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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**% *Date of Decision: 10th October, 2023*

+ CRL.M.C. 3634/2022 and CRL.M.A. 15292/2022

MISS A THROUGH GUARDIAN

..... Petitioner

Through: Ms. Tara Narula and Ms. Priya Sahil,
Advocates

versus

STATE & ANR.

..... Respondents

Through: Mr. Amit Sahni, APP for State with
SI Shubham Saini, P.S. Pandav Nagar.
Respondent No. 2 produced in Court (in JC).**CORAM:****HON'BLE MS. JUSTICE JYOTI SINGH****JUDGEMENT****JYOTI SINGH, J. (ORAL)**

1. Present petition has been filed by the Petitioner under Section 482 Cr.P.C. assailing an order dated 01.06.2022 passed by the learned Special Judge, POCSO Act, East District, Karkardooma Courts, whereby the Court has allowed the application of the accused under Section 311 Cr.P.C. recalling the Petitioner (PW-2) for cross-examination in case titled '*State v. Harpal Singh*', SC No.2152/2019 arising out of FIR No.157/2019 dated 27.04.2019 under Sections 376/354/506/509 IPC registered at PS: Pandav Nagar.

2. Pursuant to the production warrant issued by this Court, the accused/ Respondent No.2 has been produced in custody.



3. Factual score to the extent necessary is that pursuant to a complaint lodged by the Petitioner and her younger sister, the present FIR was registered. As per the averments in the petition, charges were framed against the accused on 19.09.2019 and thereafter PW-1 and PW-2 were summoned for prosecution evidence on 19.12.2019. On the said date, PW-1 and PW-2 were present in Court, however, examination-in-chief of only PW-1 could be concluded and the matter was adjourned to 06.02.2020 for her cross-examination and for examination-in-chief as well as cross-examination of PW-2. Both witnesses appeared on the said date, however, due to non-production of the accused from judicial custody, the matter was adjourned to 24.02.2020. Courts were unable to function from 24.02.2020 to 15.02.2022 on account of Pandemic COVID-19.

4. It is further stated that PW-1 and PW-2 were again summoned for 15.02.2022 and were present on the said date but cross-examination of PW-1 could not be completed and was deferred to 15.03.2022 for further cross-examination, on which date after conclusion of cross-examination, summons were issued for examination of PW-2 on 22.04.2022. On the said date, examination-in-chief of PW-2 concluded before lunch and though counsel for the accused sought adjournment for cross-examination, the request was declined by the Trial Court and he was directed to conclude the cross on the same day. Counsel for the accused failed to appear till 3.20 pm and the Trial Court closed the right of the accused to cross-examine the Petitioner. Counsel appeared thereafter and apprised the Court that he could not appear post lunch as he was held up in traffic and filed an application under Section 311 Cr.P.C. seeking recall of PW-2. Vide order dated 01.06.2022, the learned Trial Court allowed the application and relevant part of the order is



as follows:-

“5. It is unfortunate that legal aid counsel for the accused could not appear for cross examination of the witness as he was stuck in traffic jam. PW2 is a material witness of the Case. Although in normal circumstance PW2 could not have been recalled for further cross-examination but considering the fact that accused is in Judicial Custody and was provided legal aid counsel and legal aid counsel due to the reasons attributed to him did not cross-examine the witness and thus for the fault of the legal aid counsel, the accused could not be penalised.

6. In view of the above mentioned discussion, the application for recalling of PW2 is allowed subject to the condition that not more than one opportunity shall be granted to the accused to cross examine PW2. Legal Aid Counsel is directed to remain present in the first call before the court and shall continue to be present before the court till examination of PW2 is concluded on the date.”

5. Assailing the order, learned counsel for the Petitioner submits that the impugned order demonstrates lack of consideration for the hardship faced by the minor victim. The order passed is contrary to the provisions of Section 33(5) of the Protection of Children from Sexual Offences Act, 2012 (‘POCSO Act’), which provides that the Special Court shall ensure that the child is not called repeatedly to testify in Court. Being a special enactment, Section 33(5) of POCSO Act shall prevail over Section 311 Cr.P.C. and thus the exercise of discretion by the Trial Court is contrary to law. The legislative intent behind POCSO Act is to ensure that the victim is not repeatedly called to the Court to save her from harassment. Learned counsel relies on the judgments in *State (NCT of Delhi) v. Shiv Kumar Yadav and Another, (2016) 2 SCC 402; Rakesh v. State of NCT of Delhi and Another, 2023 SCC OnLine Del 4774; and Vinod Kumar v. State of Punjab, (2015) 3 SCC 220.*

6. I have heard the learned counsel for the Petitioner and examined her submissions. There can be no dispute or debate on the solemn aims and



objectives behind enacting the POCSO Act and one of them being to prevent harassment to the victim caused by appearing in Court repeatedly. Section 33(5) of the POCSO Act embodies this principle and provides that “*The Special Court shall ensure that the child is not called repeatedly to testify in the court.*” However, it is equally settled that fair trial is a part of guarantee under Article 21 of the Constitution of India and as observed by the Supreme Court repeatedly, fairness of trial has to be seen from the perspective of the victim, accused and the society. The accused is entitled to be represented by a counsel of his choice, to be provided all relevant documents and to lead his evidence in defence as well as cross-examine the prosecution witnesses. This right of the accused flows from Article 22(1) of the Constitution of India, which confers a fundamental right upon an accused, who has been arrested by the police to be defended by a legal practitioner of his choice.

