

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

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Decided on: 4th July, 2019

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W.P. (CRL.) 1387/2019

SURESH YADAV

..... Petitioner

Represented by: Mr.Lokesh Khanna, Advocate

versus

STATE AND OTHERS

..... Respondent

Represented by: Ms.Nandita Rao, ASC for the
State

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. By this petition, the petitioner, who is the complainant in case FIR No. 294/2013, under Sections 326-A/34 IPC registered at P.S. Punjabi Bagh challenges the order dated 8th February, 2019 whereby the learned Trial Court, on an application filed by the accused recalled the petitioner/complainant/victim for cross examination.

2. The case of the petitioner/complainant is that she is the victim of acid attack and despite having appeared on number of dates and having been examined and cross examined extensively, when the learned counsel for the accused was not present, her further cross examination was closed vide order dated 12th September, 2018, however, for no rhyme and reasons and simply to harass the victim, an application was filed by the accused under Section 311 CrPC to recall her for cross examination on the pretext that she

had to be confronted with certain photographs, which has been allowed by the impugned order.

3. Case of the accused/respondent No. 4, represented through his counsel, who had filed the application for recall of the petitioner is that the impugned order is a detailed and well reasoned order; one opportunity has been granted to the respondent for further cross examination of the petitioner by imposing heavy costs and confrontation of the relevant photographs to the victim/petitioner is necessary for the just decision of the case, the petitioner being the only material witness in the prosecution case.

4. A perusal of the order sheets of the learned Trial court reveals that, charge was framed against the respondent Nos. 2 to 5 for offence punishable under Section 326-A/34 IPC on 5th March, 2015 and the matter was listed for prosecution evidence on 30th April, 2015 when the petitioner was not served. On 30th April, 2015, thus, the petitioner was directed to be served through the Investigating Officer and was consequently present on 6th July, 2015, on which date, it was revealed that the FSL report was not on record and the case property had also not been brought. Thus, the Director, FSL was directed to expedite the report and matter was listed for 9th September, 2015. When the report of FSL was filed, the petitioner could not be present as her father had expired. On the next date i.e. 10th November, 2015, petitioner was present when her examination-in-chief was recorded. However, since the main counsel for the accused was not present, proxy counsel prayed for an adjournment and thus, her cross examination was deferred. On 2nd January, 2016, the petitioner could not be present as her son had met with an accident and thus, the recording of evidence was deferred for 15th March, 2016. On 15th March, 2016, when the complainant

was present thrice pass over was sought by the proxy counsel for the accused on the ground that main counsel was not present and hence, the matter was adjourned subject to cost of ₹ 2000/- imposed on the accused persons to be paid to the complainant. On the next date i.e. 30th May, 2016, petitioner was cross examined partly and her further cross examination was deferred on the request of learned counsel for the accused. Again on 8th September, 2016, petitioner was present for further cross examination. However, learned counsel for the accused sought an adjournment as the main counsel was down with viral fever. On 24th November, 2016, petitioner was again cross examined. However, further cross examination of her was deferred on the ground, learned defence counsel stated that the witness was required to be shown some photographs, which were not brought. Notice of presence for further cross examination was issued to the petitioner on 9th May, 2017 for 18th August, 2017 when she was present. However, the learned Presiding Officer was on leave. On 23rd November, 2017, the next date though not served with summons, the petitioner appeared, but could also not be cross examined as the learned proxy counsel for the accused sought an adjournment as the sister-in-law of the main counsel was ill and hospitalized. On 23rd February, 2018, again, the learned Presiding Officer was on leave and an application for exemption of the petitioner was also filed which was taken on record. On 29th May, 2018, an application for exemption was again filed on behalf of the petitioner duly supported by medical documents, which was allowed and she was bound down to appear on 12th September, 2018. On 12th September, 2018, petitioner was present for further cross examination, however, again an adjournment was sought on the ground that the main counsel was unwell

and suffering from viral fever. The adjournment was vehemently opposed by the State and it was stated that the petitioner was an acid attack victim and has been cross examined multiple occasions and it was deferred on 24th November, 2016 for only showing some photographs to the victim. Considering the circumstance and after going through the cross examination already conducted and also the fact that multiple and sufficient opportunities for further cross examination of the petitioner was granted, cross examination of the petitioner was closed and she was discharged.

5. On the next date i.e. 4th January, 2019, an application under Section 311 CrPC to recall the petitioner was filed before the learned Trial Court, which was allowed vide the impugned order dated 8th January, 2019. The main ground mentioned in the application seeking recall of the petitioner has been reproduced by the learned Trial Court in the impugned order as under:

“2. That one of the accused namely Sanjeev was not present on the last date of hearing i.e. 12.09.2018. He had given photographs to his counsel and other accused was not aware about this facts, so they failed to submit anything before this Hon’ble Court regarding photographs.

3. that it is very essential to show those photographs to the witness PW-3 Suresh Yadav to bring the truth before the Hon’ble Court and to cross examine her on the basis of those photographs and hence this application.

4. That main Counsel was not available on that day as he was not well as suffering from Vila Fever and no another opportunity given by this Hon’ble court to cross examine the witness due to absence of main counsel Hon’ble Court was pleased to give “Nil Opportunity”.”

6. Learned Trial Court vide the impugned order noted that the powers under Section 311 CrPC are discretionary and required to be exercised with

great care and caution, the object of the Section being to enable the Court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for the just and proper disposal of the case.

7. The objection of the learned counsel for the petitioner was primarily that the photographs were not admissible in evidence which is not the stage to be considered, however, the issue which requires determination is whether the recall of the petitioner is essential for a fair and just decision. The ground taken by the respondent accused for recalling the petitioner has already been noted, that, on 12th September, 2018, one of the accused namely Sanjeev was not present and he had given photographs to his counsel and other accused were not aware of this fact so, they failed to submit anything before the Court and showing of those photographs to the petitioner was essential to bring the truth before the Court.

8. While passing the impugned order, the learned Trial Court failed to notice that all the accused in the present case were being represented by a common counsel namely Mr. Deepak Ghai and it was he or his colleague, who were conducting the cross examination of all the witnesses. Thus, the fact that accused Sanjeev gave photographs to the counsel which fact was not known to the other accused, is an unwarranted plea for the reason, counsel for all the accused was same. Mr. Pranay Abhishek, Advocate, who was the colleague of the learned counsel appearing has cross-examined PW1, however, as regards the petitioner, he would seek an adjournment when the main counsel was not available. Further, as noted from the order sheets of the Trial Court, it is evident that at least, on 3-4 dates, when the complainant was present for examination and cross examination,

adjournment was sought by the learned counsel for the accused twice on his own ailment, once for his sister-in-law's illness and on one day i.e. 15th March, 2016, despite three pass overs, learned counsel for the accused did not appear and hence, the witness had to go un-examined.

9. There is yet another aspect which is evident from the cross examination of the petitioner recorded on 24th November, 2016. On the said date, the petitioner was extensively cross examined and was confronted with some photographs collectively marked as Ex.PW3/DA showing her image. It is thus evident that the learned counsel for the accused had some of the photographs but the others he did not produce on the said date.

10. In view of the conduct of the respondent Nos. 3 to 6, witness cannot be unnecessarily harassed by appearing repeatedly for cross examination or being recalled for further examination when sufficient opportunities have been granted even subject to cost and no material has been placed on record as to what kind of photographs are required to be confronted with the petitioner which are necessary for the just decision of the case.

11. The impugned order is thus set aside.

12. Petition is disposed of.

13. Trial Court record be sent back.

(MUKTA GUPTA)
JUDGE

JULY 04, 2019/akb