Ag vs Shiv Kumar Yadav And Anr on 10 September, 2015

Equivalent citations: AIR 2015 SUPREME COURT 3501

Author: Adarsh Kumar Goel

Bench: Adarsh Kumar Goel, Jagdish Singh Khehar

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS.1187-1188 OF 2015
(ARISING OUT OF SLP (CRL.) NOS.1899-1900 OF 2015)

AG …APPELLANT

VERSUS

SHIV KUMAR YADAV & ANR. ...RESPONDENTS

WITH

CRIMINAL APPEAL NOS.1191-1192 OF 2015
(ARISING OUT OF SLP (CRL) NOS.2215-2216 OF 2015)

J U D G M E N T

ADARSH KUMAR GOEL, J.

1. Leave granted. The issue raised for consideration in these appeals is whether recall of witnesses, at the stage when statement of accused under Section 313 of the Code of Criminal Procedure ("Cr.P.C.") has been recorded, could be allowed on the plea that the defence counsel was not competent and had not effectively cross-examined the witnesses, having regard to the facts and circumstances of this case.

2. Facts relevant for deciding the issue lie in a narrow compass. On 6th December, 2014, a First Information Report was lodged alleging that the respondent accused who was the driver of cab No.DL-1YD-7910, Swift Dezire, hired by the victim on 5th December, 2014 for returning home from her office committed rape on her. The statement of the prosecutrix was recorded under Section 164 Cr.P.C. on 8th December, 2014. After investigation, charge sheet was filed before the Magistrate on 24th December, 2014. Since the accused was not represented by counsel, he was provided legal aid

counsel. Thereafter on 2nd January, 2015, the accused engaged his private counsel M/s. Alok Kumar Dubey and Ankit Bhatia in place of the legal aid counsel. Thereafter, the case was committed to the Court of Session. Charges were framed on 13th January, 2015. Prosecution evidence commenced on 15th January, 2015 and was closed on 31st January, 2015. The witnesses were duly cross-examined by the counsel engaged by the accused. Statement of the accused under Section 313 Cr.P.C. was recorded on 3rd February, 2015. On 4th February, 2015, an application for recall of prosecutrix PW2 and formal witness PW-23 who booked the cab was made, but the same was rejected and the said order was never challenged. Thereafter, on 9th February, 2015, the accused engaged another counsel, who filed another application under Section 311 Cr.P.C. for recall of all the 28 prosecution witnesses on 16th February, 2015. The said application was dismissed on 18th February by the trial court but the same was allowed by the High Court vide impugned order dated 4th March, 2015 in a petition filed under Article 227 of the Constitution of India read with Section 482 Cr.P.C. Even though the specific grounds urged in the application were duly considered and rejected, it was observed that recall of certain witnesses was deemed proper for ensuring fair trial.

3. Aggrieved by the order of the High Court, the victim as well as the State have moved this Court.

4. On 10th March, 2015, when the matter came up for hearing before this Court, stay of further proceedings was granted but since the prosecutrix had already been recalled in pursuance of the impugned order and further cross-examined, the said deposition was directed to be kept in the sealed cover and publication thereof by anyone in possession thereof was restrained.

5. We have heard learned Attorney General appearing for the State, Shri Colin Gonsalves, learned senior counsel appearing for the victim and Shri D.K. Mishra, learned counsel appearing for the accused.

6. Learned Attorney General submitted that the view taken by the High Court was erroneous and true scope of power of recall has not been appreciated. Firstly, though the power of recall is very wide and could be exercised at any stage, it could not be exercised mechanically, without just and adequate grounds. At the end of the trial, exercise of such power was permissible only in exceptional situations. Once trial is conducted by a counsel, another counsel could not seek retrial or recall of all the witnesses merely by alleging that the previous counsel was not competent. At any rate, the court permitting such a course must record cogent reasons. Secondly, harassment of the victim on being recalled for cross- examination was a relevant factor which was required to be taken into account. Thirdly, expeditious trial in a heinous offence was another factor which was required to be taken into account. In this case, a further factor which the impugned order ignores is that the respondent was not facing a criminal case for the first time. He was facing three cases of rape earlier and was well conversant with the legal matters. He had made his own informed choice in appointing a counsel. Interference by the High Court was permissible only when the view taken by the trial court declining prayer for recall was found to be perverse or unjust. It was further pointed out that the conclusion recorded by the High Court was contrary to the findings in the order rejecting various grounds raised in support of prayer for recall. Learned Attorney General made reference to decisions of this Court in Rajaram Prasad Yadav vs. State of Bihar[1], Mannan Sk vs. State of West Bengal[2], P. Sanjeeva Rao vs. State of A.P.[3], State of Punjab vs. Gurmit Singh[4], State of

