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

+ **CRL.M.C. 5157/2022 & CRL.M.A.3411/2023 (stay)**

ASHU & ANR.

..... Petitioners

Through: Mr. R.P.S. Bhatti, Advocate.

versus

THE STATE(GOVT OF NCT OF DELHI)

..... Respondent

Through: Mr. Hemant Mehla, APP for the State
with Mr. Dipanshu Meena, Advocate
with SI Vivek Kumar, PS Gandhi
Nagar.

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Date of Decision: 08th February, 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.3412/2023 (exemption)

Exemptions allowed subject to all just exceptions.

CRL.M.A. 3410/2023 (early hearing)

For the reasons stated in the application, the application is allowed.

The petition is taken up for hearing today itself.

CRL.M.C. 5157/2022

1. Present petition has been filed seeking the setting aside of the order dated 1.02.2020 of the court of Special judge (POCSO), East District, Karkardooma in SC No. 2271/16 thereby allowing the petitioners to re-call

PW1/Prosecutrix for further cross-examination.

2. Briefly stated facts of the case are that on the statement of prosecutrix an FIR 328/2016 was registered under sections 376/376D/328/506 IPC and sections 6/12 of POCSO Act at PS Gandhi Nagar. In the FIR it was alleged that respondent No.2/Danish used to threaten the prosecutrix to follow his instruction. Under the influence of threat and fear she used to meet Danish/Respondent No.2. It is alleged that the offence of rape was committed by Danish/Respondent No.2 and his brother Ashu/Respondent No. 1 multiple times during a span of one and half years. It is further stated in the said FIR that she was enquired about the death of her friend who was set on blaze. It is further alleged in the FIR that the said friend/Anjali was also harassed by the Danish/Respondent No.2 and during the enquiry she disclosed the above stated incidents.

3. It is pertinent to note that the prosecutrix/complainant appeared as PW-1 in the present case and appeared in case FIR No. 326/2016 as PW6. The statement of prosecutrix was recorded in case FIR No. 328/2016 on 05.03.2018 and she was cross-examined on 07.07.2018. Thereafter, she appeared as PW6 in case FIR No. 326/16 and gave statement and was again examined and cross-examined on 01.07.2019.

4. An application u/s 311CrPC was moved by the petitioner before the learned trial court and the same was dismissed vide order dated 01.02.2020 passed by learned Special Judge, (POCSO Act), East, KKD. Thereafter a second application under section 311 Cr.P.C. was moved which was also

dismissed.

5. It is submitted by the learned counsel for petitioner that in pursuance to the order dated 12.10.2022, learned counsel for the petitioner has placed certain questions to be put before the prosecutrix in a sealed cover.

6. I have perused the questions. I consider that these questions are merely an afterthought. The prosecutrix has already been cross-examined after sufficient opportunity having been provided to the Investigating Officer. Learned Trial Court has passed a reasoned order while rejecting the application under Section 311 Cr.P.C, vide the impugned order dated 01.02.2020.

7. During submission, learned counsel for the petitioner submits that in fact the earlier counsel, who had conducted the cross-examination, was not diligent enough and did not do the cross-examination properly.

8. This is correct that the power provided under Section 311 Cr.P.C. has to be exercised liberally but it does not mean that the unlimited rights have to be given to the defence to recall the witness for the purpose of cross-examination. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is “at any stage of any inquiry or trial or other proceeding under this Code”. It is, however, to be borne in mind that whereas the section confers a

very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind. [refer :- *V.N Patil vs. K. Nirnajan Kumar & Ors.* (2021) 3 SCC 661; *Natasha Singh vs. CBI* (2013) 5 Supreme Court Cases 741. Under the garb of this Section, the accused cannot be permitted to delay the trial. I consider that recalling prosecutrix without any valid and substantial reason may also amount to her harassment. Such harassment should be avoided. The discretion under Section 311 Cr.P.C. can be exercised only if it appears that it is just and essential for the decision of the case.

9. I consider that there is no substance in the submission of the learned counsel for the petitioner. Though the case has been taken up today for the application for early hearing, but I consider that there is no substance in the petition itself. Hence, the petition along with the pending application stands dismissed.

10. The next date of 14.02.2023 stands cancelled.

DINESH KUMAR SHARMA, J

FEBRUARY 08, 2023
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