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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**% *Date of Decision: 03.04.2025*+ **CRL.M.C. 2248/2025**

MR. VIDHAN

.....Petitioner

Through: Mr. Rohit Sahrawat, Mr.  
Deepanshu. Goswami and Mr.  
Kirti Chauhan, Advocates

versus

STATE OF NCT OF DELHI

.....Respondent

Through: Mr. Naresh Kumar Chahar,  
APP for the State with SI  
Dinesh Kumar PS NIA.**CORAM:****HON'BLE DR. JUSTICE SWARANA KANTA SHARMA****JUDGMENT****DR. SWARANA KANTA SHARMA, J (ORAL)****CRL.M.A. 10042/2025 (exemption)**

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

**CRL.M.C. 2248/2025 & CRL.M.A. 10041/2025**

3. The petitioner, by way of this petition, has assailed the order dated 19.03.2025 [hereafter '*impugned order*'], passed by the learned Additional Sessions Judge (POCSO), North, Rohini Court, Delhi [hereafter '*Trial Court*']*vide* which the application preferred by the petitioner under Section 348 of the Bharatiya Nagarik Suraksha Sanhita, 2023 [hereafter '*BNSS*']/ Section 311 of the Code of



Criminal Procedure, 1973 [hereafter '*Cr.PC*'] has been dismissed.

4. Issue notice. Mr. Naresh Kumar Chahar, the learned APP accepts notice on behalf of the State.

5. Briefly stated, the facts of the present case are that on 24.06.2023, the complainant 'S' i.e. victim's mother had made a PCR vide DD No. 31A, which was received at Police Station Narela Industrial Area, Delhi. Thereafter, the statement of the victim 'K' had been recorded by the police officials, in front of her mother 'S' and a counsellor. The victim disclosed that she used to live with her mother, brother and her step-father, and her mother used to work as a cart picker and her father worked as a loader. She alleged that when her mother used to go out for work, her step-father used to touch her inappropriately, on her private parts, and this had happened on some occasions in last 1-2 months. He had also allegedly threatened her not to disclose this to her mother or else, he would kill her mother. The victim further stated that four days ago, the victim had disclosed these incidents to her mother, but she had not initially believed her, till she herself saw the accused committing such acts last night, after which the mother had called the police. On the basis of the above statement, the present FIR was registered for offence under Sections 323/354/376 of the Indian Penal Code, 1860 [hereafter '*IPC*'] and Section 6/8 of the Protection of Children from Sexual Offences Act, 2012 [hereafter '*POCSO Act*'].

6. During the course of investigation, the medical examination of the victim was conducted. On 17.08.2023, chargesheet was filed



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against the accused i.e. petitioner herein. Thereafter, the statements of the victim 'K' (PW-1) and her mother 'S' (PW-2) were recorded before the learned Trial Court on 01.02.2024 and 10.05.2024, respectively.

7. Eventually, an application under Section 348 of BNSS/ Section 311 of Cr.P.C. was filed by the petitioner, seeking recall of PW-1 and PW-2 for their cross-examination. The said application was dismissed by the learned Trial Court, *vide* the impugned order, after recording the following observations:

“...Considering the facts and circumstances of the case and that sufficient opportunity has already been granted and availed by Ld. Legal Aid Counsel for the accused by cross- examining both the witnesses i.e. victim 'K' (PW-1) and her mother Smt. 'S' (PW-2) at length and also keeping in view the fact that granting further opportunity to the accused to cross- examine these witnesses would cause unnecessary harassment to the witnesses, I am not inclined to grant further opportunity to cross-examine the victim and her mother. ***The application is accordingly dismissed and disposed of.***”

The matter is at the stage of recording the statement of accused under Section 313 Cr.P.C.

Adjournment sought by Ld. Counsel for accused for recording the statement of accused under Section 313 Cr.P.C.

At request, put up for recording the statement of accused under Section 313 Cr.P.C. on **01.04.2025...**”

Copy of this order be given dasti to the Ld. Counsel for accused, as prayed for.”

