

\$~

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

%

Reserved on:15.09.2022
Pronounced on: 20.09.2022

+ **CRL.M.C. 4584/2022 & CRL.M.As. 18614/2022 &
18615/2022**

VINOD RAWAT

..... Petitioner

Through: Mr. S.K. Tyagi and
Mr. Rajeshwar Singh,
Advocates.

versus

STATE

..... Respondent

Through: Mr. Manoj Pant, APP for the
State with IO SI Esthir, P.S.
Mehrauli.

**CORAM:
HON'BLE MS. JUSTICE SWARANA KANTA SHARMA**

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The instant petition has been filed under Sections 482/402 Cr.P.C., 1973 read with Article 227 of Constitution of India for setting aside the impugned order dated 04.08.2022 passed by learned Additional Sessions Judge (ASJ) (FTSC) (POCSO) South, Saket, New Delhi wherein the learned ASJ was pleased to dismiss the application under Section 311 Cr.P.C. for recalling the witnesses PW-1 Ms. "P" victim and PW-9 Ms. Sarojini Mukta Minj, Principal, SDMC, Nigam

Pratibha Vidyalaya Chhatarpur Village 1, New Delhi in FIR bearing no. 831/2017 under Sections 376/506 of IPC and Section 6 POCSO Act registered in Police Station Mehrauli, New Delhi on 20.10.2017.

2. The learned counsel for petitioner states that his plea for re-examination of PW-1 and PW-9 was declined on totally erroneous ground. To contest his case he argues that since the petitioner was in jail, he was able to obtain certified copy of testimony of PW-1 and PW-9 on 22.09.2022. It is his case that the witnesses were not cross-examined by his counsel thereby, causing prejudice to him and that non-cross examination of these witnesses will affect the future outcome of the case.

3. The learned counsel for the petitioner further argued that the aim of every court is to discover the truth and in case his application under Section 311 Cr.P.C. is not allowed, grave injustice will be caused to the petitioner. He argues that there is dispute about the age of the victim and the case is not covered under the POCSO Act. It is therefore, prayed that the impugned order be set aside to reach just decision of the case. To buttress his arguments the learned counsel for the petitioner has referred to two judgments titled as *V.N. Patil v. K. Niranjan Kumar & Ors.*(2021) 3 SCC 661 and *Vijay Kumar v. State of UP & Anr. (2011) 8 SCC 136* which relate to the power of the court under Section 311 Cr.P.C.

4. The learned APP for the State has, however, stated that the witnesses have been cross-examined by the previous counsel and appointment of a new counsel cannot be a ground for re-cross examination of the witnesses. He further states that the argument of the

counsel for the petitioner is nothing but a ploy to further delay the matter. He also argues that the witnesses were cross-examined in detail in the presence of the accused himself. He also states that PW-9 was tendered for cross-examination. However, the opportunity was not availed and therefore a conscious decision had been made by choosing not to cross-examine PW-9.

5. The learned ASJ on hearing both the parties dismissed the application under Section 311 Cr.P.C. by impugned order dated 04.08.2022, that reads as under:

“...6. On perusal of the record, it is seen that on 28.11.2018, the victim was examined, cross-examined in length and was subsequently discharged. When the incident occurred the age of victim was about 15 years. On 16.03.2020, PW-9/Principal of the School was examined and her cross examination was recorded as ‘Nil opportunity given’ due to unavailability of Counsel for the accused/applicant.

7. In the considered view of this Court, Ld. Counsel for the accused/applicant has failed to show that the necessity to recall the victim PW-1 Ms. 'P'/the victim and also PW-9/Principal of the school of the victim under Section 311 Cr.P.C. and same is overpowering the mandate of law under Section 33(5) of POCSO Act. Also, mere change of counsel whose caliber has not been challenged at any forum does not afford a ground to the applicant/accused to further recall a child witness/PW-1 Ms. 'P'/the victim. The submission that the relevant questions were not put to the victim PW-1 Ms. 'P' could not be a ground for recalling the victim so as to relive the trauma as the relevant questions as alleged were not put to her. Whereas the other witness i.e. PW-9/Principal of the school of the victim is concerned, she has proved the documents on record. On the day of her examination, no question was put to her in cross nor an application for recall was moved before the next date of hearing. Hence, the application under Section 311 Cr.P.C.

for recalling the witnesses i.e. PW-1/the victim and PW-9/Principal of the school of the victim is hereby dismissed being devoid of any merit...”

6. The sole ground on which the application for re-summoning the victim (PW-1) for her cross-examination was filed was that the previous counsel did not cross-examine the witness on material points.

7. I deem it appropriate to reproduce Section 311 of Cr.P.C. before proceeding with the case in hand. The relevant Section 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...”

