



2024:DHC:2302



* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 19.02.2024
Pronounced on: 22.03.2024

+ CRL.REV.P. 829/2022
NARENDER SINGH

..... Petitioner

Through: Mr.Jatan Singh, Mr.Tushar
Lamba, Ms.Vanshika Adhana,
Mr.Satnarain Sharma, Mr.Anuj
Kumar, Mr.Siddharth Singh,
Advs.

versus

STATE

..... Respondent

Through: Mr.Aman Usman, APP with SI
Gautam.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

J U D G M E N T

1. This petition has been filed under Sections 397 and 401 read with Section 482 of the Code of Criminal Procedure, 1973 (in short, 'Cr.P.C.'), challenging the Order dated 20.08.2022 (hereinafter referred to as the 'Impugned Order') passed by the learned Additional Sessions Judge – 01, Special Court (POCSO Act), North District, Rohini Courts, Delhi (hereinafter referred to as the 'Trial Court') in SC 253/2018, titled *State v. Narender Singh*, dismissing the application filed under Section 311 of the Cr.P.C. by the petitioner seeking recalling of the victim (PW-1) and her mother/complainant (PW-2) for further cross-examination.

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Factual Matrix: -

2. The above criminal case has been registered on a final report filed by the police upon the completion of the investigation in FIR No. 404/2017 registered at Police Station: K.N. Katju Marg, Rohini District, Delhi, under Section 354 of the Indian Penal Code, 1860 (in short, 'IPC') and Section 8 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the 'POCSO Act').

3. It is the case of the prosecution that on 04.09.2017, the victim, aged around 17 years, went to her tuition class at about 2:00 PM., when her tuition teacher, the petitioner herein, forcefully touched her private parts from inside her clothes. A medical examination was conducted at the BSA Hospital. Her statement under Section 164 of the Cr.P.C. was recorded on 05.09.2017. Charges under Section 10 of the POCSO Act and under Section 354 of the IPC were framed against the petitioner by the learned Trial Court vide Order dated 02.06.2018 passed by the learned Trial Court. The statement of PW-1, the victim, was recorded on 31.08.2018. In spite of opportunity granted, she was not cross-examined by the petitioner. Later, on 06.02.2019, the petitioner filed an application under Section 311 of the Cr.P.C., praying for the PW-1 to be recalled for her cross-examination. The said application was allowed by the learned Trial Court, and PW-1 was cross-examined by the petitioner on 04.09.2019 and 30.10.2019 and her cross-examination was concluded.

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4. The petitioner thereafter, again, filed an application under Section 311 of the Cr.P.C., again praying for recalling of PW-1 and this time, also of PW-4, the father of the victim, for further cross-examination. This application was, however, dismissed by the learned Trial Court vide Order dated 29.09.2020.

5. The petitioner challenged the above Order by way of a Revision Petition, being CrI.Rev.P. 336/2020, titled *Narinder Singh v. State* before this Court. The same was dismissed by this Court vide its judgment dated 21.10.2020.

6. The petitioner thereafter, again filed an application under Section 311 of the Cr.P.C., seeking to recall PW-1 for further cross-examination. In this application, the petitioner now also prayed for the recall of PW-2, that is, the complainant/the mother of the victim, for her cross-examination. The said application has been dismissed by the learned Trial Court by way of the Impugned Order.

Submissions of the Learned Counsel for the Petitioner:

7. The learned counsel for the petitioner submits that the learned Trial Court has erred in not considering that the bar under sub-Section (5) of Section 33 of the POCSO Act gets diluted once the victim attains the age of majority. He submits that as the PW-1 has attained the age of majority, the bar of Section 33(5) of the POCSO Act would no longer apply, and the petitioner should have been allowed by the learned Trial Court to further cross-examine the PW-1. In support, he places reliance on the judgment of the



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Karnataka High Court in *Mahammad Ali Akbar v. State of Karnataka*, 2022 SCC OnLine Kar 1048; and of the Madras High Court in *Sankar v. State* (Judgment dated 28.06.2022 in CRL.O.P. (MD) No. 11427/2022), and *S. Ganeshan v. State* (Judgment dated 07.03.2022 in CRL.O.P. No.4131/2022). He further submits that this Court in the Judgment dated 21.10.2020, wrongly considered the bar of Section 33(5) of the POCSO Act, while dismissing the earlier Revision Petition.