8. The learned counsel appearing on behalf of the petitioner argues that the victim 'K' is the step-daughter of the accused, and the mother 'S' is also a material witness in the present case. It is argued



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that the cross-examination of the victim and her mother, conducted earlier by the learned legal aid counsel, did not delve into the pertinent details necessary for the defence of the accused, and rather was only formal in nature and as it did not explore upon crucial aspects which could substantially aid the defence of the accused. It is contended that the victim, being the step-daughter of the accused, may have been influenced or manipulated by her mother in making the allegations against the accused. It is further submitted that the testimonies of both the victim and her mother require further scrutiny, as it is essential to ascertain the truth of the allegations and the credibility of their statements. Therefore, it is contended that recalling the victim and her mother for further cross-examination is necessary to ensure that the accused is given a fair opportunity to challenge the credibility of the witnesses and to effectively present his defence before the Court in the face of such serious allegations. It is thus prayed that the present petition be allowed.

9. The learned APP for the State, on the other hand, argues that the victim as well as her mother, who have been examined as PW-1 and PW-2, respectively, were cross-examined at length by the learned counsel for the accused/petitioner herein and the said witnesses cannot be re-called only on the ground that the new counsel appearing for the accused does not find the cross-examination satisfactory. It is also stated that as per Section 33(5) of POCSO Act, the child witness ought not to be summoned repeatedly for the purpose of cross-examination. Thus, it is prayed that the present



petition be dismissed and impugned order be upheld.

10. This Court has **heard** arguments advanced on behalf of both the parties and has perused the material available on record.

11. At the outset, it will be necessary to refer to Section 311 of Cr.PC, which provides 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. The law, insofar as Section 311 of Cr.P.C. or the new Section 348 of BNSS, is concerned, is well-settled by way of catena of judicial precedents. A Court has wide 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. A duty has also 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. However, it is also to be kept in mind that such a power of recall or re-examination of witness is not a matter of course and power under Section 311 of Cr.P.C. has to be exercised judiciously, with caution and circumspection, and not arbitrarily or capriciously, on the basis of facts and circumstances of each case, and the discretionary power has to be balanced carefully



with considerations such as uncalled for hardship to the witnesses and uncalled for delay in trial.

13. At this stage, it is also material to note that Section 33(5) of POCSO Act puts an embargo on the Special Courts to repeatedly call the victim to testify in the Court. The said provision reads as under:

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

14. The Constitutional Courts however have held that the right of an accused under Section 311 of Cr.P.C. and right of a victim under Section 33(5) of POCSO Act have to be balanced carefully, essentially on the basis of peculiar facts and circumstances of each case.

15. This Bench in *Rakesh v. State of NCT of Delhi: 2023 SCC OnLine Del 4774*, in a petition seeking an identical prayer, had observed that balance of rights needs to be maintained under Section 33(5) of POCSO Act and Section 311 of Cr.P.C. and the discretion vested in the Court to re-call a witness needs to be exercised with caution and sensitivity, especially in cases of sexual assault. The observations, relevant for the purpose of this case, are extracted as under:

“10. While the bar under Section 33(5) POCSO Act may not be absolute and balance of rights needs to be maintained under Section 33(5) of POCSO Act and Section 311 of Cr. P.C., at the same time, the Court's discretion in exercising its power to re- summon a witness for cross-examination has to be exercised with circumspection, caution and utmost sensitivity. The crucial word used in Section 33(5) of POCSO Act is "called repeatedly".



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This Section thus has to be interpreted to balance and applied with the right under Section 311 Cr. P.C. of accused and right to fair trial of an accused depending on facts and circumstances of each case.

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19. The trial in this case has already been prolonged to seven years and the application under Section 311 Cr.P.C. was filed after almost six years of recording of testimony of the witnesses concerned. All this while, for the six years, when the testimony of other witnesses was being recorded, there was no whisper from the side of the petitioner/accused to recall the present witnesses. The present revision petition as well as application filed under Section 311 Cr. P.C. before the learned Trial Court thus seems to be an attempt to delay the trial, which is already delayed.

20. Learned counsel for the petitioner also argued that in case the present petition is not allowed, it will amount to violation of right of fair trial to the accused/petitioner.

21. While this Court cannot dispute that the right to fair trial is a crucial and precious right of the accused, so is the complainant's right to a fair trial which requires that they should not unnecessarily be harassed, especially in the cases of sexual assault-. This Court notes that at times, people may not even report such cases of sexual assault of children of tender age as in this case, she was only seven years of age for fear of being harassed by continuous visits to the Courts or fear of embarrassment and traumatic cross-examination. It would have been a different decision in case the record would have revealed that the witnesses' cross-examination consisted of only asking few formal questions and not of the incident, but in the present case, to the contrary, as already observed above, the cross-examination had been conducted at length and all relevant aspects had been covered by the previous counsel for the petitioner. In view of the same, though the accused has to be granted and ensured a fair trial, it cannot mean being afforded unjustified repeated opportunities of cross-examination in every case to indicate fair trial. The case of an accused has to be meritorious where a relief as prayed for in the present case, can be granted.

