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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CRR No.1354 of 2017

Date of decision: May 11, 2017

Akshay Kumar @ Tonny

.....Petitioner

Versus

State of Haryana and another

.....Respondents

CORAM: HON'BLE MR. JUSTICE A.B. CHAUDHARI

Present: Mr. Ashish Naik, Advocate the petitioner.

Mr. A.S. Yadav, AAG Haryana.

Mr. S.K. Verma, Advocate
for respondent No.2-complainant.

A.B. CHAUDHARI, J (Oral)

Custody certificate filed by the learned State counsel today
in Court, is taken on record.

Rule. Heard with the consent of learned counsel for the
rival parties.

In a sessions trial arising out of FIR No.25 dated
18.01.2016, under section 302 read with Section 34 of the Indian penal
Code, 1860 (for short 'IPC'), registered at Police Station City Jind,
after the examination-in-chief and cross-examination of PW2-Malti
Devi, an application was filed under Section 311 of the Code of
Criminal Procedure, 1973 (for short 'Cr. P.C.') for recalling her for
further cross-examination. Application was opposed by the
prosecution on the ground that all the remaining witnesses were also

examined and the case was at the stage of 313 Cr. P.C. Trial Court heard the said application and vide order dated 05.04.2017 rejected the same on the the reasoned order stating therein that the accused had sufficient opportunity to cross-examine PW2-Malti Devi and the reasons given for recalling under Section 313 Cr. P.C. were not genuine. Following are the reasons recorded in Para 7 of the impugned order dated 05.04.2017:-

“7. I have duly considered the rival contentions of both the sides and perused the record. Malti Devi wife of Jogeshwar Parshad (deceased) who is eyewitness appeared as PW-2 in this case and after her examination, eight witnesses in prosecution evidence were examined. After completion of prosecution evidence, incriminating evidence were put to the accused on 20.02.2017, their statements under Section 13 Cr. P.C. recorded, accused also examined one witness namely Som Nath in defence. Present case is time bound by the Hon'ble High Court vide order dated 09.02.2017. The reason mentioned in the application for recalling PW-2 Malti Devi is that on 25.10.2016, defence counsel was not feeling well and not properly cross-examined the witness. The reason mentioned in the application is not tenable and seems to be taken afterthought, the witness could not be recalled on the ground as stated in the application. If the defence counsel was not feeling well, he could have requested for adjournment of case on that day, but he has not requested an adjournment on that day and PW-2 Malti Devi was cross-examined at length by the learned defence counsel. After a lapse of more than five months, present application is filed. This Court find no merit in the application in

hand.”

Learned counsel for the petitioner submitted that the perusal of the cross-examination of PW2-Malti Devi would show that the cross-examination was not made on the material points and therefore, upon rethought given to the examination-in-chief that was recorded, counsel for the accused came to the conclusion that it was necessary to cross-examine PW2-Malti Devi on vital points. He, therefore, submitted that the application should have been allowed by the trial Court.

Per contra, learned counsel for respondent No.2-complainant has vehemently opposed the petition and submitted that the petitioner had full opportunity and had in fact, cross-examined the witness at sufficient length and there is no need to allow the cross-examination over and again.

Before issuance of notice of motion, this Court had asked the counsel for the petitioner to deposit compensatory costs for the witness as the witness could be recorded only, subject to compensating her. Accordingly, learned counsel for the petitioner brought a demand draft in the name of respondent No.2-complainant. The demand draft was asked to be submitted by way of compensatory costs to the complainant whom the accused wanted to cross-examine again. The trial Court has, in Para 7 of its impugned order, given reason that after her cross-examination, 8 witnesses by the prosecution were examined; the statement under Section 313 Cr. P.C. was also recorded and incriminating part was put to the accused persons. The accused persons

had examined one defence witness by name Som Nath. The reason in the application for recalling the complainant was that since the defence counsel was not keeping well, the witness was not properly cross-examined. Trial Court found that it was the reason which was afterthought and therefore, rejected the application. It cannot be forgotten that the trial is the one for serious offence of murder under Section 302 of IPC. PW2-Malti Devi the star witness examined by the prosecution. It is true that the prosecution had examined 8 witnesses and one defence witness thereafter, but then reading of Section 311 Cr. P.C. does not prohibit recall of the witness under Section 311 Cr. P.C.

In the present case, learned counsel for the petitioner-accused submitted that the witness could not be cross-examined on material points and that is why, he wanted to cross-examine her further upon recall. In that view of the matter, I think since the petitioner is being prosecuted in a serious offence of murder, the cross-examination of witness on the material that left out would be essential and for a fair trial. At any rate, in so far as PW2-Malti Devi is concerned, care can be taken to extend protection to her and also by asking the learned Judge not to allow cross-examination on the material which has already been made and further not to allow any cross-examination that on irrelevant material or question. In that view of the matter, I think PW2-Malti Devi should be allowed to be cross-examined, subject to payment of compensatory costs in the sum of ₹50,000/- to her, which has been brought by the petitioner in the form of demand draft. The

original demand draft has been handed-over to learned counsel for respondent No.2-complainant by Reader today itself, for further being handed-over to complainant-Malti Devi. Receipt in this regard has been obtained on the photocopy of the demand draft and the same is marked as 'X' for identification. In the result, I make the following order:-

ORDER

- (i) CRR No.1354 of 2017 is allowed;
- (ii) Prayer for examination of only PW2-Malti Devi upon recall is allowed;
- (iii) The witness PW2-Malti Devi as well as accused shall appear before the learned trial Judge concerned tomorrow, i.e. 12.05.2017 for cross-examination. Counsel for the accused shall complete the cross-examination tomorrow, i.e. 12.05.2017 itself;
- (iv) Concerned SHO is directed to provide protection to PW2-Malti Devi throughout;
- (v) A photocopy of this order be given to the learned counsel for the petitioner under the signatures of the Bench Secretary.

(A.B. CHAUDHARI)
JUDGE

May 11, 2017

mahavir

Whether speaking/ reasoned: Yes/No

Whether Reportable: Yes/No