

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

9. The argument of the learned counsel for petitioner that the bar under Section 33(5) of POCSO Act, 2012 is not absolute and the Court has discretion to recall the witness in the interest of justice has been considered by this Court. This Court after considering the same as well as the case law cited before this Court is of the view that the facts and circumstances of each case are different and a court of law cannot decide all the cases before it on the basis of any standard format based order. The facts of *Vinod Rawat v. State* 2022 SCC OnLine Del 2989, a decision rendered by this Bench, are distinguishable from the facts and circumstances of the present case and this aspect has been dealt with in detail by the learned Trial Court.

10. While the bar under Section 33(5) POCSO Act may not be absolute and balance of rights needs to be maintained under Section 33(5) of POCSO Act and Section 311 of Cr.P.C., at the same time, the Court’s discretion in exercising its power to re-summon a witness for cross-examination has to be exercised with circumspection, caution and utmost sensitivity. The crucial word used in Section 33(5) of POCSO Act is “called repeatedly”. This Section thus has to



be interpreted to balance and applied with the right under Section 311 Cr.P.C. of accused and right to fair trial of an accused depending on facts and circumstances of each case.

11. The victim in this case was only seven years of age at the time of incident in the year 2016. When she was examined in the Court, she was nine years of age in the year 2018.

12. A perusal of the record would reveal that six years have passed since the testimonies of the prosecutrix and her mother were recorded before the learned Trial Court. The child victim in this case has relived the trauma of perverse sexual assault upon her at a very tender age of seven years, once, when she was sexually assaulted, thereafter while recording her statement before the police and under Section 164 Cr.P.C. before the Magistrate and thereafter before the learned Trial Court while recording her evidence.

13. The victim, being only of seven years of age having gone through this repeated trauma on number of occasions and period mentioned above, cannot be directed to appear once again after six years to depose about the same incident, only on the ground that the previous counsel had cross-examined the witness in a manner which the new counsel does not find sufficient or appropriate.

14. The contentions of learned counsel for the petitioner in the pleadings as well as during oral arguments **that the legislation of POCSO Act is a gender based legislation and therefore is being misused is not only inappropriate but misleading too.** To say the least, POCSO Act is not gender based and is neutral as far as victim children are concerned. Moreover, to argue that the legislation is



being misused and using the language such as “*as the complainant by keeping a gun on her minor daughter’s shoulder had implicated the applicant in the present case so as to coerce him to re-pay a friendly loan that he had taken from her husband*” (as mentioned in the petition) have been found to be most insensitive by this Court.

15. **Any law, whether gender based or not, has the potential of being misused. However, only because laws can be misused, the legislature cannot stop enacting laws nor judiciary can stop applying such laws since they have been enacted to curb the larger menace of commission of such offences and getting justice to genuine victims.**

16. This Court also takes note of the fact that change of counsel cannot be a ground for re-summoning of the witnesses, especially when there is a specific bar due to specific intent of the legislature, as in the present case, by way of Section 33(5) of the POCSO Act.

17. The Hon’ble Apex Court in case of *State (NCT of Delhi) v. Shiv Kumar Yadav (2016) 2 SCC 402* had emphasized that fairness of a trial has to be seen, not only from the perspective of accused, but also of the victim and society. It was also held that mere incompetence of a previous counsel cannot be the ground to re-call a witness for examination. The relevant observations in this regard 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.

15. While advancement of justice remains the prime object of law, it cannot be understood to mean that recall can be allowed for the asking or reasons related to mere convenience. It has normally to be presumed that the counsel conducting a case is competent particularly when a counsel is appointed by choice of a litigant. Taken to its logical end, the principle that a retrial must follow on every change of a counsel, can have serious consequences on conduct of trials and the criminal justice system. The witnesses cannot be expected to face the hardship of appearing in court repeatedly, particularly in sensitive cases such as the present one. It can result in undue hardship for the victims, especially so, of heinous crimes, if they are required to repeatedly appear in court to face cross-examination...

29. We may now sum up our reasons for disapproving the view of the High Court in the present case:

(vii) mere change of counsel cannot be ground to recall witness..."

18. In the context of the present case, this Court has gone through the testimony of PW-4, 5 and 9. Perusal of testimony of the minor child/prosecutrix reveals that she was cross-examined at length and her cross-examination runs into almost three pages. She has been questioned on every aspect by the previous counsel for the petitioner regarding the time, manner, place of offence, etc. As far as PW-5 i.e. mother of the prosecutrix is concerned, her cross-examination was also conducted at length on 17.08.2018, which runs into three pages and again on 29.01.2019, which runs into two pages. She has also been cross-examined and questioned on almost every aspect, which has been argued to have not been touched upon by the previous counsel. As far as PW-9 is concerned, he has deposed on behalf of the concerned doctor and has proved the MLC in its entirety.



Therefore, to say that one or two questions were not asked and therefore, he be re-called does not find favour with this Court.

19. The trial in this case has already been prolonged to seven years and the application under Section 311 Cr.P.C. was filed after almost six years of recording of testimony of the witnesses concerned. All this while, for the six years, when the testimony of other witnesses was being recorded, there was no whisper from the side of the petitioner/accused to recall the present witnesses. The present revision petition as well as application filed under Section 311 Cr.P.C. before the learned Trial Court thus seems to be an attempt to delay the trial, which is already delayed.

20. Learned counsel for the petitioner also argued that in case the present petition is not allowed, it will amount to violation of right of fair trial to the accused/petitioner.

21. While this Court cannot dispute that the right to fair trial is a crucial and precious right of the accused, so is the complainant's right to a fair trial which requires that they should not unnecessarily be harassed, especially in the cases of sexual assault-. This Court notes that at times, people may not even report such cases of sexual assault of children of tender age as in this case, she was only seven years of age for fear of being harassed by continuous visits to the Courts or fear of embarrassment and traumatic cross-examination. It would have been a different decision in case the record would have revealed that the witnesses' cross-examination consisted of only asking few formal questions and not of the incident, but in the present case, to the contrary, as already observed above, the cross-



examination had been conducted at length and all relevant aspects had been covered by the previous counsel for the petitioner. **In view of the same, though the accused has to be granted and ensured a fair trial, it cannot mean being afforded unjustified repeated opportunities of cross-examination in every case to indicate fair trial.** The case of an accused has to be meritorious where a relief as prayed for in the present case, can be granted.

22. The other contention that in case the present application is not allowed, the case may end into conviction is also without merit since, at the cost of repetition, it is to be taken note of that the previous counsel has cross-examined the witnesses at length and only due to apprehension or fear of the accused that cross-examination did not result in answers that would have helped him, cannot be a ground to recall the witnesses after six years of conclusion of their testimony.

23. While balancing the right of the accused to a fair trial and upholding the intent of the legislation, the courts are duty bound to remain sensitive to the plight of the seven-year-old sexual assault victim. She and her mother cannot be recalled to relive the entire trauma only because the new counsel is dissatisfied with the elaborate cross-examination of these witnesses. Thus, this Court also has a duty to ensure an expeditious and fair trial, preventing misuse of such applications for delaying the proceedings before the learned Trial Court.

24. Thus, in the given set of facts and circumstances, no ground is made out for recalling the witnesses at this belated stage. Accordingly, the present petition stands dismissed, being devoid of



merit. The learned Trial Court is also directed to ensure that trial is concluded expeditiously in the present case.

25. A copy of this judgment be forwarded to the learned Trial Court by the Registry for necessary information.

26. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

JULY 31, 2023/zp

