



2024:DHC:6361



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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**% *Date of Decision: 21<sup>st</sup> August, 2024*+ **CRL.M.C. 4/2024 & CRL.M.A. 22075/2024**

TKREEB

.....Petitioner

Through: Ms. Kunika, Adv. through  
V.C.

versus

STATE OF NCT OF DELHI

.....Respondent

Through: Mr. Naresh Kumar  
Chahar, APP for the State  
along with Mr. Hunny  
Yadav, Ms. Akchita Singh,  
Mr. Jaideep & Mr.  
Mahesh, Advs.  
SI Gita Yadav, PS  
Mehrauli.**CORAM:****HON'BLE MR. JUSTICE AMIT MAHAJAN****AMIT MAHAJAN, J. (Oral)**

1. The present petition is filed seeking setting aside of the order dated 04.09.2023 (hereafter '**the impugned order**'), passed by the learned Additional Sessions Judge ('**ASJ**'), South District, Saket Courts, New Delhi, in SC No. 663/2019 arising out of FIR No.537/2019, registered at Police Station Mehrauli.

2. The learned ASJ, by the impugned order, has dismissed the application filed by the petitioner accused under Section 311 of the Code of Criminal Procedure, 1973 ('**CrPC**') seeking recall of the prosecutrix (PW1) for cross-examination.

3. The present case relates to allegations of rape and sexual assault of the prosecutrix by the petitioner when she was studying in 5<sup>th</sup> class. The prosecutrix was first examined on 22.07.2022. She was cross examined on 10.01.2023 where she denied the

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occurrence of the alleged incident. Thereafter, the prosecution sought to re-examine PW1. PW1 was re-examined on 02.03.2023 and the right to cross-examine the prosecutrix was closed on the said date.

4. The learned counsel for the petitioner submits that PW1 was re-examined on 02.03.2023 for about one and a half hours. She submits that thereafter a request had been made for deferring the cross-examination, however, the request was declined and the right to cross-examine the witness was closed on the same day.

5. She submits that the order dated 02.03.2023 records cross-examination as “Nil. Opportunity given”. She submits that the learned ASJ did not consider that the adjournment was sought as it was already 4:30 pm and the counsel for the petitioner has to get back home to attend to her eight months old child.

6. She submits that the impugned order wrongly records that the reason for seeking recall of PW1 was the change of counsel. She submits that the judgments relied upon by the learned ASJ in the impugned order are thus not applicable to the facts of the present case.

7. The learned Additional Public Prosecutor for the State opposes the present petition. He however fairly submits that the right to cross-examine the prosecutrix was closed on the same day when her re-examination was conducted.

8. I have heard the learned counsel and perused the record.

9. Section 311 of the CrPC reads as under:

***“311. Power to summon material witness, or examine person present.***

*Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a*

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*witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.”*

10. Section 311 of the CrPC is a procedure for recall of witnesses which can be permitted in order to prevent failure of justice and is not to be allowed in every case in a mechanical manner. It is not in doubt that the learned Trial Court has power under Section 311 of the CrPC to summon witness and call for evidence at any stage if it is felt that the same is required for a just decision of the case. The power, however, is not to be exercised in routine manner.

11. It is trite law that the Court can summon a person at any stage of the trial if the evidence of such a person is essential for the just decision of the case. The power under Section 311 of the CrPC is wide in nature and the same can be exercised to summon or recall witnesses at any stage of trial if the Court deems that the same is necessary to reach a just decision [*Natasha Singh v. CBI: (2013) 5 SCC 741*].

12. The Hon'ble Apex Court in the case of *Rajaram Prasad Yadav v. State of Bihar : (2013) 14 SCC 461* discussed a number of decisions and underlined the principles to be considered while dealing with an application under Section 311 of the CrPC. The relevant portion of the same is reproduced hereunder:

*“17. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 CrPC read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind*

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by the courts:

**17.1.** *Whether the court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the court for a just decision of a case?*

**17.2.** *The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.*

**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.*

**17.5.** *The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.*

**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.*

**17.9.** *The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.*

**17.10.** *Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be*



rectified.

