2026:AHC:7109

AFR

HIGH COURT OF JUDICATURE AT ALLAHABAD

APPLICATION U/S 528 BNSS No. - 49947 of 2025

Smt. Neelam And Another

.....Applicant(s)

Versus

State Of U.P. And 3 Others

.....Opposite Party(s)

Counsel for Applicant(s)	:	Ajeet Kumar Srivastava, Arvind Kumar Srivastava, Neelam Srivastava, Satyendra Kumar Srivastava
Counsel for Opposite Party(s)	:	G.A.

Court No. - 81

HON'BLE VIVEK KUMAR SINGH, J.

1. Heard Shri Arvind Kumar Srivastava, the learned counsel for the applicants, Shri Akhilesh Kumar Mishra, the learned counsel appearing for respondent no.2 and Shri Mohd. Afzal, the learned counsel for the State and perused the record.

2. The present application has been filed by the applicants challenging the order dated 16.10.2025, passed by the Additional Sessions Judge/Special Judge (POCSO) Act, Sant Kabir Nagar in S.S.T. No.0071 of 2018 (State of U.P. vs. Neelam), on an application preferred by the accused applicants under Section 348 of BNSS praying herein to recall the victim/PW-2/opposite party no.3 for further cross examination.

3. The brief facts of the case are to the effect that a first information report was lodged by the informant/opposite party no.2 on 21.12.2017 in respect of incident dated 15.12.20217, bearing Case crime no.1888 of 2017, under Section 363, 366, 120B IPC and Section 7/8 POCSO Act, Police Station Bakhira, District Sant Kabir Nagar. The Investigating Officer after due investigation submitted chargesheet in this case on 27.01.2018, under Section 363, 366, 120B IPC and Section 16/17 POCSO Act and once the statement of the victim was recorded under Sections 161 and 164 Cr.P.C. the trial court took cognizance of offence and during the course of trial

charges were framed. The accused pleaded not guilty and claimed to be tried.

4. The first informant was examined in the trial court as PW-1. Thereafter the victim was examined as PW-2 on 26.04.2019 but due to paucity of time her cross-examination was continued for 10.05.2019 and she was cross-examined at length. Thereafter the applicant Neelam moved an application under Section 348 BNSS and objection was filed by the learned ADGC on 04.10.2025. Both parties were heard by the learned trial court and passed the impugned order dated 16.10.2025 whereby the application filed by the applicant Neelam was dismissed.

5. In the aforesaid background of the case, the present application under section 528 BNSS has been moved by the applicants-accused.

6. The learned counsel for the applicants submits that one more opportunity be granted to the applicants for cross-examination of the victim and the learned Trial Court had committed gross illegality in rejecting the application vide order dated 16.10.2025. The order impugned is against the principle settled by the Hon'ble Apex Court. As such interference by this Court is required in this matter.

7. The learned AGA as well as the learned counsel appearing for the opposite party no.2 have vehemently opposed the application and submitted that the application under section 348 BNSS was moved with the sole intention to delay the trial which is impermissible and in the circumstances of the case, the application has rightly been rejected by the learned trial court. The application for recalling of the witness has been moved after about six years and the delay has not been properly explained by the applicants. The victim was examined on 10.05.2019 and the application was moved in the year 2025. All the witness of facts have been examined in the trial court and as per Section 33(5) of POCSO Act, 2012, the child witness would not be called repeatedly to testify in the court.

8. I have considered the submissions advanced by the learned counsel for the parties and perused the records as well as impugned order dated 16.10.2025 passed by the learned Trial Court in the aforesaid case.

9. The principle related to recall of the witnesses under section 311 of Cr.P.C. (corresponding Section-348 BNSS) has been settled by Hon'ble Apex Court in the case (s) of **Mohd. Khalid Versus State of West Bengal, (2002) 7 SCC 334; Hanuman Prasad (Supra), Natasha Singh vs. CBI, (2013) 5 SCC 741:(2013) 4 SCC (Cri) 828:2013 SCC OnLine SC 444; Rajaram Prasad Yadav vs. State of Bihar and another, AIR 2013 SC 3081; State (NCT of Delhi) v. Shiv Kumar Yadav, (2016) 2 SCC 402; State of Haryana vs. Ram Mehar and others, (2016) 8 SCC 762; Swapan Kumar Chatterjee vs. Central Bureau of Investigation, (2019) 14 SCC 328; Varsha Garg vs. State of Madhya Pradesh and Others, 2022 SCC OnLine SC 986** and also by this Court in **Application under Section 482 Cr.P.C. No. 274 of 2022 (Ram Nayak Singh vs. State of U.P. & Another).**

10. It is well settled by catena of decisions by the Hon'ble Apex Court that the power under Section 311 Cr.P.C. or Section 348 BNSS as the case may be, must be exercised with care, caution and circumspection and only for strong and valid reasons. The recall of a witness already examined should not be a matter of course and the discretion, given to the court in this regard has to be exercised judicially to prevent failure of justice. The object of the provision as a whole is to do justice not only from the point of view of the accused and the prosecution but also from the point of view of an orderly society.

