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

+ **CRL.M.C. 7042/2024 & CRL.M.A. 24369/2024**

VIPIN KARPENTER

.....Petitioner

Through: Mr. Raj Kumar, Advocate *via* video-conferencing.

versus

STATE NCT OF DELHI

.....Respondent

Through: Ms. Shubhi Gupta, APP for the State.

CORAM:

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

ORDER

02.12.2024

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By way of the present petition the petitioner (accused) impugns order dated 26.07.2024 passed by the learned Additional Sessions Judge, Karkardooma Courts, Delhi in SC No. 194/23, whereby the learned ASJ has dismissed the petitioner's application under section 311 of the Code of Criminal Procedure 1973 ('Cr.P.C.') for recalling the prosecutrix for cross-examination.

2. As recorded in order dated 16.08.2024, since the petitioner has impugned an order made on an application under section 311 Cr.P.C., which is an interlocutory order, on oral request of learned counsel for the petitioner, the present petition was treated as one filed under section 528 of the Bharatiya Nagarik Suraksha Sanhita, 2023; notice on the petition was issued on 16.08.2024; and in view of the contentions raised, which may have lead to serious consequences for the petitioner, such contentions are being dealt with in some detail.



3. Though no status report has been filed in the matter, Ms. Shubhi Gupta, learned APP appearing for the State submits that she would base her submissions on the available record and no written response is required.
4. Mr. Raj Kumar, learned counsel appearing for the petitioner has drawn attention of this court to the following observations made by the learned ASJ in impugned order dated 26.07.2024 :

“2. It is contended by Ld. Counsel for accused that prosecutrix was not duly cross-examined by earlier counsel for the accused. It is contended that the prosecutrix had given different version qua date of incident. There are inconsistencies in her statement U/s 161 Cr.P.C. and statement before the Court which were not put to her. It is contended that previous counsel did not even ask her at what time she met the accused. It is contended that she was not at all confronted with inconsistencies in her previous statements. Hence, she was not duly cross-examined. It is contended that the case is of grievous nature which is punishable upto Life Imprisonment. It is contended that a due opportunity has to be granted to accused to cross-examine the prosecutrix which cannot be availed in the present case as previous counsel did not put certain very material questions to prosecutrix. It is contended that cross-examination of the prosecutrix is very essential and relevant for the just decision of the case. It is requested that prosecutrix may be recalled for her cross-examination.

“3. The present application has been vehemently opposed by Ld. Addl. PP for the State on the ground that present counsel for the accused wish to fill up the lacunae only. It is contended that examination-in-chief of the prosecutrix was completed on 16.12.2023. The prosecutrix was partly cross-examined on 16.12.2023 and again cross-examined on 12.01.2024. Her cross-examination is running into 08 pages. Hence, at this stage, counsel cannot appear and recall a rape survivor in order to harass her again and again. Thus, at this stage the present application cannot be allowed, which has been moved just to delay the matter and to



harass the prosecutrix or to compel her to resile from her previous testimony.

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“6. The prosecutrix was examined-in-chief in the present case on three dates. She was cross-examined on two dates. Her cross-examination is running into 08 pages. She was thoroughly cross-examined on every aspects of the case. It appears that accused is just trying to delay the matter and to harass the prosecutrix whose cross-examination was completed on 12.01.2024.

*Reliance being placed upon judgment delivered in the case titled as **State (NCT of Delhi) Vs. Shiv Kumar Yadav & Anr., (2016) 2 SCC 402** wherein it was held that plea of recall has to be bonafide and mere incompetence/change of counsel cannot be ground for recall of witnesses.*

*It is to be noted that just because now counsel has changed, the undersigned will not allow the present accused to recall the prosecutrix as it would result only into harassment of a rape victim. Thus, on the basis of above-stated discussion and law laid down in the case titled as **State (NCT of Delhi) Vs. Shiv Kumar Yadav & Anr., (2016) 2 SCC 402**, the present application is hereby **dismissed.**”*

(underscoring supplied; bold in original)

5. Mr. Kumar submits, that it is evident from a perusal of the aforesaid extracts of the impugned order that there are contradictions in the various statements of the prosecutrix as regards the dates on which rape was allegedly committed upon her by the petitioner. It is argued that the subject FIR mentions certain dates on which the offence was allegedly committed, which are different from the dates mentioned in the prosecutrix’s statement recorded under section 164 Cr.P.C. and from the dates given by her in the course of her deposition in court.
6. Mr. Kumar points-out that in the subject FIR, PW-1 had alleged that rape was committed upon her twice, on 11.06.2022 and 21.06.2022;



whereas in her statement recorded under section 164 Cr.P.C. she said that rape was committed on 03 occasions, on 11.06.2022, 09.07.2022 and 03.09.2022; but then in her testimony before the court she has alleged that the offence was committed on 21.06.2022, 23.06.2022 and 03.09.2022. It is submitted that insofar as the first incident of rape alleged on 11.06.2022 is concerned, the petitioner's Call Detail Records belie the allegation, since she was not present at the location where the incident is alleged to have occurred.

