

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

+ **CRL.A. 155/2020**

Date of Decision 24/01/2022

IN THE MATTER OF:

AMARNATH TIWARI

..... Appellant

Through: Mr. Satnarain Sharma, Mr. Kartik  
Agarwal, Mr. Shakti Saini and Mr. Anuj  
Kumar, Advocates.

versus

STATE (NCT OF DELHI)

..... Respondent

Through: Ms. Meenakshi Chauhan, APP for State.

**(VIA VIDEO CONFERENCING)**

**CORAM:**

**HON'BLE MR. JUSTICE MANOJ KUMAR OHRI**

**JUDGMENT**

**MANOJ KUMAR OHRI, J. (ORAL)**

**CRL.M.A. 2867/2020**

1. Allowed, subject to all just exceptions.
2. Application is disposed of.

**CRL.M.A. 2953/2020**

1. The present application has been filed under Section 391 read with Section 311 Cr.P.C. on behalf of the appellant seeking recall and cross-examination of PW3, PW4, PW5 and PW7.
2. The sole contention raised by learned counsel for the appellant is that in trial, the aforesaid witnesses could not be effectively cross-examined resulting in serious prejudice to the appellant.

3. The prayer sought in the application is vehemently opposed by learned APP for the State.

4. I have heard the learned counsels as well as gone through the Trial Court Record.

5. In the present case, vide order dated 05.03.2015, the appellant was charged for the commission of offence under Section 5(m) of the POCSO Act, punishable under Section 6 of the POCSO Act, for having inserted his finger in the vagina of the child victim, who was aged about 6 years at the relevant time. The appellant pleaded not guilty and claimed trial. To support its case, the prosecution cited a total of 13 witnesses, including the child victim 'M' (PW4), her younger brother 'R' (PW5), her mother 'B' (PW3) and her father 'M' (PW7).

6. The prosecution evidence began on 01.05.2015, when PW1 to PW5 were summoned. On the said day, apparently a strike call was given by the Bar, as urged on behalf of the appellant, and for that reason, a counsel appointed by the Bar had represented the appellant and cross-examined PW4 and PW5, instead of his privately engaged counsel. PW6 to PW8 were examined on the next day, when cross-examination of PW7 was also conducted by the learned counsel appointed by the Bar. Subsequently, on 05.05.2015, PW9 to PW11 were examined, when the appellant was again represented by the learned counsel appointed by the Bar.

7. This Court is constrained to note that the present case being one where the accused/appellant was facing a serious charge, which is punishable with RI for a minimum of 10 years and may extend to imprisonment for life, the Trial Court seemingly defeated the purpose of fair trial initially by not adjourning the matter to a suitable date when the appellant could be represented by a counsel of his choice. The right to be

represented by a counsel of his/her own choice is constitutionally guaranteed to every accused and the conducting of the trial in the present case, while the accused/appellant was represented by a Bar-appointed counsel who only cross-examined 3 out of the total prosecution witnesses cited, prejudiced the case of the accused to say the least.

8. On 28.05.2015, the error however came to be rectified when an application filed on behalf of the appellant under Section 311 Cr.P.C seeking recall of PW3 to PW5, PW7 to PW9 and PW11 for their cross-examination was partially allowed. A perusal of the records would show that PW3, PW7 to PW9 and PW11 were permitted to be recalled and the appellant did not press the application with respect to PW4 and PW5. At this stage, the cross-examination of the recalled witnesses was conducted by the learned counsel appointed by the appellant.

9. Subsequently, the accused/appellant did not raise a grievance regarding cross-examination of the prosecution witnesses until the filing of the present application under Sections 391/311 Cr.P.C., pending adjudication of the appeal filed before this Court against the judgment of conviction dated 10.12.2019. Vide the application, the appellant again seeks to recall stated prosecution witnesses, on the ground that proper cross-examination did not take place.