11. The Court is fully conscious of the position that after all the trial is basically for the prisoners/accused and the Court should afford an opportunity to them in the fairest manner possible. At the same time, 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. Recalling of witnesses has to be applied on the basis of judicially established and accepted principles.

12. The above observations cannot be read as laying down any inflexible rule to routinely permit a recall on the ground that earlier correct facts could not be brought on record. 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.

13. The jurisdiction under Section 528 BNSS is extraordinary and it can be used only in such cases where there is gross injustice or clear abuse of process of law. It can not be used to help such a person who is not cooperating in fair trial. Such power cannot be invoked to harass the witness who has already been examined or for causing delay in the trial.

14. In the case of **Mohd. Khalid vs. State of West Bengal reported in (2002) 7 SCC 334**, the Hon'ble Apex Court observed as under:-

> *"9. We make it abundantly clear that if a witness is present in Court he must be examined on that day. The Court must know that most of the witnesses could attend the Court only at heavy cost to them, after keeping aside their own avocation. Certainly they incur suffering and loss of income. The meagre amount of bhatta (allowance) which a witness may be paid by the Court is generally a poor solace for the financial loss incurred by him. It is a said plight in the Trial Courts that witnesses who are called through summons or other processes stand at a doorstep from morning till evening only to be told at the end of the day that the case is adjourned to another day. This primitive practice must be reformed by every one provided the presiding officer concerned has a commitment towards duty. No sadistic pleasure, in seeing how other persons summoned by him as witnesses are standard on account of the dimension of his judicial powers, can be a persuading factor for granting such adjournments lavishly, that too in a casual manner."*

15. The relevant paragraphs of the judgment passed in the case of **State (NCT of Delhi) vs. Shiv Kumar Yadav reported in (2016) 2 SCC 402** are extracted hereunder:-

> *"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.

14. In ***Hoffman Andreas case [Hoffman Andreas v. Inspector of Customs, (2000) 10 SCC 430 : 2001 SCC (Cri) 1488]*** *, 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 the 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 : (SCC p. 432, para 6)*

> *"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. The 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 the 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 authorities concerned including the Law Commission and the Bar Council of India.

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 CrPC 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 CrPC has to be exercised sparingly when there is patent error or gross injustice in the view taken by a subordinate court [Jasbir Singh v. State of Punjab, (2006) 8 SCC 294 : (2006) 3 SCC (Cri) 470, paras 10 to

14] . 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 the back of such counsel;*
>
> *(iii) 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."

16. In the case of **Swapan Kumar Chatterjee (Supra)**, a note of caution was sounded and the same can be deduced from paragraphs 11 and 12 of the report, which are as under:-

"11. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has vide power under this section to even recall witnesses for re-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law.

12. Where the prosecution evidence has been closed long back and the reasons for non-examination of the witness earlier are not satisfactory, the summoning of the witness at belated stage would cause great prejudice to the accused and should not be allowed. Similarly, the court should not encourage the filing of successive applications for recall of a witness under this provision."

17. The power to summon material witnesses under Section 348 BNSS. which falls under Chapter XXVI containing the general provisions as to inquiries and trials has been held to confer a very wide power on the courts for summoning witnesses and accordingly the discretion conferred is to be exercised judiciously as wider the power the greater is the necessity for the application of judicial mind.

18. The power conferred has been held to be discretionary and is to enable the court to determine the truth after discovering all relevant facts and obtaining proper proof thereof to arrive at a just decision in the case. The power conferred under Section 348 BNSS is to be invoked by the court to meet the ends of justice, for strong and valid reasons and it is to be exercised with great caution and circumspection. The determinative factor in this regard would be whether the summoning or recalling of the witness is in fact, essential to the just decision of the case keeping in view that fair trial - which entails the interests of the accused, the victim and of the society - is the main object of the criminal procedure and the court is to ensure that such fairness is not hampered or threatened in any manner.

19. In **State (NCT of Delhi) vs. Shiv Kumar Yadav : (2016) 2 SCC 402** , it has been held that: -

> *"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 un-called for hardship to the witnesses and un-called for delay in the trial. Having regard to these considerations, there is no ground to justify the recall of witnesses already examined."*

20. In **Ratanlal vs. Prahlad Jat, (2017) 9 SCC 340**, it was held that: -

> *"17. In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 311 are enacted whereunder any court by exercising its discretionary authority at any stage of inquiry, trial or other proceeding can summon any person as witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute. The object of the provision as a whole is to do justice not only from the point of view of the accused and the prosecution but also from the point of view of an orderly society. This power is to be exercised only for strong and valid reasons and it should be exercised with caution and circumspection. Recall is not a matter of course and the discretion given to the court has to be exercised judicially to prevent failure of justice. Therefore, the reasons for exercising this power should be spelt out in the order."*

21. In the case of **Mishrilal and others vs.State of M. P. and others (2005) 10 SCC 701** while dealing with the case having more or less similar facts the Hon'ble Apex Court observed as under:-

