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IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CRL.REV.P. 179/2025 & CRL.M.A. 14023/2025,
CRL.M.A. 14024/2025

NITESH KUMAR

.....Petitioner

Through: Mr. Rajbir Singh Sagar,
Adv.

versus

STATE (NCT OF DELHI) AND ANRRespondents

Through: Ms. Kiran Bairwa, APP
for the State.
SI Manisha, PS
Mandawali.

CORAM:

HON'BLE MR. JUSTICE AMIT MAHAJAN

ORDER

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06.05.2025

CRL.M.A. 14022/2025 (exemption)

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

CRL.REV.P. 179/2025 & CRL.M.A. 14023/2025, CRL.M.A. 14024/2025

3. The petitioner challenges the order dated 15.02.2025, passed by the learned Additional Sessions Judge, East District, Karkardooma Courts, Delhi, dismissing the application filed under Section 348 of the Bharatiya Nagarik Suraksha Sanhita, 2023 ('BNSS') for recalling the victim PW-1 and mother of the victim PW-4 for cross examination.

4. Briefly stated, the facts of the case are that on 09.09.2020, when the victim (8 years old at the time of the alleged incident) went to her grandmother's house to ask for milk, only the Petitioner/ victim's uncle was present there. It is alleged that

when the victim entered the house, the Petitioner removed her undergarments and sexually assaulted her. It is alleged that when

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the victim shouted for her parents the Petitioner moved away. Complaint in that regard to the registration of FIR No. 383/ 2020 dated 11.09.2020 registered at Police Station Mandawli Fazalpur under Sections 342/ 376 of the IPC and Section 4/ 6 of the Protection of Children from Sexual Offence Act, 2012 ('POCSO'). The chargesheet was filed under Sections 342/ 354B/ 376 of the IPC and Section 6 of the POCSO Act.

5. Charges were framed against the petitioner under Sections 342/ 354/ 376 AB of the IPC and Section 6 of the POCSO Act, by order dated 10.03.2021 passed by the learned Trial Court.

6. The victim's cross-examination was deferred on 23.12.2021 and thereafter she was re-called for cross-examination which was treated as 'NIL' due to the non-appearance of the defence counsel. The mother of the victim was called for cross-examination on 28.01.2023, however, the same was treated as 'NIL' due to non-appearance of the defence counsel.

7. The petitioner moved an application under Section 348 of BNSS for recalling of crucial witness, that is, the victim PW1 and her mother PW4, on the ground that the previous counsel of the accused could not cross-examine them. The said application was dismissed *vide* order dated 15.02.2025 passed by the learned Trial Court. Aggrieved by the same, the petitioner has preferred the present petition.

8. The learned counsel for the petitioner submits that the accused's right to cross-examination should not be closed without any opportunity being given to the accused to be heard.

He submits that the petitioner should not suffer due to the

inaction on part of his previous counsel.

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9. He submits that there is no material on record to show that the petitioner committed sexual assault upon the victim. He submits that there are contradictions in the version of the victim, which needs to be brought on record through cross-examination.

10. It is undisputed that the victim was partly examined on 30.10.2021 and her further examination in chief was deferred and concluded on 23.12.2021, on which day, the victim's cross-examination was deferred at the request of the newly engaged counsel for the accused. The victim was re-called for cross-examination on 07.05.2022, however the same was treated as 'NIL' due to the non-appearance of the defence counsel. The accused's right to cross-examine was closed.

11. The mother of the victim was examined in chief on 28.01.2023 and her cross-examination was treated at 'NIL' due to non-appearance of the defence counsel.

12. Section 348 of the BNSS reads as under:

"348. Power to summon material witness, or examine person present.

Any Court may, at any stage of any inquiry, trial or other proceeding under this Sanhita, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or re-call and re-examine any person already examined; and the Court shall summon and examine or re-call and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

13. Section 348 of the BNSS 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 348 of the BNSS 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.

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14. 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 348 of the BNSS {erstwhile Section 311 of the Code of Criminal Procedure, 1973 ('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**].

15. 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

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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.**

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(emphasis supplied)



16. This Court has perused the examination of the prime witnesses which are sought to be re-examined by the petitioner and the material placed on record. It is observed that there were several moment when the victim had cried and showed signs of trauma, while responding to the questions posed to her before the learned Trial Court.

17. The application filed by the petitioner under Section 348 of the BNSS only mentions that the earlier counsel could not cross-examine the witnesses and certain aspects are necessary to be cross-examined. The grounds as pleaded, in the opinion of this Court, are not sufficient for allowing the re-examination of the witnesses.

18. It is observed that there is a general practice that the witnesses are not examined and when the matter reaches the final stage some other lawyer is engaged, who files an application for recall of witnesses. The lawyers in such circumstances start putting the blame on the erstwhile lawyer for not conducting the cross-examination or if conducted, to have not done it in a proper manner, stating that certain material questions to have been left to be asked from the witnesses.

19. There is always a possibility that the lawyer who has been engaged at an earlier stage may have strategically thought of not cross-examining the witnesses for the benefit of the defence.

20. Undisputedly, every lawyer adopts a different strategy and the subsequently engaged lawyer may think otherwise and would like to cross-examine the witness. Such practice if allowed

will not allow the trial to conclude, since after every examination/cross-examination a new lawyer can be engaged

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who may like to examine further or examine a witness to his own satisfaction.

21. Even in the application filed by the petitioner, he does not mention the manner in which he wants to examine the witnesses. Certain inconsistencies are pointed out in the application with regard to the statements made by the victim, the same admittedly can be pointed out to the learned Trial Court at the time of final arguments and the Court would necessarily have to consider the said inconsistencies in accordance with law and give the benefit to the accused.

22. This Court is in agreement with the view taken by the learned Trial Court, holding that such offences are guided by the legislative intent under Section 33(5) of the POCSO Act, which ensures that the child victim is not called repeatedly to testify in Court, which may invariably make the victim re-visit the trauma. It is further observed that enough opportunity has already granted to the accused to cross-examine the witnesses. Moreover, the learned Trial Court also rightly observed that the accused preferred this application at the fag end of the trial when the matter is listed for final arguments.

23. Section 35(2) of the 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.

24. 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

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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.

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

AMIT MAHAJAN, J

MAY 6, 2025

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