Karnataka vs. Shivanna[5], Hoffman Andreas vs. Inspector of Customs[6], Dayal Singh vs. State of Uttaranchal[7], Devender Pal Singh vs. State (NCT of Delhi)[8], NHRC vs. State of Gujarat[9], Swaran Singh vs. State of Punjab[10].

7. Shri Gonsalves, learned senior counsel adopted the submissions of learned Attorney General and further submitted that the High Court appears to have been impressed by the fact that the accused was in custody and thus had no reason to delay the trial. A presumption that an accused in custody will not delay the trial was not well founded and could not be a valid consideration for retrial or recall of prosecutrix and other witnesses. The prosecutrix had already faced court proceedings while recording her statement under Section 164 Cr.P.C. and while facing cross-examination for three days. He also placed reliance on P. Ramachandra Rao vs. State of Karnataka[11], Delhi Domestic Working Women' Forum vs. Union of India[12], Natasha Singh vs. CBI[13], Mohanlal Shamji Soni vs. Union of India[14], Zahira Habibulla H. Sheikh vs. State of Gujarat[15], Sister Mina Lalita Baruwa vs. State of Orissa[16], Raminder Singh vs. State[17], Rama Paswan vs. State of Jharkhand[18], Nisar Khan vs. State of Uttaranchal[19], Hussainara Khatoon (I) vs. Home Secy. State of Bihar[20] and Vijay Kumar vs. State of U.P.[21].

8. Learned counsel for the respondent-accused supported the impugned order and submitted that though the previous counsel had cross-examined the witnesses, he had not asked relevant questions nor given suggestions which were required to be given. He placed reliance on Kishore Chand vs. State of Himachal Pradesh[22], Hardeep Singh vs. State of Punjab[23], Ram Chander vs. State of Haryana[24], State of Rajasthan vs. Ani @ Hanif[25], Ritesh Tewari vs. State of U.P.[26], Maria Margarida Sequeria Fernandes vs. Erasmo Jack De Sequeria (dead) through Lrs.[27], Rajeshwar Prosad Misra vs. State of West Bengal[28], Jamatraj Kewalji Govani vs. The State of Maharashtra[29], Raghunandan vs. State of U.P.[30], Shailendra Kumar vs. State of Bihar[31], Satyajit Banerjee vs. State of West Bengal[32], U.T. of Dadra & Haveli vs. Fatehsinh Mohansinh Chauhan[33], Iddar vs. Aabida[34], Himanshu Singh Sabharwal vs. State of M.P.[35], Godrej Pacific Tech. Ltd. vs. Computer Joint India Ltd.[36], Hanuman Ram vs. The State of Rajasthan[37], Sudevanand vs. State through CBI[38], Mohd. Hussain @ Julfikar Ali vs. The State (Govt. of NCT) Delhi[39], J. Jayalalithaa vs. State of Karnataka[40], Salamat Ali vs. State (Crl.A. No.242/2010, High Court of Delhi).

9. We have considered the rival submissions.

10. It can hardly be gainsaid that fair trial is a part of guarantee under Article 21 of the Constitution of India. Its content has primarily to be determined from the statutory provisions for conduct of trial, though in some matters where statutory provisions may be silent, the court may evolve a principle of law to meet a situation which has not been provided for. It is also true that principle of fair trial has to be kept in mind for interpreting the statutory provisions.

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 power available with the court to prevent injustice has to be exercised only if 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 to only some of the decisions for the principles laid down which are relevant for this case.