7. The Supreme Court in ***Rajaram Prasad Yadav v. State of Bihar and Another, (2013) 14 SCC 461***, laid down the principles which are to be borne in mind while deciding an application for recall under Section 311 Cr.P.C., the object of which is to reserve the power with the Court to prevent injustice in the conduct of trial at any stage. Some of the principles which would be useful to allude to are:

“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.

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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.

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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.

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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."

8. In ***Shiv Kumar Yadav (supra)***, the Supreme Court observed that the power available to a Court under Section 311 Cr.P.C. has to be exercised only if the Court, for valid reasons, feels that injustice is caused to a party and this would depend on the facts of each case. Fair trial is the underlying principle behind exercise of power under Section 311 Cr.P.C. The twin issues raised by learned counsel for the Petitioner in the present case are: (a) unwarranted adjournments on behalf of the accused leading to repetitive appearance of the Petitioner, which is against the ethos of POCSO Act and procrastination of trial causing undue harassment to the Petitioner; and (b) being a special legislation, Section 33(5) of POCSO Act will override Section 311 Cr.P.C.



9. Factual narrative that emerges from the reading of the petition and the order sheets is that the case was first listed for Prosecution Evidence on 19.12.2019, when PW-1 and Petitioner (PW-2) were present and examination-in-chief of PW-1 was completed. Matter was adjourned to 06.02.2020 for cross-examination of both the witnesses since the accused wanted to cross-examine them on the same day. On 06.02.2020, the evidence could not proceed due to non-production of the accused from judicial custody and thereafter no proceedings could take place on account of Pandemic COVID-19 till 15.02.2022, when both PW-1 and PW-2 were present. On the said date, cross-examination of PW-1 took place but could not be concluded and was deferred to 15.03.2022, on which date the same was concluded and fresh summons were issued to the Petitioner to appear before Court on 22.04.2022. It is further seen that on 22.04.2022 examination-in-chief of the Petitioner was conducted before the lunch hour and counsel for the accused was directed to appear at 2.30 PM to conclude the cross-examination on the same day. Counsel for the accused, however, did not appear and at 3.20 PM the right to cross-examine was closed. An application was filed on behalf of the accused under Section 311 Cr.P.C. for recalling PW-2, which was allowed by the impugned order.

10. Therefore, the first thing that emerges from the narrative is that counsel for Petitioner is not correct in arguing that the facts are egregious and it is the accused who has been taking repeated adjournments, leading to the prosecutrix appearing in Court again and again. Secondly, the Trial Court has correctly noted in the impugned order that the accused was in judicial custody and was provided with a Legal Aid Counsel, who could not appear at 2.30 PM as he was stuck in traffic jam and this cannot be



attributed to the accused. The Trial Court is also right that PW-2 is a material witness of the case and her testimony would determine the final outcome of the case and thus in its wisdom and with a view to ensure fair trial, learned Trial Court allowed the application for recall. In ***Sh. Vimal Khanna v. State (Govt. of NCT Delhi), 2018 SCC OnLine Del 11796***, this Court has held that denial of opportunity to the accused to cross-examine the witness violates the Constitutional Guarantee to the accused and vitiates the trial. Where the accused does not have assistance of a lawyer or his lawyer fails to defend his case, it is the duty of the Court to provide a lawyer to the accused, unless the accused voluntarily makes an informed decision to defend himself. The same view is taken by this Court in ***Mohd. Gulzar v. The State (Govt. of NCT Delhi), 2018 SCC OnLine Del 11845*** and ***Vinod Rawat v. State, 2022 SCC OnLine Del 2989***. Relevant paras of the judgment in ***Vinod Rawat (supra)***, are:-

“8. The scope of Section 311 Cr.P.C. has been examined and principles have been laid down in catena of judgments of the High Courts and the Hon'ble Supreme Court. In the case of *State (NCT of Delhi) v. Shiv Kumar Yadav, (2016) 2 SCC 402*, the Hon'ble Supreme Court observed as follows:

“...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 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 only some of the decisions for the principles laid down which are relevant for this case...”