8. The scope of Section 311 Cr.P.C. has been examined and principles have been laid down in catena of judgments of the High Courts and the Hon'ble Supreme Court. In the case of ***State (NCT of Delhi) v. Shiv Kumar Yadav (2016) 2 SCC 402***, the Hon'ble Supreme Court observed as follows:

“...11. It is further well settled that fairness of trial has to be seen not only from the point of view of the accused, but also from the point of view of the victim and the society. In the name of fair trial, the system cannot be held to ransom. The accused is entitled to be represented by a counsel of his choice, to be provided all relevant documents, to cross-examine the prosecution witnesses and to lead evidence in his defence. The object of provision for recall is to reserve the power with the court to prevent any injustice in the

conduct of the trial at any stage. The court, for valid reasons, feels that injustice is caused to a party. Such a finding, with reasons, must be specifically recorded by the court before the power is exercised. It is not possible to lay down precise situations when such power can be exercised. The legislature in its wisdom has left the power undefined. Thus, the scope of the power has to be considered from case to case. The guidance for the purpose is available in several decisions relied upon by the parties. It will be sufficient to refer only some of the decisions for the principles laid down which are relevant for this case... ”

9. Further, the Hon'ble Supreme Court in ***Rajaram Prasad Yadav v. State of Bihar & Anr. (2013) 14 SCC 461*** laid down guidelines regarding exercise of powers under Section 311 Cr.P.C. The relevant portion reads as under:

“...15.1 In the decision in jamatraj Kewalji Gowani v. State of Maharashtra, this Court held in para 14: (AIR pp. 182-83)

14. It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in court at or to recall a witness already examined, and makes this the duty and obligation of the court provided the just decision of the case demands it. In other words, where the court exercises the power under the second part, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new evidence is needed by it for a just decision of the case. If the court has acted without the requirements of a just decision, the action is open to criticism but if the court's action is supportable as being in aid of a just decision the

action cannot be regarded as exceeding the jurisdiction...”

(emphasis supplied)

14.3 In the decision in *Raj Deo Sharma (2) v. State of Bihar*, the proposition has been reiterated as under in para 9: (SCC p. 613)

“9. We may observe that the power of the court as envisaged in Section 311 of the Code of Criminal Procedure has not been curtailed by this Court. Neither in the decision of the five-Judge Bench in *A.R. Antulay* case nor in *Kartar Singh* case such power has been restricted for achieving speedy trial. In other words, even if the prosecution evidence is closed in compliance with the directions contained in the main judgment it is still open to the prosecution to invoke the powers of the court under Section 311 of the Code. We make it clear that if evidence of any witness appears to the court to be essential to the just decision of the case it is the duty of the court to summon and examine or recall and re-examine any such person.

(emphasis supplied)

15.6. In *P. Sanjeeva Rao v. State of A.P.* the scope of Section 311 CrPC has been highlighted by making reference to an earlier decision of this Court and also with particular reference to the case, which was dealt with in that decision in paras 20 and 23, which are as under: (SCC pp. 63-64)

“20. Grant of fairest opportunity to the accused to prove his innocence is the object of every fair trial, observed this Court in *Hoffman Andreas v. Inspector of Customs*. The following passage is in this regard apposite: (SCC p. 432, para 6)

“6....In such circumstances, if the new counsel thought to have the material witnesses further examined the court could adopt latitude and a liberal view in the

interest of justice, particularly when the court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible.

23. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined-in-chief about an incident that is nearly seven years old. Delay takes a heavy toll on the human memory apart from breeding cynicism about the efficacy of the judicial system to decide cases within a reasonably foreseeable time period. To that extent the apprehension expressed by Mr Raval, that the prosecution may suffer prejudice on account of a belated recall, may not be wholly without any basis. Having said that, we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself.

(emphasis supplied)

10. It is settled law that the Court has widest discretionary powers to summon, examine or recall and re-examine any person with an object of finding out the truth for reaching just and correct decision of the case. However, the discretionary power has to be used with caution and judiciously and not arbitrarily. Every court has to keep in mind that the powers so exercised should be used in a manner which will ensure that

no serious prejudice is caused to the accused and miscarriage of justice does not take place. The satisfaction of the court in this respect is essential.