12. In Rajaram case, the complainant was examined but he did not support the prosecution case. On account of subsequent events he changed his mind and applied for recall under Section 311 Cr.P.C. which was declined by the trial court but allowed by the High Court. This Court held such a course to be impermissible, it was observed :

> "13. .. In order to appreciate the stand of the appellant it will be worthwhile to refer to Section 311 CrPC, as well as Section 138 of the Evidence Act. The same are extracted hereunder:
>
> Section 311, Code of Criminal Procedure "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." * * * Section 138, Evidence Act "138. Order of examinations.—Witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.
>
> The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.
>
> Direction of re-examination.—The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter."
>
> 14. A conspicuous reading of Section 311 CrPC would show that widest of the powers have been invested with the courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a prefix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the

> said expression "any" as a prefix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the court was only in relation to such evidence that appears to the court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the court. The order of re-examination is also prescribed calling for such a witness so desired for such re-

examination. Therefore, a reading of Section 311 CrPC and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 CrPC. It is, therefore, imperative that the invocation of Section 311 CrPC and its application in a particular case can be ordered by the court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined is concerned, the court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re- examined has to be ascertained. To put it differently, while such a widest power is invested with the court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution."

13. After referring to earlier decisions on the point, the Court culled out following principles to be borne in mind :

> "17.1. Whether the court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the court for a just decision of a case?
>
> 17.2. The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.
>
> 17.3. If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.
>
> 17.4. The exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

17.5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

17.6. The wide discretionary power should be exercised judiciously and not arbitrarily.

17.7. The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

17.8. The object of Section 311 CrPC simultaneously imposes a duty on the court to determine the truth and to render a just decision.

17.9. The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

17.10. Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that 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.

17.11. The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

17.12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

17.13. The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

17.14. The power under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore,

> the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."

14. In Hoffman Andreas case, the counsel who was conducting the case was ill and died during the progress of the trial. The new counsel sought recall on the ground that the witnesses could not be cross-examined on account of illness of the counsel. This prayer was allowed in peculiar circumstances with the observation that normally a closed trial could not be reopened but illness and death of the counsel was in the facts and circumstances considered to be a valid ground for recall of witnesses. It was observed :

> "6. Normally, at this late stage, we would be disinclined to open up a closed trial once again. But we are persuaded to consider it in this case on account of the unfortunate development that took place during trial i.e. the passing away of the defence counsel midway of the trial. The counsel who was engaged for defending the appellant had cross-examined the witnesses but he could not complete the trial because of his death. When the new counsel took up the matter he would certainly be under the disadvantage that he could not ascertain from the erstwhile counsel as to the scheme of the defence strategy which the predeceased advocate had in mind or as to why he had not put further questions on certain aspects. 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."

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. Taken to its logical end, the principle that a retrial must follow on every change of a counsel, can have serious consequences on conduct of trials and the criminal justice system. 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.

16. The interest of justice may suffer if the counsel conducting the trial is physically or mentally unfit on account of any disability. The interest of the society is paramount and instead of trials being conducted again on account of unfitness of the counsel, reform may appear to be necessary so that such a situation does not arise. Perhaps time has come to review the Advocates Act and the relevant Rules to examine the continued fitness of an advocate to conduct a criminal trial on account of advanced age or other mental or physical infirmity, to avoid grievance that an Advocate who conducted trial was unfit or incompetent. This is an aspect which needs to be looked into by the

concerned authorities including the Law Commission and the Bar Council of India.

17. In State (NCT of Delhi) vs. Navjot Sandhu[41], this Court held:

> "167. ……. we do not think that the Court should dislodge the counsel and go on searching for some other counsel to the liking of the accused. The right to legal aid cannot be taken thus far. It is not demonstrated before us as to how the case was mishandled by the advocate appointed as amicus except pointing out stray instances pertaining to the cross-examination of one or two witnesses. The very decision relied upon by the learned counsel for the appellant, namely, Strickland v. Washington makes it clear that judicial scrutiny of a counsel's performance must be careful, deferential and circumspect as the ground of ineffective assistance could be easily raised after an adverse verdict at the trial. It was observed therein:
>
> "Judicial scrutiny of the counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess the counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining the counsel's defence after it has proved unsuccessful, to conclude that a particular act of omission of the counsel was unreasonable. Cf. Engle v. Isaac [456 US 107 (1982) at pp. 133-134). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of the counsel's challenged conduct, and to evaluate the conduct from the counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge in a strong presumption that the counsel's conduct falls within the wide range of reasonable professional assistance;…."

