



2024:DHC:7280



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**% ***Date of Decision: 19th September, 2024***+ **CRL.M.C. 7409/2024****SUDARSHAN****.....Petitioner**Through: Ms. Sakshi Sachdeva &
Ms. Ritika Rajput, Advs.

versus

**THE STATE (GOVT. OF NCT OF
DELHI) & ANR.****.....Respondents**Through: Mr. Naresh Kumar
Chahar, APP for the State
SI Preeti Saini, PS-
Kanjhawala**CORAM:****HON'BLE MR. JUSTICE AMIT MAHAJAN****AMIT MAHAJAN****CRL.M.A. 28288/2024 (for exemption)**

1. Exemptions allowed, subject to all just exceptions.
2. The application stands disposed of.

CRL.M.C. 7409/2024 & CRL.M.A. 28287/2024 (for stay)

3. The present petition is filed challenging the order dated 11.10.2023 (hereafter '**the impugned order**'), passed by the learned Additional Sessions Judge ('**ASJ**'), Rohini Courts, New Delhi, in SC No. 144/2022 arising out of FIR No.18/2022, registered at Police Station Kanjhawala.

4. 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

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recall of the victim/PW1 for cross-examination and noted as under:

“As per record, PW1/Victim had been examined on 07.07.2022 when she was only 13 years old and she was duly cross-examined by the Ld. Legal Aid Counsel on the same day. The present application has been filed only on 05.10.2023 i.e. after lapse of about 15 months from the date of the examination of the victim without there being any justification for the delay even more so when the vakalatnama on behalf of the accused in favour of a private counsel is on record which reflects the date of attestation to be 18.08.2022 and was filed in the court on the same day.

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It is also noted that while fair trial remands that opportunity be afforded to the accused to defend himself, in cases where the cross-examination has already been conducted, it would be against the mandate of law to resummon the victim especially in cases of sexual assault in view of Section 33 (5) POCSO Act.”

5. The learned counsel for the petitioner submits that the cross examination of the victim by the learned Legal-Aid Counsel was not conducted properly as neither any questions with respect to the alleged incident were asked nor any questions as to the date and time of the alleged incident had been put to the victim.

6. 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.

7. 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 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

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appears to it to be essential to the just decision of the case.”

8. 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.

9. 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*].

10. 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 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

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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)

11. The petitioner is primarily aggrieved by the denial of her request to recall and cross-examine the victim, which was made on the grounds that his counsel had changed and that the cross-examination conducted by the previous counsel, appointed through legal aid, was allegedly improper.

12. It is important to highlight that the victim/PW1, was initially examined in chief on 07.07.2022 and was subsequently cross-examined by the petitioner's legal aid counsel at that time. However, the petitioner filed an application under Section 311 of the CrPC on 05.10.2023, seeking the recall of the victim for further cross-examination. This application was filed after an extended delay of about 15 months from the examination of the victim. The petitioner's justification for the delay rested on the assertion that the cross-examination conducted by her previous



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counsel was inadequate.

13. It must be emphasized that recalling a victim for additional cross-examination is not a matter to be taken lightly. When a victim, especially a child or someone of tender age, is recalled to the stand, they are compelled to relive the traumatic events associated with the incident. Such repeated questioning can result in significant emotional distress and further psychological harm. The legal system aims to balance the rights of the accused with the need to protect vulnerable witnesses from unnecessary re-traumatization, particularly in sensitive cases.

14. It is apparent from the perusal of the application filed by the petitioner that nothing has been pleaded which would justify the recall of witnesses or which is essential for a just decision of the case. Vague averments have been made that recall of the witnesses is required as the petitioner failed to examine certain important aspects that were vital to the case. Allowing such delayed applications to address the alleged lacuna which are left in the examination would undermine the fairness and efficiency of the trial process, which should ideally be swift and conclusive to uphold principles of justice.

15. It is relevant to note that the present petition has been filed almost 11 months after the impugned order was passed. While it is within a litigant's rights to change their legal counsel, this cannot be used as a strategy to compensate for gaps in the defence. Accepting the petitioner's argument in this context would undermine the finality of trials. If such a reasoning were permitted, it would set a precedent where, after a certain amount of time has passed, a new counsel could be appointed to

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represent the accused, potentially re-opening proceedings by requesting to recall the victim for further examination. This would essentially allow the accused to continually seek to fill perceived gaps, thereby prolonging the trial indefinitely.

16. Section 35(2) of the Protection of Children from Sexual Offences Act, 2018 (**POCSO Act**) mandates that trials should be completed within one year from the date the court takes cognizance of the offence. The purpose of this provision is to prevent prolonged trials, ensuring that the child victim is not subjected to the trauma of reliving the abuse over an extended period. Additionally, Section 33(5) of the POCSO Act explicitly states that the child victim should not be repeatedly called to testify in court. The legal framework clearly aims to protect child witnesses from the risk of victimization and harassment through repeated court appearances. Therefore, a mere averment that recalling the victim is necessary for ensuring a fair trial, merely because of a change in counsel, is insufficient in the absence of any cogent reasons.

17. In view of the above, this Court finds no infirmity with the impugned order, and the present petition being without any merits is dismissed. Pending application is also disposed of.

AMIT MAHAJAN, J

SEPTEMBER 19, 2024

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