10. Before proceeding further, be it noted that the scope of Section 311 Cr.P.C. has been considered by the Supreme Court at length in P. Sanjeeva Rao v. State of Andhra Pradesh reported as **(2012) 7 SCC 56** and Natasha Singh v. Central Bureau of Investigation (State) reported as **(2013) 5 SCC 741**. From an overview of the decisions, it is discernible that the rejection/acceptance of an application filed under Section 311 Cr.P.C. is closely linked with guaranteeing a fair trial, that too, not only to the accused, but also to the victim(s), witnesses and society at large.

Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracise injustice, prejudice, dishonesty and favouritism [Refer: Rattiram and Others v. State of Madhya Pradesh through Inspector of Police reported as (2012) 4 SCC 516].

11. At the same time however, in State (NCT of Delhi) v. Shiv Kumar Yadav and Another reported as (2016) 2 SCC 402, the Supreme Court has cautioned that witnesses cannot be allowed to be routinely recalled on the ground that cross-examination was not proper for reasons attributable to a counsel. Sufficient and cogent reasons must exist for a Court to permit recall of witnesses, particularly in cases of heinous offences. Relevant excerpt from the decision is reproduced hereunder:-

*“15. The above observations cannot be read as laying down any inflexible rule to routinely permit a recall on the ground that cross-examination was not proper for reasons attributable to a counsel. While advancement of justice remains the prime object of law, it cannot be understood that recall can be allowed for the asking or reasons related to mere convenience. It has normally to be presumed that the counsel conducting a case is competent particularly when a counsel is appointed by choice of a litigant. ...witnesses cannot be expected to face the hardship of appearing in court repeatedly, particularly in sensitive cases such as the present one. It can result in undue hardship for victims, especially so, of heinous crimes, if they are required to repeatedly appear in court to face cross-examination.*

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*27. ...Undoubtedly, fair trial is the objective and it is the duty of the court to ensure such fairness. ...Mere observation that recall was necessary “for ensuring fair trial” is not enough unless there are tangible reasons to show how the fair trial suffered without recall. Recall is not a matter of course and the discretion given to the court has to be exercised*

judiciously to prevent failure of justice and not arbitrarily. While the party is even permitted to correct its bona fide error and may be entitled to further opportunity even when such opportunity may be sought without any fault on the part of the opposite party, plea for recall for advancing justice has to be bona fide and has to be balanced carefully with the other relevant considerations including uncalled for hardship to the witnesses and uncalled for delay in the trial. Having regard to these considerations, we do not find any ground to justify the recall of witnesses already examined.”

(emphasis added)

12. Considering that two of the prosecution witnesses sought to be recalled in the present case are child witnesses, i.e. the child victim (PW4, aged 6 years at the time of examination) and the child victim's brother (PW5, aged 4.5 years at the time of examination), it is deemed apposite to allude to Section 33(5) of the POCSO Act, which prescribes that the Special Court shall ensure that a child is not repeatedly called to testify in the Court. Needless to state, the provision is targeted at ensuring protection to a child witness from victimization and harassment by repeated appearances in Court.

In Jaidev v. State, **CRL.M.C. 4412/2019**, this Court had the occasion to consider the mandate of Section 33(5) of the POCSO Act under similar circumstances. Keeping in view the facts and circumstances of the case, the petition, which was filed against the order of the Trial Court rejecting application of the accused for recall of a child witness, was dismissed and it was observed:-

*“11. Chapter 8 of the POCSO Act specifies the procedure and powers of Special Courts and recording of evidence. A bare reading of Section 33 of the POCSO Act would show that keeping in view the objects and reasons of the POCSO Act, a special procedure has been adopted for recording of evidence of the child witness. Under Section 33(2), it is required that the questions to be put to a child witness shall*

*be first communicated to the Special Court, who then, in turn, would put those questions to the child witness. Section 33(5) specifically provides that child is not to be called repeatedly to testify in the Court.*

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*16. In the present case, the child witness was about 4 years of age at the time of the incident. At the time of her examination-in-chief on 16.12.2017, she was about 8 years of age. The petitioner alongwith other accused persons was duly represented before the trial court through their counsels who had appeared on many dates prior to the examination of the child witness.*

*17. The recall of the child witness, in the facts of the present case, will cause her enormous mental trauma...*