18. It may be proper to recall that the present case is in the category of cases where the trial is required to be fast tracked. In fact this Court directed in Shivanna [(2014) 8 SCC 916] as under :

> "2. While we propose to consider this matter on merits after service of notice to the respondent-accused, we feel acutely concerned as to why the Union of India should not take initiative and steps to evolve a procedure for fast-track justice to be adopted by the investigating agencies and the Fast Track Courts by proposing amendments to CrPC for speedy justice to the victim.
>
> 3. Fast Track Courts no doubt are being constituted for expeditious disposal of cases involving the charge of rape at the trial stage, but we are perturbed and anguished to notice that although there are Fast Track Courts for disposal of such cases, we do not yet have a fast-track procedure for dealing with cases of rape and gang rape lodged under Section 376 IPC with the result that such heinous offences are repeated incessantly.
>
> 4. We are of the considered opinion that there is pressing need to introduce drastic amendments to CrPC in the nature of fast-track procedure for Fast Track Courts and

here is an occasion where we deem it just and appropriate to issue notice and call upon the Union of India to file its response as to why it should not take initiative and sincere steps for introducing necessary amendment into CrPC, 1973 involving trial for the charge of "rape" by directing that all the witnesses who are examined in relation to the offence and incident of rape cases should be straightaway produced before the Magistrate for recording their statement to be kept in sealed cover and thereafter the same be treated as evidence at the stage of trial which may be put to test by subjecting it to cross-examination. We are further of the view that the statement of victim should as far as possible be recorded before the Judicial Magistrate under Section 164 CrPC skipping over the recording of statement by the police under Section 161 CrPC which in any case is inadmissible except for contradiction so that the statement of the accused thereafter be recorded under Section 313 CrPC. The accused then can be committed to the appropriate court for trial whereby the trial court can straightaway allow cross-examination of the witnesses whose evidence were recorded earlier before the Magistrate.

5. What we wish to emphasise is that the recording of evidence of the victim and other witnesses multiple times ought to be put to an end which is the primary reason for delay of the trial. We are of the view that if the evidence is recorded for the first time itself before the Judicial Magistrate under Section 164 CrPC and the same be kept in sealed cover to be treated as deposition of the witnesses and hence admissible at the stage of trial with liberty to the defence to cross-examine them with further liberty to the accused to lead his defence witnesses and other evidence with a right to cross-examination by the prosecution, it can surely cut short and curtail the protracted trial if it is introduced at least for trial of rape cases which is bound to reduce the duration of trial and thus offer a speedy remedy by way of a fast-track procedure to the Fast Track Court to resort to.

6. Considering the consistent recurrence of the heinous crime of rape and gang rape all over the country including the metropolitan cities, we are of the view that it is high time such measures of reform in CrPC be introduced after due deliberation and debate by the legal fraternity as also all concerned. We, therefore, deem it just and appropriate to issue notice to the Union of India through the Attorney General which the counsel for the petitioner is directed to serve by way of dasti summons. The matter be posted again on 3-9-2013 for further consideration."

19. In continuation of the above, further order dated 25th April, 2014 [(2014) 8 SCC 913] was passed as follows :

"10.1. Upon receipt of information relating to the commission of offence of rape, the investigating officer shall make immediate steps to take the victim to any Metropolitan/preferably Judicial Magistrate for the purpose of recording her statement under Section 164 CrPC. A copy of the statement under Section 164 CrPC should be handed over to the investigating officer immediately with a specific

direction that the contents of such statement under Section 164 CrPC should not be disclosed to any person till charge- sheet/report under Section 173 CrPC is filed.

10.2. The investigating officer shall as far as possible take the victim to the nearest Lady Metropolitan/preferably Lady Judicial Magistrate.

10.3. The investigating officer shall record specifically the date and the time at which he learnt about the commission of the offence of rape and the date and time at which he took the victim to the Metropolitan/preferably Lady Judicial Magistrate as aforesaid.

10.4. If there is any delay exceeding 24 hours in taking the victim to the Magistrate, the investigating officer should record the reasons for the same in the case diary and hand over a copy of the same to the Magistrate.

10.5. Medical examination of the victim: Section 164-A CrPC inserted by Act 25 of 2005 in CrPC imposes an obligation on the part of investigating officer to get the victim of the rape immediately medically examined. A copy of the report of such medical examination should be immediately handed over to the Magistrate who records the statement of the victim under Section 164 CrPC.

11. A copy of this order thus be circulated to all the Directors General of Police of all the States/Commissioners of Police in Metropolitan cities/Commissioners of Police of Union Territories who are then directed to send a copy of this order to all the Police Stations-in-Charge in their States/Union Territories for its compliance in cases which are registered on or after the receipt of a copy of these directions. Necessary instructions by the DGPs/Commissioners of Police be also issued to all the Police Stations-in-Charge by the DGPs/Commissioners of Police incorporating the directions issued by us and recorded hereinbefore."