8. The learned counsel for the petitioner submits that an application under Section 311 of the Cr.P.C. cannot be dismissed merely on the ground that it will lead to the filling up of loopholes in the prosecution case. In support, he places reliance on the judgment of the Supreme Court in *Varsha Garg v. State of Madhya Pradesh & Ors.*, 2022 SCC OnLine SC 986.

9. He submits that the learned Trial Court has erred in prejudging the evidence of the witnesses sought to be examined, and in reaching a conclusion that the production of such evidence by the defence was not essential to facilitate a just decision of the case. Placing reliance on the judgment of the Supreme Court in *Natasha Singh v. Central Bureau of Investigation (State)*, 2013 SCC OnLine SC 444, he submits that such an assumption is wholly misconceived and the accused has every right to adduce evidence in rebuttal of the evidence brought on record by the prosecution.

10. Placing reliance on the judgment of the Allahabad High Court in *Madhusudan Shukla v. State of U.P. & Anr.*, 2022 SCC OnLine All 409, he submits that the application under Section 311 of the

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Cr.P.C. cannot be dismissed only on the ground that it may cause delay in the conclusion of the trial. He submits that, in case PW-1 and PW-2 are not recalled for further cross-examination, it would cause grave prejudice and irreparable loss to the petitioner, on the other hand, if they are recalled for further cross-examination, no prejudice shall be caused to the prosecution.

Submissions of the Learned APP for the State:

11. On the other hand, the learned APP, placing reliance on the judgment of the Supreme Court in *State of Orissa v. Ram Chander Agarwala & Ors.*, (1979) 2 SCC 305, submits that the petition is not maintainable, as it is, in fact, a review of the earlier judgment dated 21.10.2020 of this Court passed in CRL.REV.P. 336/2020.

12. He further submits that even otherwise, the petitioner has failed to show any ground for recalling the said witnesses. He submits that both the witnesses sought to be recalled have been duly examined before the learned Trial Court. He submits that the petitioner has already filed a number of applications seeking similar relief before the learned Trial Court, and the present petition is yet another attempt to recall the said witnesses only to harass the victim as also the complainant, and to embarrass and delay the trial.

Analysis and Findings:

13. I have considered the submissions made by the learned counsels for the parties.

14. As noted hereinabove, the petitioner is facing a charge, including under Section 10 of the POCSO Act. The Supreme Court,

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considering the object of the POCSO Act, in ***Alakh Alok Srivastava v. Union of India & Ors.***, (2018) 17 SCC 291, directed the Courts across the country to ensure that the Trial in the cases under the POCSO Act must be fast-tracked, and unnecessary adjournments should not be granted, and further directed that an endeavour should be made to complete the trial in a time-bound manner or within a specific time frame.

15. Special provisions have also been made in the POCSO Act for the protection of the child victim so that he/she does not feel a sense of discomfort or fear or is reminded of the horrifying experience. One such provision in this direction is contained in Section 33(5) of the POCSO Act, which is reproduced hereinbelow: -

“Section 33. Procedure and powers of Special Court.—

xxxx

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

16. The above provision must guide the learned Trial Court while considering an application filed by the accused seeking recall of the child victim for further cross-examination.

17. In ***Mahammad Ali Akbar*** (Supra), a learned Single Judge of the High Court of Karnataka, while observing that if the recall of the witness for cross-examination appears to be essential and necessary for a just decision in the case, the same should be allowed, emphasized that the object of the above provision is that the victim is not harassed and that where repeated applications under Section 311 of the Cr.P.C. are filed on frivolous reasons, the same shall not



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be allowed.

18. In ***Sankar*** (Supra), the High Court of Madras reiterated that Section 33(5) of the POCSO Act is to ensure that the child should not be repeatedly called by the Court for examination as it would affect the mind of the child. The Court further observed that, however, once the victim has attained the age of majority and it is essential for the victim to be recalled for a just and proper decision, an application for her recall may be allowed.

19. In ***S. Ganeshan*** (Supra), the High Court of Madras observed that a balance has to be brought between the rights of the child victim and the rights of the accused.

20. This Court as well, in ***Rakesh v. State of NCT of Delhi and Anr.*** Neutral Citation no.2023:DHC:5301, has held that it would depend on the facts and circumstances of each case as to whether the application filed by the accused to recall the child victim can be allowed; there cannot be a standard format based order for the same. It was held that while the bar under Section 33(5) of the POCSO Act may not be absolute and a balance of rights needs to be maintained under Section 33(5) of the POCSO Act and Section 311 of the 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.