11. It is also to be kept in mind by the Courts that a constitutional duty has been cast on every Court to determine the truth and reach a correct and just decision so that miscarriage of justice does not take place by failure of affording an opportunity in a fair manner to the concerned party. In case the evidence sought to be brought on record is essential to the issue involved, the powers under Section 311 Cr.P.C. must be invoked. A fair trial is a constitutional goal and basic Fundamental Right of every individual. In *Vimal Khanna vs. State, 2018 SCC Online Del 11796*, this High Court made the following observations:

“...10. Denial of an opportunity to the accused to cross examine the witnesses violates the constitutional guarantee to an accused. Such denial also vitiates the trial. Where accused does not have assistance of a lawyer or his lawyer fails to defend the case in accordance with law, it is the duty of the court to provide a lawyer to the accused, unless the accused voluntarily makes an informed decision to defend himself personally without assistance of a lawyer. Failure to provide a lawyer to the accused would vitiate the trial...”

12. A perusal of the record in the present case reveals that the case has been filed under Sections 376/506 IPC and Section 6 POCSO Act. From the cross-examination of the victim it is revealed that during the cross-examination no question was put regarding the charge against the accused. Though, change of counsel in a case cannot always be ground for recalling and re-examination of witness, more so, in cases of sexual

offences, however, the facts and circumstances of each case have to be appreciated before deciding an application under Section 311 Cr.P.C.

13. In the present case, the issue concerning determination of the age of the victim as well as cross-examination of the victim regarding the allegations leveled against the accused is essential, as only that can unfold the truth.

14. As far as the plea regarding the re-summoning of concerned Principal of School (PW-9) is concerned, it is mentioned in the order that opportunity to cross-examine the witness could not be availed due to unavailability of the counsel for the accused/applicant. There is no doubt that the counsel for the accused should have remained present on the dated fixed for cross-examination of the witness concerned.

15. Neither it is mentioned in the order nor the petition specifies the reason as to why the counsel for the petitioner was not available on the date fixed for cross-examination of PW-9. Be that as it may, the fact remains that in the present case, determination of the age of the victim is crucial for the just decision of the case.

16. Fair trial demands that opportunity to defend the accused be afforded. In case, the cross-examination would have been conducted extensively, it would have been against mandate of law to re-summon the witness especially in a case of sexual offence. However, in the present case, only questions regarding the family members, etc. of the victim were asked in the cross-examination and no question was put regarding the allegation leveled against the accused.

17. Since the application has been rejected on the ground of bar under section 33(5) of POCSO Act, it is relevant to reproduce the said section, which reads as under:

“33(5) The Special Court shall ensure that the child is not called repeatedly to testify in the court.”

18. However, Section 33(5) cannot be read alone, as a balance of rights under Section 33(5) and Section 311 Cr.P.C. needs to be maintained. The right to fair trial as well as the bar under Section 33(5) both need to be looked into while deciding such application, depending upon facts of each case. This view has also been expressed in catena of cases across several Courts in the country.

19. In ***Mohd. Gulzar v. The State (GNCTD), 2018 SCC OnLine Del 11845***, a coordinate bench of this Court made the following observations with regard to balancing of the rights under section 33(5) POCSO and section 311 Cr.P.C.:

“6. Perusal of orders dated 10.04.2018, 11.04.2018 and 12.04.2018 shows that the counsel for the petitioner was not present for the purpose of cross-examination. The right of cross-examination is a valuable right provided to an accused. No doubt, a child under Section 33(5) of Chapter VIII POCSO also has rights of not being harassed at trial but a balance has to be achieved between the two rights.”

20. The Orissa High Court in ***Pidika Sambaru v. State of Odisha & Anr. 2022 SCC OnLine Ori 802*** while reiterating the observations of this Court in ***Vimal Khanna (supra)*** and ***Mohd. Gulzar (supra)*** ordered recalling of the witnesses on the ground that non-cross-examination of the witnesses would put the petitioner in prejudice. Similar view was

held by Karnataka High Court in *Deva @ Devaraj v. State of Karnataka*, CrI. Petition No. 201325/2019.

21. Therefore, the bar under Section 33(5) of POCSO Act has to be interpreted keeping in mind the facts of each case. In the present case, it is not the case of the prosecution that the witness has been repeatedly called for cross-examination. The application has been moved on the first available opportunity to the accused/applicant who, was in judicial custody. Therefore, in this Court's opinion this is a fit case where application under Section 311 Cr.P.C. be allowed with the following conditions:

- a) That the PW-1 and PW-9 will be cross-examined in one single opportunity and on same day preferably.
- b) No adjournment shall be sought by the counsel for the accused/applicant for cross-examination of the PW-1 and PW-9.
- c) Cost of Rs. 5,000/- is imposed on the accused/applicant which will be deposited with Delhi High Court Advocates' Welfare Fund within a period of two weeks from the date of receipt of this judgment.

22. In view of the above, the petition along with pending applications stands disposed of.

SWARANA KANTA SHARMA, J

SEPTEMBER 20, 2022/zp