22. The other contention that in case the present application is not allowed, the case may end into conviction is also without merit since, at the cost of repetition, it is to be taken note of that the previous counsel has cross-examined the witnesses at length



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and only due to apprehension or fear of the accused that cross-examination did not result in answers that would have helped him, cannot be a ground to recall the witnesses after six years of conclusion of their testimony.

23. While balancing the right of the accused to a fair trial and upholding the intent of the legislation, the courts are duty bound to remain sensitive to the plight of the seven-year-old sexual assault victim. She and her mother cannot be recalled to relive the entire trauma only because the new counsel is dissatisfied with the elaborate cross-examination of these witnesses. Thus, this Court also has a duty to ensure an expeditious and fair trial, preventing misuse of such applications for delaying the proceedings before the learned Trial Court...”

16. Coming to the facts of the given case, this Court notes that the victim PW-1 was examined on 01.02.2024 and her mother PW-2 was examined on 10.05.2024 before the learned Trial Court. The sole ground on which the learned counsel for the petitioner/accused seeks re-calling of the said witnesses is - that the learned Legal Aid Counsel at that point of time did not conduct cross-examination at length, and some questions relevant for the defence of the accused were not put to the witnesses. The learned counsel also argued before this Court that the contradictions between the statement of the victim and her mother have to be highlighted by way of further cross-examination.

17. To appreciate these contentions, this Court has perused the testimonies of PW-1 and PW-2, which have been placed on record. A perusal of the same reveals that the concerned legal aid counsel for the accused had, in fact, cross-examined both the witnesses at length. The learned counsel had put questions, such as whether the victim was deposing on the asking of her mother and whether the statements



given earlier were also on the asking of her mother, to the victim PW-1, in addition to certain other questions. As far as PW-2 is concerned, her cross-examination runs into two pages and she has cross-examined in detail. Thus, the contention that the previous counsel had not put relevant questions to the witnesses during their cross-examination is without any merit.

18. It is also pertinent to note that the learned Trial Court, while recording the testimony of the victim child, has mentioned at the end that:

“Considering the tender age of the child witness, suggestions are not being allowed to put to her. However, contradictions, if any, in the statement of the child witness, shall be given due care and attention at the time of final arguments”

19. Thus, the learned Trial Court had, on its own, at the time of recording of testimony of the victim had given a finding that since the Court, considering the tender age of the victim, had not permitted the learned LAC to give certain suggestions, the contradictions in the statement of victim child, if any, would be appreciated at the time of final arguments. In view of the same, the contention of the learned counsel that further cross-examination is to be conducted to highlight the contradictions in the statements of witnesses is also unmerited.

20. The case is now at the stage of recording statement of accused under Section 313 of Cr.P.C. It has also been held by the Hon’ble Supreme Court in *State (NCT of Delhi) v. Shiv Kumar Yadav and Anr: (2016) 2 SCC 402* that mere incompetence or change of counsel cannot be ground for recall of witness under Section 311 of Cr.P.C.



and that it is not only matter of delay but also of harassment for witnesses to be recalled which could not be justified. In this Court's opinion, these observations would apply with greater force in case such as present one, where one of the witnesses sought to be recalled is a minor girl, who is a victim of sexual offence, allegedly at the hands of her step-father i.e. the petitioner herein. While balancing the accused's right to a fair trial, the Court must remain mindful of the trauma suffered by the victim of sexual assault. A minor victim cannot be compelled to relive the ordeal merely because the new defence counsel is dissatisfied with the cross-examination conducted by previous counsel.

21. Therefore, considering the mandate of Section 311 of Cr.P.C. read with Section 33(5) of POCSO Act, this Court finds no ground to direct re-call of PW-1 and PW-2 for their cross-examination, which has already been conducted in detail by the previous counsel.

22. The impugned order suffers from no infirmity, and accordingly, the present petition alongwith pending application, if any, stands dismissed.

23. It is, however, clarified that nothing expressed herein above shall tantamount to an expression of opinion on merits of the case.

24. The judgment be uploaded on the website forthwith.

**DR. SWARANA KANTA SHARMA, J**

**APRIL 3, 2025/zp**