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

+ CRL.M.C. 6208/2025 and CRL.M.A. 26288/2025

GAURAV MADAN

.....Petitioner

Through: Mr.Jitendra Sethi, Senior Advocate
with Mr.Hemant Gulati, Mr.Bharat
and Mr.Shobit Dimri, Advocates

versus

STATE NCT OF DELHI

.....Respondent

Through: Mr.Digam Singh Dagar, APP with
Inspector Babita DIU/West and WSI
Dolly Pant PS Rajouri Garden.

CORAM:

HON'BLE MR. JUSTICE ARUN MONGA

ORDER

% **03.09.2025**

1. Petitioner is before this Court seeking setting aside of an order dated 14.08.2025 passed by the learned Trial Court whereby the learned Court had dismissed the application filed under section 311 of the Cr.P.C. by the petitioner seeking to recall PW-6/HC Jyoti Prakash and PW-7/Inspector Babita for cross-examination on the ground that material documents, which were prepared by the Investigating Officer (I.O.)/ WSI Sumitra, were required to be proved by the said two witnesses.

2. Case set up by the petitioner is that the investigation in the present case was initially conducted by W/SI Sumitra Sharma (now deceased), who had carried out the crucial part of the investigation, prepared several documents, and recorded the statements of witnesses. Subsequently, the charge sheet was filed in May 2018 by W/SI Babita, and charges were framed in May 2019. Despite repeated summons, the prosecutrix did not appear for a considerable period and could be examined only in March 2023.



During trial, W/SI Babita was examined as PW-7 on 23.12.2024 and proved only a part of the investigation conducted by her, but did not prove any documents prepared by the deceased first IO. Thereafter, the prosecution closed its evidence on 21.04.2025 without examining the remaining witnesses named in the charge sheet.

2.1 As per the prosecution case, the prosecutrix, aged about 19 years, was employed as a maid servant in the Petitioners' house since August 2014. In April 2015, some jewellery and cash were found missing, and suspicion was raised against her. The matter was amicably settled on 10.04.2015 with the intervention of NGO worker Ms. Deepika Malik, and all dues of the prosecutrix were paid. In her statement recorded on that date, she categorically stated that her employer had not misbehaved with her and that she had no complaint against the Petitioner. However, it is alleged that she was subsequently pressurised by another NGO worker, Ms. Prabha Muni, to change her version. Accordingly, on 06.05.2015, she for the first time made allegations of rape and molestation against the Petitioner.

2.2 With regard to her age, several documents, including her affidavit, application with the placement agency, IO's report, and her father's statement, indicated her age to be 18–19 years at the relevant time. The Petitioners contend that since the first IO could not be examined due to her death, it was incumbent upon the prosecution to prove the documents prepared by her. However, the prosecution selectively proved only documents favourable to its case while failing to bring on record material documents supporting the defence, thereby causing serious prejudice to the Petitioner.

2.3 The Petitioner is facing trial under Sections 323/354/376/506 IPC



read with Sections 6 & 10 POCSO Act. Petitioner moved an application under Section 348 BNSS (corresponding to Section 311 Cr.P.C.) seeking recall of PW-7 for effective cross-examination regarding the investigation conducted by the deceased IO. The Learned Trial Court, however, dismissed the said application on 14.08.2025 without assigning cogent reasons. Hence, the present petition.

3. In the aforesaid backdrop I have heard the rival contentions and perused the case file.

4. Arguments of Learned senior are on lines of Grounds pleaded in the petition and he urges that the learned Trial Court has committed a serious illegality in dismissing the Petitioner's application under Section 348 BNSS (old Section 311 Cr.P.C.) on vague and flimsy grounds, without assigning any cogent reasons, despite the fact that recall of PW-7, Inspector Babita, was absolutely essential for the just decision of the case.

4.1 That the first Investigating Officer, W/SI Sumitra Sharma, who had conducted the crucial part of the investigation, prepared several documents, and recorded important statements, unfortunately passed away before she could be examined in Court. The non-examination of this witness has deprived the Petitioner of an opportunity to bring on record the most material aspects of the case.