20. In Mir. Mohd. Omar vs. Stateof W.B.[42] after the statement of the accused under Section 313 was recorded, the public prosecutor filed an application for his re-examination on the ground that some more questions are required to be asked. The application was rejected by the trial court but allowed by the High Court. This Court disapproved the course adopted and held :

"16. .....Here again it may be noted that the prosecution has closed the evidence. The accused have been examined under Section 313 of the Code. The prosecution did not at any stage move the trial Judge for recalling PW 34 for further examination. In these circumstances, the liberty reserved to the prosecution to recall PW 34 for re-examination is undoubtedly uncalled for."

21. We may also note that the approach to deal with a case of this nature has to different from other cases. We may refer to the judgment of this court in Gurmit Singh case, wherein it was observed:

"8. .....The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable....." xxxxx

21. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault — it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity...."

22. We may now refer to the orders passed by the trial Court dated 18th February, 2015 and the High Court dated 4th March, 2015. Referring to the ground of the earlier counsel not being competent, the trial court observed that the counsel was of the choice of the accused. The accused was not facing a criminal trial for the first time. The cross-examination of witnesses was deferred time and again to enable the counsel to seek instructions from the accused. The cross-examination of the prosecutrix was deferred on 15th January, 2015 to enable the counsel to have legal interview with the accused. After part of cross-examination on 16th January, 2015, further cross-examination was concluded on 17th January, 2015. Cross-examination of PW 13 was deferred on the request of the accused. Similarly, cross-examination of PWs 22, 26 and 27 was deferred on the request of the defence counsel. After referring to the record, the trial court observed as under :

"22. The aforesaid proceedings clearly bely the claim of the accused/applicant that the case has been proceeding at a "hurried pace" or that he was not duly represented by a defence counsel of his choice. The claim of the applicant that he was unwilling to continue with his earlier counsel is also nothing but a bundle of lie in as much as the

accused never submitted before the court that he wants to change his counsel. Rather, it is revealed from the record that the earlier counsel, Sh. Alok Kumar was acting as per his instructions and having legal interview with him. The accused cannot be permitted to take advantage of his submissions made on the first date i.e. 13/01/2015 that he wants to engage a new counsel as his subsequent conduct does not support this submission. I may also add that before proceeding with the case further, I had personally asked the accused in the open court whether he wants to continue with his counsels and only on getting a reply in the affirmative, were the proceedings continued further. It thus appears that the endeavor of the accused by filing this application is only to delay the proceedings despite the fact that all along the trial his request for adjournment have been duly considered and allowed and he has been duly represented by a private counsel of his choice.

23. I am also unable to accept the plea of the accused that the counsel representing him earlier was incompetent, being a novice and that he is entitled to recall all the prosecution witnesses now that he has engaged a new counsel. Although, Sh. Alok Kumr Dubey and Sh. Ankit Bhatia, both have enrolment number of 2014 as per the Power of Attorney executed by the accused in their favour, however, to my mind the competence of a Lawyer is subjective and the date of his enrolment with the Bar Council can certainly not be said to be a yardstick to measure his competence.

24. Moreover, the competence of the new counsel may again be questioned by another counsel, who the accused may choose to engage in future. This fact was also admitted by Sh. D.K. Mishra during the course of arguments on the application under consideration.

xxxxxx

27. At this stage, to judge as to whether certain questions should have been put to the witnesses in cross examination or should not have been put to them, would in my view result in pre-judging as to what are the material portions of the evidence and would also amount to re-appraising the entire cross examination conducted by the earlier counsel to conclude whether he had done a competent job or not. This certainly is not within the scope and power of the court u/s. 311 Cr.P.C. I am supported in my view by the observations of Hon'ble Delhi High Court in its order dated 20/02/2008 in case titled as Raminder Singh vs. State, Criminal MC 8479/2006, where it has been held as under :

"In the first place, it requires to be noticed that scope of Section 311 CrPC does not permit a court to go into the aspect whether material portions of the evidence on record should have been put to the witness in cross-examination to elicit their contradictions. If the court is required to perform such an exercise every time an application is filed under Section 311 then not only would it be pre-judging what according to it are `material portions' of the evidence but it would end up reappraising the entire cross-examination conducted by a counsel to find out if the

> counsel had done a competent job or not. This certainly is not within the scope of the power of the trial court under Section 311 CrPC. No judgment has been pointed out by the learned Counsel for the petitioner in support of such a contention. Even on a practical level it would well nigh be impossible to ensure expeditious completion of trials if trial courts were expected to perform such an exercise at the conclusion of the examination of prosecution witnesses every time."

