



2024:DHC:9756



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

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Date of Decision: 11.12.2024

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CRL.M.C. 9628/2024, CRL.M.A. 36951/2024

SUNDER SINGH BISHT

.....Petitioner

Through: Mr. B.P. Pandey, Mr. R.B. Singh, Mr. Shubham Patel and Mr. Vineet Pandey, Advocates.

versus

THE STATE GOVT OF NCT OF DELHI

.....Respondent

Through: Ms. Manjeet Arya, APP for State with SI Dev Rani PS Badarpur, Delhi.
Ms. Thonpinao Thangal, Advocate
(Amicus Curiae) for the prosecutrix.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT (ORAL)

1. By way of present petition, the petitioner seeks setting aside of the order dated 05.09.2024 passed by ASJ-01 (POCSO), South East, Saket Court, New Delhi whereby petitioner's application under Section 217 Cr.P.C. for re-examination of the child victim (PW1) came to be dismissed.
2. Petitioner is facing trial with regard in FIR No. 216/2018 registered on 14.06.2018 under Section 376 IPC and Section 6 of the POCSO Act at P.S. Badarpur, Delhi. After investigation, the charge-sheet was filed on 21.08.2018 under Sections 354 IPC and Sections 8 of the POCSO Act. Thereafter, on 26.02.2019, the Trial Court framed charges under Sections 354/354A IPC and Section 10 of POCSO Act against the petitioner. The child victim came to be examined on 21.05.2019 wherein she stated that one



day while she was alone and sleeping in the house, the petitioner unlocked the door from outside and lied upon her whereafter he also removed her as well as his own clothes and thereafter inserted his '*susu wali jagah*' in her '*susu wali jagah*'. He did it for 15 minutes. He also threatened her with a knife so as not to tell the incident to anyone. After one/two days, he again came to her house and did the same thing. Petitioner did the said act on three occasions i.e. 12.10.2017, 14.10.2017 and 16.10.2017. When she developed stomach ache, she informed about the incident to her mother on 12.06.2018 whereafter the case was registered and investigation commenced.

In view of the aforesaid testimony, the Trial Court vide order dated 31.10.2019 amended the charge. As per the amended charge, the petitioner was charged for the offences punishable under Sections 376(2)(i)(n)/506 and Section 6 of POCSO Act. The petitioner pleaded being not guilty and claimed trial. Apparently, the trial has progressed and reached near its culmination as the matter is now stated to be listed for final arguments. The petitioner in the meantime has preferred an application seeking re-examination of the child victim. The said application came to be filed on 06.08.2024. It was contended that on account of inadvertence, the victim could not be re-examined after alteration of charge. Seeking fair adjudication, recall of the child victim was prayed. The application came to be dismissed by the impugned order by observing that the said application was filed after a delay of 5 years and the child victim could not be recalled as the petitioner has failed to show as to how his case is prejudiced.

3. Considering the facts involved, Ms. Thonpinao Thangal, Advocate was appointed as Amicus Curiae to represent the child victim. She



contended that recall of the child victim after 5 years would compel her to again undergo trauma associated with the event. She also referred to Section 33(5) of POCSO Act which stipulates that child victim should not be repeatedly called to testify in Court. Ld. Amicus Curiae further invited attention to the cross-examination conducted on behalf of the petitioner to submit that all the suggestions were put to the child victim.

4. Ld. APP for the State also contested the application and submitted that the application is highly belated and filed only for the purpose of delaying the trial.

5. Section 35(2) of the POCSO Act mandates completion of trial within one year from the date of taking cognizance of the offence. Further, the mandate of Section 33(5) has to be kept in mind which provides for ensuring that the child victim is not repeatedly called to testify before the Court. Present is not a case where the petitioner was in custody. He was released on regular bail vide order dated 18.09.2019. Ordinarily, the import of Section 217 Cr.P.C. would mandate recall of the witness on alteration of charge, however, keeping in view the further fact that application has been filed after a delay of 5 years when final arguments are to be addressed, the application is nothing but a sheer abuse of process of law. In this regard, gainful reference is made to the observations in the order dated 05.08.2024 passed by the Supreme Court in **SLP (Crl.) No. 10082/2024** tilted Madhab Chandra Pradhan & Ors. v. State of Odisha wherein it was held that:-

“6. The principles which would guide the exercise of a Court’s power under Section 311 of the Cr.P.C were succinctly summed up by this Court in State (NCT of Delhi) v. Shiv Kumar Yadav (2016) 2 SCC 402. It was laid down by this Court that first, the plea for recall of a witness under Section 311 must be bona fide and genuine. Secondly, applications for



recall of a witness under Section 311 should not be allowed as a matter of course and the discretion given to the Court must be exercised judiciously, not arbitrarily.

9. From a perusal of the record of the case, it is abundantly clear that ample opportunities were given to the defence counsel to cross-examine the victim. When the victim has been examined and then cross-examined at length twice already, mechanically allowing an application for recall of the victim, especially in trial of offences under the POCSO Act would defeat the very purpose of the statute. Hence, we find no error or illegality in the impugned order of the High Court or the Order dt. 10.10.2023 of the Special Court."

6. In the present case, although the subject application was filed under Section 317 CrPC, from a reading of the cross-examination, it is evident that the child victim has been given suggestions with respect to incidents that were alleged to have occurred on the aforesaid dates. Therefore, allowing the belated application for recall of the victim would go against the intent of the Act.

7. In view of the aforesaid discussions and on consideration of totality of the facts, I find no ground to interfere with the impugned order. Consequently, the petition is dismissed alongwith pending application.

MANOJ KUMAR OHRI, J

DECEMBER 11, 2024

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