

Khushnood Alias Raju vs State Of Nct Delhi on 16 January, 2023

Author: Yogesh Khanna

Bench: Yogesh Khanna

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ CRL.M.C. 2447/2021, CRL.M.A. 16086/2021
KHUSHNOOD alias RAJU

Through: Mr.Amit Chadha, Mr.Ati
Mr.Tarun Kuma
Mr.Deevanshu Sharm
Singh and Mr
Advocates.

versus

STATE OF NCT DELHI

Through: Mr.Harpreet Singh Popl
State with WSI Ani
Ranhola.

CORAM:
HON'BLE MR. JUSTICE YOGESH KHANNA
ORDER

% 16.01.2023

1. This petition is filed against the impugned order dated 16.03.2021 passed by the learned Trial Court whereby the application under Section 311 Cr P C filed by petitioner/ accused was rejected on the premise the change of the counsel is no ground to recall a witness and secondly per Section 33(5) of the POSCO Act the minor prosecutrix cannot be recalled again and again.

2. So far as the second limb of the impugned order is concerned, the learned counsel for petitioner has referred to Pidika Sambaru vs State of Odisha & Anr Crl Rev. No.490/2021 decided on 04.03.2022 wherein it was noted:-

6. It is also contended that the intention behind enacting Section 33 (5) of the POCSO is only to ensure that in a genuine case the child victim is not harassed, but cannot be used as a shield by the trial Court to deprive the accused of a right of proper cross examination and therefore a right of fair trial.

8. In Vimal Khanna vs. State 2018 SCC OnLine Del 11796 (DHC) the Court has held that denial of opportunity to cross examine the witnesses violates the Constitutional guarantee to an accused and vitiates the trial. Vimal Khanna (Supra) has been followed in Mohd. Gulzar v. The State (GNCTD) 2018 (4) JCC 2291 (DHC) wherein after recording that the counsel for the accused was not present on three consecutive dates to cross examine the witness, the Court held that since the right of cross

examination is a valuable right, the child's right under Section 33 (5) of POCSO Act has to be balanced with the aforesaid rights of the accused and thus permitted one more opportunity to the accused to cross examine the alleged victim. In *B. C. Deva @ Dyava vs. State Of Karnataka* the Court CA (Crl) No.205/2001 (SC) was clearly of the view that the power to recall a witness at the instance of either party to ensure justice is done is greater than the provisions set out in Section 33 POCSO Act. The provisions of Section 33 laid down a general principle which must guide the trial Court and is similar to Section 309 Cr.P.C, being in the nature of laws to ensure speedy trial. However, by virtue of Sections 4 and 5 of Cr.P.C, Section 311 Cr.P.C shall prevail as no specific procedure is provided under POCSO Act for recall of a witness. Section 42A of POCSO Act clarifies that the Act is not in derogation of any other Law.

9. In that view of the aforesaid, this Court is of the view that cross-examination of the prosecution witnesses being an essential right of the accused, it is evident that non- cross-examination of the said witnesses will put the petitioner to prejudice. In such circumstances, it is not unjust to afford an opportunity to the petitioner to cross- examine P.Ws.1 to 3 by recalling them.

and further in *Prasanna vs State of Karnataka & Others* MANU/KA/2335/2022, the Court held as under:-

15. The other factor that is necessary to be noticed is, the current age of the victim. The learned counsel for the petitioner has placed on record Ex.P9, the study certificate issued by the school in which the victim had studied. As on 18-01-2019 the victim was about 15 years of age as her date of birth was 2.01.2004. As on date of filing of the application by the petitioner under Section 311 Cr.P.C.

which was on 28-03-2022 the victim had crossed 18 years of age. Once the victim crosses 18 years of age, the rigor of Section 33(5) of the Act gets diluted, as it is the child-victim who shall not be called for cross-examination or re- examination repeatedly. The word 'child' is defined under Section 2(1)(d) of the Act, to mean a person below 18 years of age. On the child attaining 18 years of age, the rigor under Section 33(5) of the Act gets diluted and sequentially, will not become a bar for seeking further cross- examination of the victim under Section 311 of the Cr.P.C. It is more so in cases where the accused is alleged to have committed offences punishable under the Act as there is presumption under Section 29 of the Act against the accused. To bring in evidence contrary to the presumption is a heavy burden cast upon the accused for offences punishable under the Act. Therefore, to rebut such presumption, as also, peculiar reasons in the case at hand, the victim ought to have been permitted to be cross- examined by accepting the application seeking to recall the witness.

16. If a victim/witness has crossed the age of 18 years, she would not be a child as defined under the Act. If she is no longer a child under the Act, Section 33(5) of the Act would not become absolute embargo, save as in cases where the applications are filed as an abuse of the process of law, such applications should be permitted and the witness be recalled for further cross-examination. This would be imperative to see that the trial does not result in miscarriage of justice in any manner and such miscarriage is prevented at any point of spell and juncture.

3. In any case, the learned counsel for petitioner has submitted in case the offence is proved against the petitioner it would entail heavy punishment which can be extendable to life and hence it need to be seen by the Court the accused be given a fair chance to represent himself during trial. It is submitted the age of the accused and conduct of the prosecutrix is a pari materia to determine the sentence to be awarded to accused, thus various letters mentioned in the cross examination held on 11.10.2019 must be put up to the prosecutrix as are relevant in this context.

4. The learned counsel for petitioner seeks time to argue the matter with supporting case law.

5. At request, list again on 09.02.2023.

YOGESH KHANNA, J.

JANUARY 16, 2023 M