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10. *It is settled law that the Court has widest discretionary powers to summon, examine or recall and re-examine any person with an object of finding out the truth for reaching just and correct decision of the case. However, the discretionary power has to be used with caution and judiciously and not arbitrarily. Every court has to keep in mind that the powers so exercised should be used in a manner which will ensure that no serious prejudice is caused to the accused and miscarriage of justice does not take place. The satisfaction of the court in this respect is essential.*

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16. *Fair trial demands that opportunity to defend the accused be afforded. In case, the cross-examination would have been conducted extensively, it would have been against mandate of law to re-summon the witness especially in a case of sexual offence. However, in the present case, only questions regarding the family members, etc. of the victim were asked in the cross-examination and no question was put regarding the allegation leveled against the accused.*

17. *Since the application has been rejected on the ground of bar under section 33(5) of POCSO Act, it is relevant to reproduce the said section, which reads as under:*

“33(5) The Special Court shall ensure that the child is not called repeatedly to testify in the court.”

18. *However, Section 33(5) cannot be read alone, as a balance of rights under Section 33(5) and Section 311 Cr.P.C. needs to be maintained. The right to fair trial as well as the bar under Section 33(5) both need to be looked into while deciding such application, depending upon facts of each case. This view has also been expressed in catena of cases across several Courts in the country.*

19. *In Mohd. Gulzar v. The State (GNCTD), 2018 SCC OnLine Del 11845, a coordinate bench of this Court made the following observations with regard to balancing of the rights under section 33(5) POCSO and section 311 Cr.P.C.:*

“6. Perusal of orders dated 10.04.2018, 11.04.2018 and 12.04.2018 shows that the counsel for the petitioner was not present for the purpose of cross-examination. The right of cross-examination is a valuable right provided to an accused. No doubt, a child under Section 33(5) of Chapter VIII POCSO also has rights of not being harassed at trial but a balance has to be achieved between the two rights.”



20. *The Orissa High Court in Pidika Sambaru v. State of Odisha, 2022 SCC OnLine Ori 802 while reiterating the observations of this Court in Vimal Khanna (supra) and Mohd. Gulzar (supra) ordered recalling of the witnesses on the ground that non-cross-examination of the witnesses would put the petitioner in prejudice. Similar view was held by Karnataka High Court in Deva @ Devaraj v. State of Karnataka, Crl. Petition No. 201325/2019.*

21. *Therefore, the bar under Section 33(5) of POCSO Act has to be interpreted keeping in mind the facts of each case. In the present case, it is not the case of the prosecution that the witness has been repeatedly called for cross-examination. The application has been moved on the first available opportunity to the accused/applicant who, was in judicial custody.....”*

11. Seen in the light of the aforesaid observations of the Courts, the Trial Court cannot be faulted for allowing the application under Section 311 Cr.P.C. and recalling PW-2 for cross-examination. It must be noted that the Trial Court has while allowing the application counterbalanced the rights of the prosecutrix by putting a condition that not more than one opportunity shall be granted to the accused to cross-examine PW-2 with a further direction to the Legal Aid Counsel to remain present in the first call and continue to be present till the examination of PW-2 is concluded on the said date. In my view, it is a well-reasoned and balanced order, which warrants no interference. However, this Court further directs that copy of this order be sent to the Member Secretary, Delhi State Legal Services Authority, to ensure that the Legal Aid Counsel engaged on behalf of the accused in the present matter appears before the Court and conducts the cross-examination on the next date fixed by the Court and no adjournment is sought. In case the said counsel is unavailable for any reason, another counsel shall be engaged and deputed to do the needful and said counsel will not seek an adjournment on the ground that he/she has been newly engaged.



12. The propositions of law laid down in the three judgments cited by the counsel for the Petitioner cannot be debated and are well-settled and binds this Court. However, a reading of the judgments supports the case of the accused that rights of the accused and the prosecutrix/complainant have to be balanced and the right of cross-examination given to an accused in law is an important right. There can be no room for doubt that cross-examination by an accused of a material witness produced by the prosecution can tilt the outcome of the case in favour of the accused. Therefore, the judgments cannot enure to the advantage of the Petitioner in the facts and circumstances of the present case. I may also add that the facts of the cases cited were completely different from the factual narrative in the present case where substantial part of the period, within which the trial could not proceed, was covered by Pandemic COVID-19. On one date the evidence was deferred but that was due to non-production of the accused from judicial custody, which cannot be attributed to the accused and the second was when the right to cross-examine was closed on account of non-appearance of the Legal Aid Counsel engaged to represent the accused who is in judicial custody. Therefore, even on facts the present case falls outside the categories of those cases where the trial is delayed or prolonged owing to the fault of the accused.

13. With these observations, the petition is dismissed along with pending application.

JYOTI SINGH, J

OCTOBER 10, 2023/kks/KA