**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.

**17.12.** The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

**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.**”

(emphasis supplied)

13. The petitioner is essentially aggrieved that his request for a short adjournment to cross-examine PW1 was denied.

14. The learned ASJ in the impugned order noted that PW1 was re-examined at length on 02.03.2023 and an opportunity was granted for cross-examination, however, no question was put to PW1 whereafter the cross-examination was closed. The relevant portion of the impugned order is reproduced hereunder:

“5. It is pertinent to mention that the Ld. Counsel for the accused who appeared on that day was Ms. Kunika Sidharth and she had been appearing in the present matter on several previous occasions and had signatures on the vakalatnama along with the counsel appearing today Sh. Kuljeevan Sidharth and therefore, the submissions made on



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*behalf of the counsel today that the counsel appearing on 02.03.2020 was not granted adequate opportunity to cross examine the witness is not tenable.*

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14. *Merely because in cross-examination the counsel for the accused did not put questions which ought to have been put is not a ground for, to recalling the witnesses for cross-examination as held in State of MP Vs. Pattu, 2001 CrLJ 3217 (3266) (MP). Where the accused's counsel had not cross-examined the prosecution witnesses, inspite of several opportunities and several adjournment on his behalf, the rejection of his application for cross-examination of the witnesses under Section 311 CrPC, was held proper in Ashok Kumar Vs. State of Rajasthan, 1995 Cr LJ 1231 (Raj). Merely because the counsel had been busy attending to some other cases can hardly be a ground for recall of witnesses as held in K Anbazhagan Vs. Superintendent of Police, AIR 2004 SC 524 : 2004 CrLJ 583 : (2004) 3 SCC 767.*

15. *Thus, in view of the above discussion and after carefully going through the record. Mere non-appearance of one of the counsels on the date of cross examination along with the other counsel whose caliber has not been challenged at any forum does not afford a ground to the applicant/accused to further recall a child witness/PW-1 Ms. 'G'/the victim. The submission that the cross-examination of the victim/PW-1 was not concluded as stated above is without any merit and could not be a ground for recalling the victim so as to relive the trauma. Hence, the application under Section 311 Cr.P.C. moved on behalf of accused. Tkreeb for recalling the witness i.e. PW-1/the victim is hereby dismissed being devoid of any merit. Copy of this order be given dasti to Counsel for the accused Tkreeb, as prayed for."*

15. It is argued that the counsel had waited in Court on 02.03.2023 from 10 am for the re-examination of PW1, however, the re-examination started at 3pm and went on till 4:30 pm. It is argued that the petitioner as well as the counsel of the petitioner had come from Farukhabad, Uttar Pradesh and the request for a short adjournment was made as the counsel for the petitioner had to return home to attend to her eight months old child.

16. In the present case, evidently, the prosecutrix during her

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cross-examination on 10.01.2023 had denied the incident and stated that she had falsely deposed before the police and the Magistrate earlier. In re-examination, PW1 again resiled and answered in the affirmative when asked if she had told the truth to the police (in her statement under Section 161 of the CrPC), the Magistrate (in her statement under Section 164 of the CrPC) and to the Judge on 22.07.2022.

17. As per the record, while an opportunity was given to the counsel for the petitioner on 02.03.2023, no questions at all were put by her. The reason for the same is stated to be that it was already 4:30 pm and the learned counsel for the petitioner had to get back home to her child, due to which she had sought for an adjournment.

18. While the accused cannot be allowed to take unwarranted adjournments to delay the proceedings, the right to cross-examine was admittedly closed after only one opportunity. It is not the case that multiple opportunities were taken by the petitioner or his counsel in order to delay the proceedings. It also cannot be denied that the present case is not one where the recall of witness is sought for cross-examination because the counsel for the accused had inadequately cross-examined the witness at the first instance or where the cross-examination was not conducted inspite of multiple opportunities.

19. The witness sought to be cross-examined is the prosecutrix whose testimony is germane to the issue at hand and undisputably crucial for a just decision of the case. As opined by the Hon'ble Apex Court in *Rajaram Prasad Yadav v. State of*



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***Bihar*** (*supra*), it is better to err on the side of caution of the accused getting an opportunity to ensure a fair trial.

20. It is also relevant to note that the right to cross-examine was closed on 02.03.2023 and the application for Section 311 of the CrPC was preferred by the petitioner soon thereafter on 26.04.2023. The impugned order was passed on 04.09.2023 whereafter the petitioner filed the present case in December, 2023.

21. Keeping in mind the facts of the present case, this Court is of the opinion that ends of justice would be met if one final opportunity is afforded to the petitioner to cross-examine PW1 and the petitioner's application under Section 311 of the CrPC is allowed.

22. Considering the aforesaid discussion, the impugned order is therefore set aside.

23. In view of Section 33(5) of the Protection of Children from Sexual Offences Act, 2012, this Court also deems it necessary to balance the rights of the parties and to ensure that the prosecutrix is not unduly harassed by being called repeatedly to testify before the Court. Thus, the learned ASJ is directed to fix one date for cross-examination of PW1. It is made clear that no adjournment should be sought on behalf of the petitioner on the date fixed by the learned ASJ.

24. The present petition is allowed in the aforesaid terms.

**AMIT MAHAJAN, J**

**AUGUST 21, 2024**

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