7. It is argued however, that questions in relation to the dates and places of the offence were never put to the prosecutrix; and that it is important that "proper cross-examination" of the prosecutrix be conducted in the interests of fair trial, in which the petitioner could face punishment upto life imprisonment.
8. On the other hand, Ms. Gupta submits, that mere contradictions in the statements of a witness, in this case the prosecutrix, is no ground for seeking recall of a witness for cross-examination.
9. Ms. Gupta has drawn attention of this court to the observations of the Supreme Court in ***State (NCT of Delhi) vs. Shiv Kumar Yadav & Anr.***¹ and ***Neha Begum & Ors. vs. State of Assam & Anr.***,² to submit that the Supreme Court has said that a plea that an erstwhile lawyer had not properly cross-examined a witness is no ground for recalling a witness under section 311 Cr.P.C., especially on a vague assertion that an erstwhile lawyer did not conduct "proper cross-examination".

¹ (2016) 2 SCC 402 at para 29

² Order dated 02.09.2024 made by the Supreme Court in Special Leave to Appeal (Crl.) No. 3910/2024 at paras 5 & 6



10. It is further argued by the learned APP, that as observed by the Supreme Court in the aforesaid decisions, section 311 Cr.P.C. operates in 02 parts, “... .. the first part clothes the Court with a power to summon or examine any person in attendance or recall or re-examine any person already examined. The second part mandates that the Court shall summon and examine or recall and re-examine such person, if his evidence appears to be essential to the just decision of the case.”³
11. Learned APP also submits that it will be available to the petitioner to lead defence evidence and to impeach the prosecution’s case by citing the contradictions in the prosecutrix’s statements; and therefore not recalling the prosecutrix for further cross-examination will not cause any prejudice to the accused. It is argued that, as observed by the learned ASJ, the prosecutrix’s examination-in-chief was conducted on 03 dates; she was cross-examined on 02 dates; and her cross-examination runs into 08 pages. Learned APP submits that it goes without saying that the prosecutrix would face harassment and mental trauma if she is put through an oppressive cross-examination yet again.
12. The prosecutrix is present in court. As recorded in the last order, she has said that she does not need counsel to represent her.
13. The prosecutrix has also made brief submissions in the matter. She states that she had appeared before the learned ASJ on some 4-5 days and she was cross-examined at length. She has expressed that she

³ Neha Begum (supra) at para 5



would be put through serious harassment if she was to be recalled for further cross-examination.

14. It is observed that it is not the petitioner's case that he was not given a proper 'opportunity' to cross-examine the prosecutrix; but that his erstwhile lawyer did not conduct proper cross-examination. This ground for seeking another opportunity to cross-examine a witness, viz. that a previous lawyer did not conduct proper cross-examination of a witness, is untenable and unwarranted, especially in view of the observations of the Supreme Court in the aforementioned cases.
15. Furthermore, as is correctly pointed-out by the learned APP, mere contradictions in various statements of the prosecutrix in the present case in relation to the dates or places of commission of the alleged offence, can be appropriately addressed while leading defence evidence; and can at best be subject matter of consideration at the stage of final arguments.
16. As a sequitur to the above, this court is not persuaded that there is any justification for allowing the prayer under section 311 Cr.P.C. That apart, it is obvious and evident that harassment, embarrassment and inconvenience would be caused to the prosecutrix by putting her through further cross-examination.
17. Needless to add, the petitioner would be at liberty to take-up his defence in the course of leading defence evidence or at the stage of final arguments.
18. In view of the above, the petition is dismissed.
19. The stay of further proceedings before the learned Trial Court granted *vide* order dated 16.08.2024 stands vacated.



20. Pending applications, if any, also stand disposed-of.

DECEMBER 2, 2024/V.Rawat

ANUP JAIRAM BHAMBHANI, J