21. In ***Vikas v. State***, Neutral Citation no.2020:DHC:3058, this Court observed that the mandate of the POCSO Act and especially Section 33 thereof is to ensure the protection of a child witness from victimization and harassment by repeated appearances in

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Court. The plea of recall of the witness has to be *bona fide* and then a balance is to be achieved between the rights of the victim and that of the accused. A mere plea that recall was necessary for ensuring a fair trial is not enough unless there are tangible reasons to show how the fairness of a trial would suffer without a recall.

22. The purpose of Section 311 of the Cr.P.C. is not to reopen the trial, but is to ensure that the Court can recall a witness and re-examine the witness if the evidence of such witness appears to be essential for the just decision of the case. Reference can be made to the judgment of the Supreme Court in ***Harendra Rai v. State of Bihar***, 2023 SCC OnLine SC 1023. In ***Ratanlal v. Prahlad Jat***, (2017) 9 SCC 340, the Supreme Court has held as under:

“17. In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 311 are enacted whereunder any court by exercising its discretionary authority at any stage of inquiry, trial or other proceeding can summon any person as witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute. The object of the provision as a whole is to do justice not only from the point of view of the accused and the prosecution but also from the point of view of an orderly society. This power is to be exercised only for strong and valid reasons and it should be exercised with caution and circumspection. Recall is not a matter of course and the discretion given to the court has to be exercised judicially to prevent failure of justice. Therefore, the reasons for exercising this power should be spelt out in the order.

18. In Vijay Kumar v. State of



U.P. (2011) 8 SCC 136, this Court while explaining scope and ambit of Section 311 has held as under:

“17. Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of [CrPC] and the principles of criminal law. The discretionary power conferred under Section 311 has to be exercised judicially for reasons stated by the court and not arbitrarily or capriciously.”

19. In Zahira Habibullah Sheikh (5) v. State of Gujarat (2006) 3 SCC 374, this Court has considered the concept underlying under Section 311 as under:

“27. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case of the prosecution and not that of the accused. 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.”

20. *In State (NCT of Delhi) v. Shiv Kumar Yadav (2016) 2 SCC 402, it was held thus:*

“... Certainly, recall could be permitted if essential for the just decision, but not on such consideration as has been adopted in the present case. Mere observation that recall was necessary “for ensuring fair trial” is not enough unless there are tangible reasons to show how the fair trial suffered without recall. Recall is not a matter of course and the discretion given to the court has to be exercised judiciously to prevent failure of justice and not arbitrarily. While the party is even permitted to correct its bona fide error and may be entitled to further opportunity even when such opportunity may be sought without any fault on the part of the opposite party, plea for recall for advancing justice has to be bona fide and has to be balanced carefully with the other relevant considerations including uncalled for hardship to the witnesses and uncalled for delay in the trial. Having regard to these considerations, there is no ground to justify the recall of witnesses already examined.”

21. *The delay in filing the application is one of the important factors which has to be explained in the application. In Umar Mohammad v. State of Rajasthan (2007) 14 SCC 711, this Court has held as under:*

“38. Before parting, however, we may notice that a contention has been raised by the learned counsel for the appellant



that PW 1 who was examined in Court on 5-7-1994 purported to have filed an application on 1-5-1995 stating that five accused persons named therein were innocent. An application filed by him purported to be under Section 311 of the Code of Criminal Procedure was rejected by the learned trial Judge by order dated 13-5-1995. A revision petition was filed thereagainst and the High Court also rejected the said contention. It is not a case where stricto sensu the provisions of Section 311 of the Code of Criminal Procedure could have been invoked. The very fact that such an application was got filed by PW 1 nine months after his deposition is itself a pointer to the fact that he had been won over. It is absurd to contend that he, after a period of four years and that too after his examination-in-chief and cross-examination was complete, would file an application on his own will and volition. The said application was, therefore, rightly dismissed.”

23. In **Swapan Kumar Chatterjee v. CBI**, (2019) 14 SCC 328, the Supreme Court has held as under:

“11. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has vide power under this section to even recall witnesses for re-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law.



12. Where the prosecution evidence has been closed long back and the reasons for non-examination of the witness earlier are not satisfactory, the summoning of the witness at belated stage would cause great prejudice to the accused and should not be allowed. Similarly, the court should not encourage the filing of successive applications for recall of a witness under this provision."

