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

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+ **CRL.REV.P. 5/2023**

RAJ KUMAR

..... Petitioner
Through: Mr. Kedar Yadav, Mr. Rahul
Yadav and Mr. Sharun Daniel,
Advocates

versus

STATE OF DELHI AND ANR. Respondents

Through: Mr. Naresh Kumar Chahar,
APP for the State with SI
Naveen Kumar, P.S. I.P.
Estate.

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA
JUDGMENT

SWARANA KANTA SHARMA, J. (ORAL)

CRL.M.A. 45/2023 (exemption)

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

CRL.M.A. 44/2023 (for delay)

3. For the reasons stated in the application, the delay of 60 days in filing is condoned.
4. Application stands disposed of.

CRL.REV.P. 5/2023

5. The instant revision petition under Sections 397/401 read with Section 482 of the Code of Criminal Procedure, 1973 (“Cr.P.C.”) has been filed by the petitioner against the order dated 26.07.2022 passed by learned ASJ, Central District, Tis Hazari Courts, Delhi whereby the learned Trial Court had rejected an application filed under Section 311 of Cr.P.C. for recalling of PW-3/prosecutrix for re-cross-examination in a case FIR bearing no. 90/2019, registered at Police Station I.P. Estate, Central District, Delhi for the offences punishable under Sections 328/376/354D/506/34/376D of the Indian Penal Code, 1860 (“IPC”).

6. Issue notice. Mr. Naresh Kumar Chahar, learned APP for the State accepts notice.

7. Brief facts of present case, as per the material on record, are that the complainant is a student of Mata Sundari College, Delhi and on the pretext of giving notes of B.Com Second year, the accused, who is serving as a security guard in the college on a contractual basis, took the complainant/prosecutrix to sports complex and forced himself upon the prosecutrix and committed rape upon her. Further, it is alleged by the complainant that she was threatened to be killed by elder brother, parents, three friends and an uncle of the petitioner. Initially an FIR bearing no. 90/2019 was registered against the accused for the offences punishable under Sections 376/328/506/34 and later Sections 354D/376D were added based on the complaint.

8. Learned counsel appearing for petitioner states that the applicant is in judicial custody since 08.05.2019. It is further stated by the learned counsel for the applicant that previous counsel of the

applicant could not cross-examine the prosecutrix to the extent of confronting her with photographs which were taken with consent of the prosecutrix and WhatsApp chats which reflect that there was consensual relationship between the accused and prosecutrix. It is further stated by learned counsel for applicant that the accused is in judicial custody since his arrest in this case except for a brief period of one month when he was granted bail. It is also stated by learned counsel that applicant was unable to convey to his previous counsel regarding the WhatsApp chats and the photographs which were in his possession and the same being crucial evidence needs to be put to the prosecutrix for the purpose of cross-examination.

9. On the other hand, learned APP for the State states that the prosecutrix in this case has been cross-examined at length and a detailed cross-examination has been conducted by the learned counsel which runs into 9 pages. It is therefore, stated that the present petition is liable to be rejected.

10. Heard.

11. Before going into the facts of the case, it would be appropriate to reproduce Section 311 of the Cr.P.C., which 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.”

12. Recently, the Hon'ble Supreme Court in ***Varsha Garg v. The State of Madhya Pradesh & Ors., 2022 SCC OnLine SC 986***, held as under:

"32. This power can be exercised at any stage of any inquiry, trial or other proceeding under the CrPC. The latter part of Section 311 states that the Court "shall" summon and examine or recall and re-examine any such person "if his evidence appears to the Court to be essential to the just decision of the case". Section 311 contains a power upon the Court in broad terms. The statutory provision must be read purposively, to achieve the intent of the statute to aid in the discovery of truth.

37. The power of the court is not constrained by the closure of evidence. Therefore, it is amply clear from the above discussion that the broad powers under Section 311 are to be governed by the requirement of justice. The power must be exercised wherever the court finds that any evidence is essential for the just decision of the case. The statutory provision goes to emphasise that the court is not a hapless bystander in the derailment of justice. Quite to the contrary, the court has a vital role to discharge in ensuring that the cause of discovering truth as an aid in the realization of justice is manifest."

13. Also relying in the case of ***Zahira Habibullah Sheikh (5) v. State of Gujarat, (2006) 3 SCC 374***, which was reiterated in the recent case of ***Godrej Pacific Tech. Ltd. v. Computer Joint India Ltd., (2008) 11 SCC 108***, the issue was dealt by the Hon'ble Court regarding the allowing the application of Section 311 and it was noted that:-

"28. The court is not empowered under the provisions

of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the court may result in what is thought to be “filling of loopholes”. That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.”

(emphasis supplied)

14. Coming back to the present case, the FIR bearing no. 90/2019 has been registered for the offences punishable under Sections 328/376/354D/506/34/376D of IPC and prosecutrix was examined on 09.12.2021. On, 06.05.2022, an application under Section 311 of Cr.P.C. was filed by the accused for re-call of prosecutrix for re-cross-examination, however, the same was rejected by the learned Trial Court vide order dated 26.07.2022 on the ground that cross-examination was conducted by the learned counsel for accused in detail.

15. Ensuring fair trial is a fundamental right of the accused under Article 21 of the Constitution of India and in case of **Rajendra Prasad v. Narcotic Cell, (1999) 6 SCC 110** it was held that:-

“8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight

in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. 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. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.”
(emphasis supplied)

16. After hearing learned counsel for both the parties and perusing the material on record, this Court is of the opinion that WhatsApp chats and the photographs are required to be put to the prosecutrix for reaching just decision of the present case. The Court takes note of the fact that the accused is in judicial custody since 08.05.2019 and it may have been possible that he was not be able to assist his counsel or hand over the six photographs and WhatsApp chats running into 13 pages. Though, change of counsel cannot be a ground for recalling a witness for cross-examination as has been laid down in several judgments of the Hon’ble Apex Court, however, depending upon circumstances and facts of each case, Courts are vested with power under Section 311 of Cr.P.C. to exercise the said discretion as mentioned above. The photographs and the WhatsApp chats annexed with the present petition are essential to be put to the prosecutrix for the purpose of cross-examination which could not be put to her for the reasons mentioned above.

17. In view of the above, the present petition is allowed on the following conditions:

- i) That the PW-3/Prosecutrix will be cross-examined in

- one single opportunity and on same day preferably.
- ii) The cross-examination will be limited only to confronting the prosecutrix with the six photographs and WhatsApp chats running into 13 pages which have been annexed with the present petition.
 - iii) Learned counsel will also provide advance copy of these six photographers and WhatsApp chats running into 13 pages to the learned APP for State and the counsel for the prosecutrix at least 15 days in advance.
 - iv) The learned Trial Court, in the meanwhile, will continue to record evidence of the other witnesses by the learned counsel for the present accused/applicant.
 - v) A cost of Rs. 5,000/- is imposed upon the present accused/applicant which will be paid to the prosecutrix in Court before cross-examination.
18. In view of the above, the present petition stands disposed of.
19. This order will come into operation, in case the cost is paid by the petitioner to the prosecutrix.
20. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

JANUARY 4, 2023/zp