

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

+ **CRL.M.C. 4412/2019**

Reserved on : 04.12.2019

Date of Decision : 12.12.2019

IN THE MATTER OF:

JAIDEV

..... Petitioner

Through: Mr. M. N. Dudeja and Mr.G.P.Thareja,
Advocates.

Versus

STATE

..... Respondent

Through: Mr. Rahul Mehra, Standing Counsel
(jCrl.) with Mr. Hirein Sharma, APP for the State
with Inspector Ramesh Prasad Singh, ATO, Police
Station-M. S. Park.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

1. The present petition has been filed assailing the order dated 06.07.2019, whereby the petitioner's application under Section 311 Cr.P.C. to recall the child witness was dismissed.

2. Mr. M.N. Dudeja & Mr. G.P. Thareja, learned counsels for the petitioner have submitted that earlier the child witness could not be cross-examined and thereafter the opportunity to cross-examine was closed. It was further contended that the cross-examination of the child is necessary and absence of the same would cause grave prejudice to the petitioner.

3. Learned Standing Counsel for the State has vehemently opposed the petition and submits that repeated calling of the child witness results in re-living the trauma and ought not to be allowed in view of Section 33(5) of POCSO Act. He has also pointed out that disciplinary action has also been taken against the petitioner and he has retired with immediate effect vide order dated 18.11.2019.

4. I have heard learned counsel for the parties and I have gone through the case records.

5. Briefly, the facts as noted in the impugned order are reproduced below:-

“The relevant facts for the disposal of the application are that the accused persons were charge-sheeted for the offences punishable u/s 504/506/509/354A(i)/294/34 IPC & 12 POCSO Act on the allegations that initially the FIR was registered for offence punishable u/s 506/509/34 IPG on the statement of one 'J' wherein she stated that 4 boys living in their neighbourhood i.e., accused Jaidev, Jagmal, Surajbhan and Jagdev troubled her regarding which she made complaint several times to the police but police did not take any action. On 31.05.2013 when she was going to her house, accused Jaidev became naked and started making obscene act and obscene gestures which was recorded by CCTV and when she refused accused Jaidev, Jagmal and Surajbhan gave her filthy abuses. Subsequently, revealed that one child witness aged about 4 years had also witnessed to the incident and her statement was also recorded u/s 164 Cr.P.C and therefore POCSO was attracted”.

6. A perusal of the case records show that, on 23.08.2017, both the parties levelled allegations of misbehaviour against each other. In order to avoid any unwarranted situation, the trial court directed exemption of all the accused persons till conclusion of arguments on charge. The arguments on charge on behalf of the State were heard and the matter

was listed for arguments on behalf of the accused persons. Thereafter, the case was listed on 25.08.2017, 08.09.2017, 21.09.2017, 03.11.2017 & 16.12.2017. On these dates, the accused persons were represented by their counsels, Shri P.L. Behl, Advocate & Shri Ch. Rajender Singh, Advocate.

7. On 16.12.2017, the child witness was examined. The counsel for the petitioner was present but refused to cross-examine the child witness on the ground that they were not prepared and one of the counsels representing co-accused was out of the country. The trial court was constrained to observe that the child witness was aged about 8 years and had come in the morning at 10:00 a.m. for her examination. It is recorded in the order sheets that opportunity was given to the counsel to prepare the case but after sometime they disclosed their inability to do so even after going through the file. The trial court noted that the examination of the child was less than half page and even at 3:45 p.m., the cross-examination was not conducted. Noting that the case pertained to the year 2013 and the intention of the accused was to delay the trial, the request to defer the cross-examination of the child witness was declined.

8. A perusal of the various order sheets prior to the passing of the impugned order would show that the petitioner alongwith other accused persons were consistently represented through their counsels. The counsels were well aware of the summoning of the child witness for 16.12.2017.

9. The Trial Court while passing their impugned order also noted the following guidelines issued by this Court and which were later notified for recording of evidence of vulnerable witnesses in criminal matters.

“15. It is worthwhile to mention that as per the guidelines for recording of evidence of vulnerable witnesses in criminal matters prepared by Hon'ble High Court of Delhi which is also notified that:

7. Identification of Stress causing factors of adversarial Criminal Justice System-

Factors which cause stress on child witness, rendering them further vulnerable witnesses, and impeding complete disclosure by them shall, amongst others, include:

(ii) Delays and continuances.

(iii) Testifying more than once.

And in pursuance to the same the duty is casted on the criminal court judge which as follows:

28. Directions for Criminal Court Judges-

(i) Vulnerable witnesses shall receive high priority and shall be handled as expeditiously as possible, minimizing unnecessary delays and continuances. (Whenever necessary and possible, the court schedule will be altered to ensure that the testimony of the child victim or witness is recorded on sequential days, without delays.)”