28. It may also be relevant to mention that Article 22(1) of the Constitution of India confers a Fundamental Right upon an accused, who has been arrested by the police to be defended by a legal practitioner of his choice. This Fundamental Right has been duly acknowledged by the Hon'ble Superior Courts in numerous pronouncements including the case of State of Madhya Pradesh vs. Shobha Ram and others, AIR 1966 SC 1910 wherein it has been observed as under:

> "Under Art. 22, a person who is arrested for whatever reason, gets three independent rights. The first is the right to be told the reasons for the arrest as soon as an arrest's made, the second is the right to be produced before a Magistrate within 24 hours and the third is right to be defended by advocate of his choice. When the Constitution lays down in absolute terms a right to be defended by one' own counsel, it cannot be taken away by ordinary law, and, it is not sufficient to say that the accused was so deprived, of the right, did not stand in danger of losing his personal liberty."

29. In the case of State vs. Mohd. Afzal & Ors. 2003 IV AD (Cr.) 205, the Hon'ble Delhi High Court addressed the issue of Fundamental Right of the accused to be represented by a counsel from the point of his arrest especially in a case involving capital punishment. The case of US Supreme Court in Strickland vs. Washington 466, U.S. 688 (1984) was cited before the Delhi High Court and the ld. Counsel for the accused in that case had argued that the law required a conviction to be set aside where counsel's assistance was not provided or was ineffective. Hon'ble Delhi High Court took note of the observations in the said case as well as the Rulings of the Hon'ble Supreme Court in the case of (1991) 1 SCC 286 Kishore Chand vs. State of Himachal Pradesh, (1931) 1 SCC 627 Khatri & Ors. vs. State of Bihar & Ors., (1980) 1 SCC 108 Hussainara Khatoon & Ors. vs. Home Secretary, State of Bihar, (1983) 3 SCC 307 Rajan Dwivedi vs. Union of India, (1978) 3 SCC 544 Madhav Hayawadanrao Hoskot vs. State of Maharashtra while dealing with this issue. It was however observed that from hindsight it is easy to pick wholes in the cross examination conducted but applying the test in Strickland's case, it cannot be said that it was the constructive denial of the counsels to accused Mohd. Afzal. The observations of the Hon'ble Delhi High Court were met with the approval by Hon'ble Supreme Court when the matter was decided by the Hon'ble Apex Court by its ruling titled as State vs. Navjot Sandhu & Ors. AIR 2005 SC 3820.

30. The Hon'ble Apex Court, after considering the facts of the case, nutshell that "we do not think that the court should dislodge the Counsel and go on searching for some other counsel to the liking of the accused. The right to legal aid cannot be taken thus far." While relying upon the ruling in the case Strickland's (supra), the Hon'ble Supreme Court observed that scrutiny of performance of a counsel who has conducted trial should be highly deferential.

xxxxx

34. It may be noted that the recall of IO and prosecutrix has been sought on the ground besides others, that she has to be questioned as to why she did not give her sim of her mobile to the IO and why the IO did not ask her for the same. Similarly, it has been submitted that the accused though admitted his potency report but has not admitted the time and process of the potency test as stated by the IO and thus the 10 needs to be recalled. Further, SI Sandeep is required to be recalled for cross examination in order to cross examine him with regard to the document given by the Transporter, who brought the cab in question from Mathura to Delhi. It may also be mentioned that in his zest to seek recall of all the prosecution witnesses, the applicant has also sought recall of one lady constable Manju, who as per record was not even examined as a prosecution witness.

35. It is further necessary to mention that on 04/02/2015 accused had moved an application u/s 311 Cr.P.C., thereby seeking recall of prosecutrix PW-2 and PW-23 Ayush Dabas. The application was dismissed. The present application has been filed now seeking recall of all PWs, including PW-2 and PW-23, while the order dated 04/02/2015 still remains unchallenged.