4.2 That since the first IO could not be examined, it was incumbent upon the prosecution to prove the documents prepared by her through PW-7, Inspector Babita, the second IO. However, the prosecution failed to do so and instead proved only those documents which were favourable to its case while withholding those which were exculpatory and favourable to the defence.



4.3 That the abrupt closure of prosecution evidence on 21.04.2025, without examining the remaining witnesses and without proving the documents of the deceased first IO, amounts to a denial of fair trial and has caused serious prejudice to the Petitioner.

4.4 That the Petitioner, facing grave charges under Sections 323/354/376/506 IPC read with Sections 6 & 10 of POCSO Act, is entitled to a fair and effective opportunity to cross-examine PW-7, Inspector Babita, on the documents and investigation conducted by the late IO.

4.5 That the order dated 14.08.2025 of the learned Trial Court suffers from non-application of mind, overlooks the mandatory duty of the Court to ensure a fair trial, and results in gross miscarriage of justice.

5. Learned APP for the State opposes the petition on the ground that order passed by the trial court is well reasoned and warrants no interference.

6. From perusal of the impugned order dated 14.08.2025, it is borne out that the learned trial court observed that section 348 *ibid* empowers courts to recall witnesses if their evidence is essential to the just decision of the case, true that, but it felt that since this power must be exercised cautiously, not as a matter of course, and only where necessary to prevent failure of justice and instant was not a case found to be such nature. In this case, prosecution evidence concluded on 21.04.2025, with PW-6 examined on 04.03.2024 and PW-7 on 23.12.2024, and both were duly cross-examined. The recall plea was filed belatedly, over six months later. Moreover, PW-6 had only identified the handwriting/signatures of Late SI Sumitra, and PW-7 had conducted limited investigation steps (potency test, preparing and filing chargesheet). Neither had prepared the documents sought to be confronted. Hence, recalling them is neither necessary nor would denial thereof cause any prejudice the accused. It



appears that the Trial Court was also of the mind that the first IO, SI Sumitra, had since expired and that her successor could not depose about the investigation carried out by her.

7. Be that as it may, it cannot be lost sight of that there are certain documents prepared by the deceased IO which, unless the petitioner is afforded an opportunity to have these confronted to PW-7, prejudice to the defence cannot be ruled out. The right to fair trial being a fundamental right, the exercise of discretion under Section 348 BNSS must lean in favour of eliciting truth rather than foreclosing relevant evidence.

8. Having heard the rival contentions, I am of the view that what appears to have weighed on the mind of the learned Trial Court, while rejecting the application under Section 311 Cr.P.C., is the fact that the Investigating Officer, late Sub-Inspector Sumitra, has passed away and, since she was the officer who had conducted the investigation, it is only natural that the successor Investigating Officer cannot testify regarding the investigation carried out by the deceased officer. Those documents to be relied upon by the prosecution have been brought on record by the successor Investigating Officer. To that extent, the person who wishes to rely on those documents and has placed them on record is required to testify about the same and has also to face cross-examination.

9. The petitioner, facing trial under Sections 323/354/376/506 IPC read with Sections 6 & 10 POCSO Act. Trite as it may sound, the right to a fair trial is envisaged under Article 21 of the Constitution of India. Any negligence on the part of the defence may result in undesirable consequences for the accused, particularly in a case involving such severe punitive imprisonment as the present one under Section 376 of the IPC.



10. Accordingly, taking a wholesome view of the matter, the application under Section 348 BNSS (corresponding to Section 311 Cr.P.C.) seeking recall the witness named/described therein is allowed. The learned Trial Court shall, therefore, grant one effective opportunity to the petitioner to re-examine PW-7, i.e., Inspector Babita. However, the Trial Court shall have the discretion to grant further opportunity depending on its day-to-day workload.

11. The petition along with accompanying application is disposed of.

ARUN MONGA, J

SEPTEMBER 3, 2025/SV