



2024:DHC:7587



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

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Date of Decision: 1st October, 2024+ **CRL.M.C. 7747/2024**

VAIBHAV JAIN

.....Petitioner

Through: Mr. Yash Prakash and
Mr. Ishan Jain, Advs.

versus

STATE NCT OF DELHI

.....Respondent

Through: Mr. Sunil Kumar Gautam,
APP for the State with SI
Rani Jassal, PS Sultanpuri.**CORAM:****HON'BLE MR. JUSTICE AMIT MAHAJAN****AMIT MAHAJAN, J. (Oral)****CRL.M.A. 29582/2024** (*exemption from filing certified copies of annexures*)

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

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3. The present petition is filed challenging the order dated 29.07.2024 (hereafter '**impugned order**'), passed by the learned Additional Sessions Judge (**ASJ**) (FTSC)(POCSO), North-West District, Rohini District Courts, in Sessions Case No. 53545/2016.

4. The learned ASJ, by the impugned order, dismissed the



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application filed by the petitioner under Section 311 of the Code of Criminal Procedure, 1973 (**CrPC**), seeking recall of PW-3, PW-4, PW-5 and PW-8.

5. The FIR was registered on a complaint alleging that on 13.08.2016, the petitioner had kidnapped the complainant's 15-year-old daughter.

6. The charge sheet was thereafter filed under Sections 363/376/328 of the Indian Penal Code, 1860 (**IPC**) read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 (**POCSO Act**).

7. The learned ASJ noted that the witnesses were examined in the year 2022 and the application had been filed belatedly.

8. It was further noted that the matter pertains to the year 2016. The learned ASJ allowed the cross-examination of PW-8 noting that the said Investigating Officer (**IO**) was not cross-examined and is a material witness.

9. It is undisputed that PW-3 and PW-4 were examined and also cross-examined by the petitioner on 24.08.2022. PW-5 was examined on 20.12.2022 and was also cross-examined at length.

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



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11. 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.

12. 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].

13. 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 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)

14. This Court has perused the examination as well as cross-examination of the prime witnesses which are sought to be re-examined by the petitioner.

15. It is seen that an extensive cross-examination was held. The application filed by the petitioner under Section 311 of the CrPC only mentions that certain aspects were left to be cross-examined. It was pleaded that the earlier counsel had not put specific questions to the witness. The grounds as pleaded, in the opinion of this Court, are not sufficient for allowing the re-examination of the witnesses.

16. Section 35(2) of the POCSO Act mandates that trials



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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.

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

18. In view of the above, this Court finds no infirmity with the impugned order, and the present petition being without any merits is dismissed with cost of ₹20,000/- to be paid to the victim.

AMIT MAHAJAN, J

OCTOBER 1, 2024

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