36. The application under consideration is thus nothing but an attempt to protract the trial and in fact seek an entire retrial. There is no change in circumstances except change of Counsel, which, to my mind, is no ground to allow the application. Interestingly, in para 17 of the application, it has been contended that the present counsel is not aware of the scheme and design of defence of the previous counsel and is thus at a loss and disadvantageous position to defend the accused and for conducting the case as per his acumen and legal expertise, the recalling of PWs are necessary. It may be noted that the defence of an under trial is not expected to vary from counsel to counsel and irrespective of change of counsel, an under trial is expected to have a single and true line of defence which cannot change every time he changes a counsel. Nor can a new counsel defend the case of such an under trial as per the new scheme and design in accordance with his acumen and legal expertise."

23. The High Court made a reference to the Criminal Law Amendment Act, 2013 providing for trial relating to offences under Section 376 and other specified offences being completed within two months from the date of filing of the charge sheet. Reference has also been made to circular issued by the Delhi High Court drawing the attention of the judicial officers to the mandate of speedy disposal of session cases. The High Court also referred to the decisions of this Court in Lt. Col. S.J. Chaudhary vs. State (Delhi Administration)[43], State of U.P. vs. Shambhu Nath Singh[44], Akil @ Javed vs. State of NCT of Delhi[45] and Vinod Kumar vs. State of Punjab[46], requiring the trials to be conducted on day to day basis keeping in view the mandate of Section 309 Cr.P.C.

24. After rejecting the plea of the accused that there was any infirmity in the conduct of the trial after detailed reference to the proceedings, the High Court concluded:

> "31. The aforesaid narration of proceedings before the learned Additional Sessions Judge clearly reflects that while posting the matter on day to day basis, the Court's only endeavour was to comply with the provisions of Section 309 Cr.P.C. as far as

possible while ensuring the right of the accused to a fair trial. The earlier counsel had been seeking adjournment for consulting the petitioner which was duly granted and under these circumstances the submission of learned counsel for the petitioner that justice hurried is justice buried, deserves outright rejection."

25. It was then observed that competence of a counsel was a subjective matter and plea of incompetence of the counsel could not be easily accepted. It was observed :

"32. The other submission of learned counsel for the petitioner that Sh. Alok Dubey, Advocate was not competent to appear as an Advocate inasmuch as he had not even undergone screening test as required by Bar Council of Delhi Rules and was not issued practice certificate, this submission is not fortified by any record. Much was said against the competency of the earlier counsel representing the petitioner. However, learned standing counsel for the State was right in submitting that competency of an Advocate is a subjective issue which should not have been attacked behind the back of the concerned Advocate. ... ...

33. Learned Additional Standing counsel for the State has furnished details of the number of questions put by the earlier counsel to the prosecution witnesses for showing the performance of the earlier counsel.

Moreover, one cannot lose sight of the fact that the Advocate was appointed by the petitioner of his own choice."

26. Inspite of the High Court not having found any fault in the conduct of the proceedings, it held that "although recalling of all the prosecution witnesses is not necessary" recall of certain witnesses was necessary for the reasons given in para 15 (a) to (xx) on the application of the accused. It was observed that the accused was in custody and if he adopted delaying tactics it is only he who would suffer.

27. It is difficult to approve the view taken by the High Court. Undoubtedly, fair trial is the objective and it is the duty of the court to ensure such fairness. Width of power under Section 311 Cr.P.C. is beyond any doubt. Not a single specific reason has been assigned by the High Court as to how in the present case recall of as many as 13 witnesses was necessary as directed in the impugned order. No fault has been found with the reasoning of the order of the trial court. The High Court rejected on merits the only two reasons pressed before it that the trial was hurried and the counsel was not competent. In the face of rejecting these grounds, without considering the hardship to the witnesses, undue delay in the trial, and without any other cogent reason, allowing recall merely on the observation that it is only the accused who will suffer by the delay as he was in custody could, in the circumstances, be hardly accepted as valid or serving the ends of justice. It is not only matter of delay but also of harassment for the witnesses to be recalled which could not be justified on the ground that the accused was in custody and that he would only suffer by prolonging of the proceedings. Certainly recall could be permitted if essential for the just decision but not on such consideration as has been adopted in the present case. 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.

