

**114 IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

CRR-128-2024

Date of decision: 7th March, 2024

Ummar

...Petitioner(s)

Versus

State of Haryana and another

...Respondent(s)

CORAM: HON'BLE MRS. JUSTICE MANISHA BATRA

Present: Mr. Saurav Bhatia, Advocate for the petitioner.

Ms. Nidhi Garg, AAG, Haryana.

MANISHA BATRA, J (ORAL):-

The present petition has been filed by the petitioner challenging the order dated 11.12.2023 passed by the Court of learned Additional Sessions Judge, Fast Track Court, Nuh in sessions case No. SC/82/2023 titled as 'State Vs. Ummar' arising out of FIR No. 374, dated 24.09.2022, under Sections 376, 354-A, 450 and 506 of Indian Penal Code, 1860 whereby an application filed by the petitioner under Section 311 of Cr.P.C. had been partly allowed.

2. Brief facts of the case relevant for the purpose of disposal of this petition are that the present petitioner is accused in the aforementioned FIR and is facing trial for alleged commission of offences punishable under Section 354-A, 376, 450 and 506 of IPC. The case is at the stage of producing defence evidence by him. On 11.12.2023, an application under Section 311 of Cr.P.C. was filed by him for recalling the prosecutrix who had already been cross-examined as PW-11, by submitting that previously, one Mr. Kamludin, Advocate had been appearing on his behalf but now he has

engaged new counsel and it has been found that the prosecutrix had not been properly cross-examined by the previous counsel. Therefore, prayer had been made for re-calling the prosecutrix for the purpose of conducting her further cross-examination. The respondent-State is shown to have filed reply to the said application alleging that the petitioner could not be allowed to fill up the *lacuna* in his case. After hearing, the contentions as raised by both the sides, the learned trial Court dismissed the prayer made by the petitioner for recalling the prosecutrix.

3. It is submitted in the present petition and it is argued by learned counsel for the petitioner that the impugned order is not sustainable in the eyes of law and is liable to be set aside as the same suffers from material illegalities. Infact, while cross-examining the prosecutrix on 09.10.2023, she was not confronted with regard to the findings as given in the FSL report dated 12.10.2022 which had been produced in evidence. It is submitted that the prosecutrix had admitted during her cross-examination that her clothing had been taken by the police but the said clothing was not produced at the time of her examination nor she could be confronted with regard to her plea on that point. Therefore, it is argued that the impugned order is liable to be set aside, the petition deserves to be allowed and the petitioner deserves further cross-examination of the prosecutrix.

4. I have heard learned counsel for the petitioner at considerable length and have gone through the record carefully.

5. Annexure P-3 is copy of the sworn deposition as recorded by the prosecutrix before the learned trial Court as on 09.10.2023. A perusal of

the same shows that due opportunity to conduct effective cross-examination had been given to counsel who was representing the present petitioner. It is well settled principle of law that victims in cases of sexual assault cannot be subjected to ordeal of repeated cross-examination where sufficient opportunity has already been granted to the accused at appropriate stage to cross-examine the witnesses. Reliance in this regard can be placed upon observations made by High Court of Madras in '**Krishnaraj @ Thangaraj v. Inspector of Police, Crl. OP No. 211 of 2021 and Crl. M.P. No. 93 of 2021**' decided on 08.01.2021', wherein it was observed that recalling of the witness on the ground that there is new counsel who has been engaged by the petitioner and he found that certain vital question have not been put to the witnesses is not a good ground. Moreso, once proper opportunity to cross-examine the prosecutrix had been availed by the petitioner, he cannot be allowed to fill up the *lacuna* in his case in the garb of application as filed by him. In this regard, I rely upon '**Mohanlal Shamji Soni v. Union of India and another, AIR 1991 SC 1346**', wherein the Hon'ble Supreme Court while cautioning against filling up lacuna, had observed that the criminal Court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed but the jurisdiction of the Court must obviously be dictated by exigency of the situation, fair play and good sense appear to be the only safe guides and that only requirement of justice command this examination of any person, would depend upon the facts and circumstances of each case. It is well settled proposition of law that an application under section 311 Cr.P.C must

not be allowed only to fill up *lacunas* in the case of the prosecution, or of the defence or to give an unfair advantage to the opposite party. In ‘*Swapan Kumar Chatterjee vs. Central Bureau of Investigation, 2019 (2) RCE (Criminal) 162*’, Hon'ble Supreme Court has held that the power conferred under Section 311 Cr.P.C. should be invoked by the court only to meet the ends of justice and for strong and valid reasons and it should be exercised with great caution and circumspection. The discretion as conferred under Section 311 of Cr.P.C. upon the Court is to be invoked only for the ends of justice and it should be exercised consistently with the provisions of the Code and principles of criminal law i.e. judicially for the reasons stated by the Court and not arbitrarily and capriciously.

6. On applying the aforementioned well established position of law to the peculiar facts and circumstances of the present case, I am of the considered opinion that the petition does not deserve to be allowed and no case has been made out for exercising powers under Section 311 of Cr.P.C.

7. Accordingly, it is held that the observation made by the learned trial Court does not warrant any interference as merely because of the fact that a new counsel has been engaged by the petitioner, no right *ipso facto* was agreed in his favour to seek recall of the prosecutrix as that would result in travesty of justice. Consequentially, while upholding the order passed by learned trial Court, the petition stands dismissed.

[MANISHA BATRA]

JUDGE

7th March, 2024

Parveen Sharma

1. Whether speaking/ reasoned

2. Whether reportable

:

:

Yes / No

Yes / No