> *"In our opinion, the procedure adopted by the Sessions Judge was not strictly in accordance with law. Once the witness was examined in-chief and cross- examined fully, such witness should not have been recalled and re-examined to deny the evidence he had already given before the court, even though that witness had given an inconsistent statement before any other court or forum subsequently. A witness could be confronted only with a previous statement made by him. At the time of examination of PW 2 Mokam Singh on 6.2.1991, there was no such previous statement and the defence counsel did not confront him with any statement alleged to have been made previously. This witness must have given some other version before the Juvenile Court for extraneous reasons and he should not have been given a further opportunity at a later stage to completely efface the evidence already given by him under oath. The courts have to follow the procedures strictly and cannot allow a witness to escape the legal action for giving false evidence before the court on mere explanation that he had given it under the pressure of the*

police or some other reason. Whenever the witness speaks falsehood in the court, and it is proved satisfactorily, the court should take a serious action against such witnesses."

22. In the case of **Yakub Ismailbhai Patel vs.State of Gujarat-AIR 2004 SC 4209**, in para 40 and 41 the Hon'ble Supreme Court observed as under :-

"40. Significantly this witness, later on filed an affidavit wherein he had sworn to the fact that whatever he had deposed before Court as PW-1 was not true and it was so done at the instance of Police.

41. The averments in the affidavits are rightly rejected by the High Court and also the Sessions Court. Once the witness is examined as a prosecution witness, he cannot be allowed to perjure himself by resiling from testimony given in Court on oath. It is pertinent to note that during the intervening period between giving of evidence as PW-1 and filing of affidavit in Court later he was in jail in a narcotic case and that the accused persons were also fellow inmates there"

23. In the case of **Nisar Khan alias Guddu and others vs. State of Uttaranchal (2006) 9 SCC 386** where an application was filed on behalf of the accused under Section 311 of the Cr.P.C. and witness was recalled. With regard to this fact the Honble Apex Court observed as under:

"We are of the view that no reasonable person properly instructed in law would allow an application filed by the accused to recall the eyewitnesses after a lapse of more than one year that too after the witnesses were examined, cross-examined and discharged."

24. It is important to state here that POCSO Act is a special legislation, which was enacted to protect children from sexual offences and for safeguarding interests and ensuring the well-being of the child at every stage of trial of offences under the Act. Section 33 of the POCSO Act provides for the procedure and powers of the Special Court and reads as under:

*"33. **Procedure and powers of Special Court.** - (1) A Special Court may take cognizance of any offence, without the Accused being committed to it*

for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts.

(2) The Special Public Prosecutor, or as the case may be, the counsel appearing for the Accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child.

(3) The Special Court may, if it considers necessary, permit frequent breaks for the child during the trial.

(4) The Special Court shall create a child-friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court.

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

(6) The Special Court shall not permit aggressive questioning or character assassination of the child and ensure that dignity of the child is maintained at all times during the trial.

(7) The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial..."

25. A bare perusal of Section 33(5) of the Act indicates that a duty is cast upon the Special Court to ensure that a child is not repeatedly called to give his/her testimony before the court. The legislative intent behind this provision is clear. It is to ensure that the child who has suffered a traumatic experience of sexual assault is not called time and again to testify about the same incident.

26. The Hon'ble Supreme Court in a recent judgment in the case of **Madhab Chandra Pradhan and Others vs. State of Odisha,** reported in **MANU/SC/1494/2024** has held that a child witness, who has already been examined and cross-examined at length, cannot be recalled to testify again in the Court. Such an application cannot be allowed mechanically, especially in trial of offences under the POCSO Act. The facts of the

present case are similar to the facts of the case of **Madhab Chandra Pradhan (supra)** case. Therefore, the application moved under Section 348 BNSS can not be allowed in view of the aforesaid judgment.

27. From perusal of the above case laws, it is apparent that a witnesses who has already been examined and cross-examined, cannot be recalled and re-examined to deny the evidence he has already given before the trial court and no opportunity at a later stage can be given to him to completely efface the evidence already given by him under oath.

28. Upon consideration of the aforesaid facts and also the settled law on the issue this Court does not find any illegality in the order impugned dated 16.10.2025. It is for the reason that in view of this Court the application under Section 348 BNSS was preferred by the applicants either to delay the trial or to win-over the victim, who has already been examined and cross-examined at length. The application under Section 348 BNSS was not a *bonafide* application and the same was filed after six years from the date of cross-examination of the victim. Therefore, the recall application was rightly rejected by the learned Trial Court vide order dated 16.10.2025. The learned Trial Court did not commit any illegality or irregularity in rejecting the application of the applicant.

29. The application under Section 528 BNSS lacks merit and is accordingly rejected.

30. No order as to cost.

31. The Registrar (Compliance) is directed to communicate this order to the Trial Court by the fastest mode through District Judge concerned.

(Vivek Kumar Singh,J.)

January 12, 2026
Nitendra