

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

+ CRL.M.C. 3464/2009

Date or Order: 12th January 2010

NOOR JAHAN Petitioner
! Through: Muhammad Arif, Advocate

versus

\$ STATE OF NCT OF DELHI Respondent
^ Through: Mr.Jaideep Malik for State.

* CORAM:
HON'BLE MR. JUSTICE V.K. JAIN

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

: **V.K. JAIN, J. (Oral)**

This is a petition under Section 482 Cr.P.C. challenging the order dated 7.8.2009 whereby the application filed by the petitioner under Section 311 of Cr.P.C. for recalling the prosecutrix(PW-9) for further cross-examination was dismissed.

2. The impugned order has been challenged primarily on the ground that the main counsel was not present when PW-5 to PW-11 were examined on 22nd of January, 2009 and, therefore, they were cross-examined by the junior/associate Shri Gaurav Vashisth, who being less experienced and due to lack of knowledge could not put

material questions to the prosecutrix.

3. A perusal of the record of the trial court would show that the prosecutrix was examined on 22nd of January, 2009. On that day the petitioner was represented by her counsel Shri Gaurav Vashisht and Shri R.K.Kochar. A perusal of the cross-examination of the prosecutrix would show that she was cross-examined by Shri Gaurav Vashisth, Advcoate. Thus, not only Shri Gaurav Vashisht who actually cross-examined the prosecutrix, Shri R.K.Kochar, senior counsel representing the petitioner was also present at the time of cross-examination of the witness. It is submitted by the learned counsel for the petitioner that in fact Mr.Kochar was not present in the trial court on 22nd of January, 2009. Admittedly no application was filed by the petitioner before the trial court for correction of the proceedings dated 22.1.2009 on the ground that Shri R.K.Kochar, Advocate was not present in the court on that date and that his presence has wrongly been recorded in the order there. In the absence of such an application, the record of the proceedings has to be taken as accurate and the petitioner cannot be permitted to say that Shri R.K.Kochar, Advocate was actually not present in the court on that date. It is not open to a party to dispute the correction of the judicial proceedings before a Superior Court, without first moving the court concerned, by bringing the inaccuracy to its knowledge and seeking rectification of the error, which according to him had crept into the proceedings. The Superior Court does not know what had transpired and who was present before the Court below, on a

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particular date. This fact being in the knowledge of concerned Court alone, the discrepancy, if any, in the proceedings, should be got removed when the matter is still fresh in the memory of the Judge who recorded the proceedings. Unless it is done, the record of judicial proceedings remains sacrosanct and cannot be disputed as regards the facts stated therein.

4. A perusal of the cross-examination of the prosecutrix shows that she was cross-examined by Shri Gaurav Vashisht after court questions had been put to the witness. No question proposed to be put to the witness was rejected by the trial court. Thus, it cannot be said that the petitioner was denied adequate opportunity to cross-examine the prosecutrix who is a young girl studying in 3rd standard at the time of her cross-examination in court. The application does not specify any material aspect of the case left out in the cross-examination of the witness nor does it indicate what questions are proposed to be put to her. An application for recall of a witness for further cross-examination, without any limitation, cannot be treated at par with an application seeking further cross-examination on a material aspect inadvertently left out or an application to recall him on account of discovery of new facts which were not in the knowledge of the party at the time the witness was initially cross-examined.

5. No doubt, the power of the Court under Section 311 of the Code of Criminal Procedure are wide enough to recall a witness at any stage, but, the discretion vested in the Court being a judicial discretion, needs

to be exercised on sound legal principles, and a witness cannot be recalled merely at the asking of a party. We need to appreciate that the witness coming to depose before the Court, particularly in a criminal trial is doing a public service to the Criminal Justice System. While the Judges as well as the lawyers are compensated for the time they devote to the cases and the party to a case has a personal interest in the litigation, it is the witness alone who has no personal interest or stake in the litigation and therefore, is entitled to receive due respect and protection for the service he renders to the society, by coming forward to depose before a criminal Court. We cannot deny that a common man is reluctant to be a witness, particularly in a criminal case and one major reason behind such reluctance is the innumerable visits he has to undertake, to attend police stations and Courts at the cost of considerable inconvenience to him, without any commensurate benefit. The Courts, therefore, need to realize and appreciate the inconvenience that is caused to a witness if he is repeatedly summoned to suit the convenience or interest of a party to the litigation. Therefore, unless sufficient cause is shown and the Court feels that the interest of justice would suffer irreparably if the witness is not recalled, it would not be appropriate to re-summon the witness who has already been duly examined by the parties to the litigation. This is more so when the witness happens to be a young girl, who is victim of a serious crime such as rape and who in our society is otherwise reluctant to attend the Court. The Courts,

therefore, need to be sensitive to the feeling of such a witness and she should not be recalled unless the failure to recall her is likely to result in serious miscarriage of justice.

6. Since the request is not confined to a limited cross-examination and if allowed, would enable the petitioner to go for an unrestricted and full-fledged de novo cross-examination of the witness, which cannot be allowed. The provisions of Section 311 of the Cr.P.C. cannot be used to fill up the gaps or make up the deficiencies left in the cross-examination of the witness conducted by a counsel. If witnesses are allowed to be recalled on such a ground alone, there will be no finality to their examination. In fact, in a given case, a party may even win over a witness after his cross-examination has been concluded and then seek his recall on the pretext that the counsel who cross-examined him was not well versed in law or was not adequately briefed on facts. The course, which may possibly result in such frightening consequences cannot and should not be adopted.

For the reasons given above, I find no merits in the petition and the same is hereby dismissed.

**V.K. JAIN
(JUDGE)**

**JANUARY 8, 2010
Rs/bg**