28. It will also be pertinent to mention that power of judicial superintendence under Article 227 of the Constitution and under Section 482 Cr.P.C. has to be exercised sparingly when there is patent error or gross injustice in the view taken by a subordinate court[47]*. A finding to this effect has to be supported by reasons. In the present case, the High Court has allowed the prayer of the accused, even while finding no error in the view taken by the trial court, merely by saying that exercise of power was required for granting fair and proper opportunity to the accused. No reasons have been recorded in support of this observation. On the contrary, the view taken by the trial court rejecting the stand of the accused has been affirmed. Thus, the conclusion appears to be inconsistent with the reasons in the impugned order.

29. We may now sum up our reasons for disapproving the view of the High Court in the present case:

> (i) The trial court and the High Court held that the accused had appointed counsel of his choice. He was facing trial in other cases also.

The earlier counsel were given due opportunity and had duly conducted cross- examination. They were under no handicap;

(ii) No finding could be recorded that the counsel appointed by the accused were incompetent particularly at back of such counsel;

(iiii) Expeditious trial in a heinous offence as is alleged in the present case is in the interests of justice;

(iv) The trial Court as well as the High Court rejected the reasons for recall of the witnesses;

(v) The Court has to keep in mind not only the need for giving fair opportunity to the accused but also the need for ensuring that the victim of the crime is not unduly harassed;

(vi) Mere fact that the accused was in custody and that he will suffer by the delay could be no consideration for allowing recall of witnesses, particularly at the fag end of the trial;

(vii) Mere change of counsel cannot be ground to recall the witnesses;

(viii) There is no basis for holding that any prejudice will be caused to the accused unless the witnesses are recalled;

(ix) The High Court has not rejected the reasons given by the trial court nor given any justification for permitting recall of the witnesses except for making general observations that recall was necessary for ensuring fair trial. This observation is contrary to the reasoning of the High Court in dealing with the grounds for recall, i.e., denial of fair opportunity on account of incompetence of earlier counsel or on account of expeditious proceedings;

(x) There is neither any patent error in the approach adopted by the trial court rejecting the prayer for recall nor any clear injustice if such prayer is not granted.

30. Accordingly, we allow these appeals, set aside the impugned order passed by the High Court and dismiss the application for recall.

... ... J . [J A G D I S H S I N G H K H E H A R] .....J. [ADARSH KUMAR GOEL] NEW DELHI SEPTEMBER 10, 2015.

---

[1] (2013) 14 SCC 461
[2] (2014) 13 SCC 59
[3] (2012) 7 SCC 56
[4] (1996) 2 SCC 384
[5] (2014) 8 SCC 916
[6] (2000) 10 SCC 430
[7] (2012) 8 SCC 263
[8] (2002) 5 SCC 234
[9] (2009) 6 SCC 767
[10] (2000) 5 SCC 668
[11] (2002) 4 SCC 578
[12] (1995) 1 SCC 14
[13] (2013) 5 SCC 741
[14] (1991) Supp. 1 SCC 271
[15] (2004) 4 SCC 158
[16] (2013) 16 SCC 173

[17] Crl.M.C.8479/2006 & Crl.M.A. 14359/2006, decided on 20.02.2008 (Delhi H.C.) [18] (2007) 11 SCC 191 [19] (2006) 9 SCC 386 [20] (1980) 1 SCC 81 [21] (2011) 8 SCC 136 [22] (1991) 1 SCC 286 [23] (2009) 16 SCC 785 [24] (1981) 3 SCC 191 [25] (1997) 6 SCC 162 [26] (2010) 10 SCC 677 [27] (2012) 5 SCC 370 [28] (1966) 1 SCR 178 [29] (1967) 3 SCR 415 [30] (1974) 4 SCC 186 [31] (2002) 1 SCC 655 [32] (2005) 1 SCC 115 [33] (2006) 7 SCC 529 [34] (2007) 11 SCC 211 [35] (2008) 3 SCC 602 [36] (2008) 11 SCC 108 [37] (2008) 15 SCC 652 [38] (2012) 3 SCC 387 [39] AIR (2012) SC 750 [40] (2014) 2 SCC 401 [41] (2005) 11 SCC 600 [42] (1989) 4 SCC 436 [43] (1984) 1 SCC 722 [44] (2001) 4 SCC 667 [45] (2013) 7 SCC 125 [46] (2015) 1 SCALE 542 [47] 47* Jasbir Singh vs. State of Punjab (2006) 8 SCC 294, prs. 10 to 14