*18. A Coordinate Bench of this Court in Bimla Devi vs. State reported as **2017 SCC OnLine Del 11425** while taking note of Section 33(5) of the POCSO Act rejected the prayer to recall the witness and to the similar effect are the decisions of the Calcutta High Court In Re: Debashis Mondal reported as **2017 SCC OnLine Cal 1191** and Punjab and Haryana High Court in Avtar Singh vs. State of Haryana & Anr., **CRM-M-8524-2015 (O&M)** decided on 9th December, 2016.*

*19. In view of the aforesaid discussion, I am of the opinion that recalling the child witness who would be only 10 years of age by now would make her re-live the mental trauma and the same may play havoc on her psyche."*

13. The Courts throughout the country, being cognizant of the mandate contained in Section 33(5) of the POCSO Act, have likewise declined entertaining requests for recall of child witnesses [Refer: S. Sankara Varman v. State represented by the Inspector of Police W-18, M.K.B. Nagar Police Station, M.K.B. Nagar, Chennai reported as **2016 SCC OnLine Mad 5681**; Bimla Devi v. The State Govt. of NCT of Delhi reported as **2017 SCC OnLine Del 11425**; Vikas v. State reported as **MANU/DE/3270/2020** and Sivakumar v. State of Kerala Represented

by the Public Prosecutor, High Court of Kerala reported as **2021 SCC OnLine Ker 3022**].

14. Adverting to the present case, it is observed at the cost of repetition that when an application seeking recall of PW3 to PW5, PW7 to PW9 and PW11 came to be filed on behalf of the appellant, the concerned Court vide order dated 28.05.2015 partially allowed it and permitted recall of PW3, PW7 to PW9 and PW11 for their cross-examination. The application was not pressed by the appellant himself in respect of PW4 and PW5. The said order was never challenged before this Court and it attained finality.

Subsequently, the learned counsel engaged by the appellant conducted the cross-examination of PW3, PW7, PW9 and PW11. The appellant also examined witnesses in his defence, wherefore the Trial Court convicted him for the charged offences vide the impugned judgment, resulting in filing of the present appeal in the year 2020.

15. In support of his submissions, learned counsel for the appellant has placed reliance on the decision in Dev Kumar Yadav v. State reported as **2019 SCC Online Del 8485**. A plain reading of the decision shows that it came to be passed in a case where the Trial Court itself had noted in the impugned judgment that for some prosecution witnesses, there was either no cross-examination or no material cross-examination. Considering that the same had resulted in grave prejudice to the appellant, the matter was sent back for re-trial.

In the present case however, after considering the request of the accused, the Trial Court had permitted recall of certain prosecution witnesses prior to passing of a judgment, whereafter they were cross-examined by a counsel of the appellant's choice. Thus, the reliance



sought to be placed on the decision in Dev Kumar Yadav (Supra) is misplaced.

16. From an overview of the material on record, it is borne out that sufficient opportunity to cross-examine the prosecution witnesses who are sought to be recalled at this stage was available to the appellant as well as availed. Two of the said witnesses were in fact recalled during the trial pursuant to an application filed under Section 311 Cr.P.C. by the appellant, which was not pressed with respect to the other two witnesses by the appellant himself.

In the present application, it is averred that proper cross-examination of the witnesses has not taken place. However, no sufficient ground has been raised to incline this Court to direct recall of the prosecution witnesses, which power, needless to state, has to be exercised sparingly and judiciously. Further, the effect of prejudice occasioned by the cross-examination of prosecution witnesses by the Bar-appointed counsel stood remedied when the appellant's application under Section 311 Cr.P.C. was allowed by the Trial Court, albeit partially. Even though PW4 and PW5 were not recalled, there is nothing on record to indicate that the two witnesses were not cross-examined at length and/or on material aspects.

17. Keeping in view the aforesaid and the exposition of law on the issue, this Court is of the considered opinion that the present application lacks merit and is an abuse of the process of the Court. Accordingly, the same is dismissed.



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List in due course at its own turn.

**(MANOJ KUMAR OHRI)**  
**JUDGE**

**JANUARY 24, 2022**

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