24. The above view in **Ratanlal** (Supra) and **Swapan Kumar Chatterjee** (Supra) has been reiterated by the Supreme Court in **Satbir Singh v. State of Haryana**, 2023 SCC OnLine SC 1086.

25. Applying the above principles to the facts of the present case, it would be apparent that the victim was examined by the prosecution on 31.08.2018. In spite of the opportunity granted, she was not cross-examined by the petitioner/accused. On an application filed under Section 311 of the Cr.P.C., the victim was allowed to be recalled as a witness, and was cross-examined by the petitioner on 04.09.2019 and 30.10.2019. The petitioner then again filed an application seeking recall of the victim, which was dismissed by the learned Trial Court vide Order dated 29.09.2020. The said order was upheld by this Court vide its judgment dated 21.10.2020 passed in CRL.REV.P. 336/2020. The said order was not challenged by the petitioner. Instead, on 17.08.2022, the petitioner again filed an application seeking recall of the victim as also her mother/complainant for further cross-examination.

26. In the present petition, apart from making a general and vague statement that recall of the witness is necessary for a fair trial, there is no explanation/ground given for seeking the recall of the said



witnesses. As noted hereinabove, the victim has been cross-examined on two dates before the learned Trial Court. The learned Trial Court also observed the vagueness of the assertion made in the application seeking recall of the said witnesses, however, in spite of the same, even in the present petition, the petitioner has not explained the reason for recalling the said witnesses. The learned counsel for the petitioner has also not explained in his oral submissions before this Court, as to why the recall of the said witnesses is prayed for.

27. As noted hereinabove, the power under Section 311 of the Cr.P.C. should be invoked by the Court only to meet the ends of justice. It is to be exercised for strong and valid reasons and with great caution and circumspection. It cannot be exercised at the mere whims and fancies of the accused.

28. Added to the above is the fact that a Revision Petition seeking recall of PW-1 and her father (PW-4), already stands dismissed by this Court vide its judgment dated 21.10.2020 passed in CrI.Rev.P. 336/2020 referred hereinabove, and the fact that the said judgment was not challenged by the petitioner before the Supreme Court and therefore, has attained finality.

29. In ***Ram Chander Agarwala*** (Supra), the Supreme Court has held that the principle as to the finality of judgments is not confined only to the Trial Courts but is also extended to the High Courts. It was further held that there is no power to review its own order in the exercise of a revisional jurisdiction, except in accordance with the provisions of the Cr.P.C.



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30. As far as the recall of PW-2, that is the complainant/mother of the victim, is concerned, again barring making a vague and general statement that her recall is necessary for a just and proper adjudication of the trial, there is no specific reason given for seeking her recall. It is important to note that PW-2 was examined and cross-examined on 06.02.2019 and her evidence was concluded. It was thereafter that the petitioner first filed an application seeking recall of PW-1/the victim, which was allowed. The petitioner then filed an application on 22.09.2020, seeking recall of the victim/PW-1 and the father of the victim (PW-4), however, did not file an application for seeking recall of the mother of the victim (PW-2). The application seeking recall of PW-2 was filed only on 17.08.2022, and as noted hereinabove, without any specific reason or explanation seeking such recall. Applying the abovementioned principles, therefore, again this application could not have been allowed and has been rightly rejected by the learned Trial Court.

31. In conclusion, I would also note the observations made by the learned Trial Court in its Impugned Order, wherein, giving reference to the Order dated 31.08.2018 passed by the learned Trial Court, it has been observed that earlier the victim and her mother were threatened at the behest of the petitioner wanting them to recall their testimonies and to drop their case against the petitioner. The application in question appears to be yet another attempt to somehow force/pressurize the victim as also the complainant/the victim's mother to withdraw their statement against the petitioner,

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by harassing them. Such an attempt by the petitioner cannot be allowed and must be severely dealt with.

32. In view of the above, I find no merit in the present petition. The same is, accordingly, dismissed with the costs quantified at Rs.50,000/- to be deposited by the petitioner with the Delhi State Legal Services Authority within a period of four weeks of the date of this judgment.

33. The costs so deposited shall be utilized by the Delhi State Legal Services Authority for providing counselling/psychological support to the POCSO Victims requiring such assistance.

NAVIN CHAWLA, J.

MARCH 22, 2024/rv/AS

Click here to check corrigendum, if any

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