10. Article 15 of the Constitution confers upon State powers to make special provision for children. The Protection of Children from Sexual Offences Act, 2012 came into effect on 14.11.2012. The preamble notes:-

“AND WHEREAS it is necessary for the proper development of the child that his or her right to privacy and confidentiality be protected and respected by every person

by all means and through all stages of a judicial process involving the child”

11. Chapter 8 of the POCSO Act specifies the procedure and powers of Special Courts and recording of evidence. A bare reading of Section 33 of the POCSO Act would show that keeping in view the objects and reasons of the POCSO Act, a special procedure has been adopted for recording of evidence of the child witness. Under Section 33(2), it is required that the questions to be put to a child witness shall be first communicated to the Special Court, who then, in turn, would put those questions to the child witness. Section 33(5) specifically provides that child is not to be called repeatedly to testify in the Court.

12. Coming back to the present case, I deem it necessary to briefly state the prosecution case. The accused persons are police personnel and live in the immediate neighbourhood of the child witness and her family. As per the “list of events” handed over by learned Standing Counsel for the State during the course of arguments and taken on record, it is stated that on 25.03.2013, accused persons including the present petitioner had used vulgar language towards the child witness and her paternal aunt, Jayawati (complainant) which was followed by a scuffle. On 15.05.2013, as per the CCTV footage placed on record, the present petitioner was seen coming out in under garments, urinating and masturbating on the street in front of Satyapal/the father of the complainant. On 26.05.2013 again, the petitioner was seen on the road in a naked condition. On 28.05.2013, at various times, the petitioner was seen on the CCTV footage doing obscene act of showing his genital part to the child witness and father of the complainant. The CDR location of the petitioner corroborate his presence at home. Again, on 31.05.2013, the petitioner

alongwith other accused on various occasions were seen doing obscene acts which were witnessed by the child witness and the complainant's father and also captured in the CCTV footage.

13. During trial, the prosecution has examined the child witness, Jayawati, the complainant and her father, Satyapal. All the three witnesses have supported the prosecution case. It has been informed that the trial is pending at the stage of cross-examination of the Investigating Officer.

14. Learned counsel for the petitioner while referring to Section 311 Cr.P.C. submitted that the Court has ample power to summon, recall or re-examine any person at any stage of the trial. He further submitted that the examination of the child witness is essential for the just decision of the case and in this regard has placed reliance on the decisions rendered by the Supreme Court in Lakhmi & Ors. vs. State reported as **1996 (1) CC Cases 411 (HC)**, Avtar Singh vs. State, reported as **2010 VII AD(Delhi) 181**, P.Sanjeeva Rao vs. State of A.P., reported as **2012(3) JCC 1867**, Rahul Labroo vs. Dr. Priya, reported as **2016(1) JCC 133**, Bhujang Bhanudas Torse vs. State of Maharashtra reported as **2018 SCC OnLine Bom 13237** and Bhimashankar vs. State, **Criminal Petition No.200137/2019** decided on 19th February, 2019 &.

15. A perusal of the aforesaid decisions would show that except Bhujang Bhanudas Torse (Supra) and Bhimashankar (Supra), none of the above pertains to a case relating to POCSO Act. A perusal of the decision in Bhujang Bhanudas Torse (Supra) show that Section 33(5) of the POSCO Act was not brought to the notice of the Court. So far as, the decision in Bhimashankar (Supra), is concerned, the same arose out of FIR under Sections 376/506 IPC & Section 4/5(L)/6/8/12 of POCSO Act.

The accused and the victim girl were found in a compromising position by the girl's mother. The victim girl was aged about 17 years of age at the time of the incident. The victim girl was sought to be re-examined after more than one year by which time she had turned major. In the above circumstances, the victim girl was allowed to be recalled.

16. In the present case, the child witness was about 4 years of age at the time of the incident. At the time of her examination-in-chief on 16.12.2017, she was about 8 years of age. The petitioner alongwith other accused persons was duly represented before the trial court through their counsels who had appeared on many dates prior to the examination of the child witness.

17. The recall of the child witness, in the facts of the present case, will cause her enormous mental trauma. The Supreme Court in Alakh Alok Srivastava vs. Union of India reported as (2018) 17 SCC 291, issued the following directions, in the spirit of the POCSO Act.

“25.1 The High Courts shall ensure that the cases registered under the POCSO Act are tried and disposed of by the Special Courts and the Presiding Officers of the said courts are sensitised in the matters of child protection and psychological response.

25.2 The Special Courts, as conceived, be established, if not already done, and be assigned by the responsibility to deal with the cases under the POCSO Act.

25.3 The instructions should be issued to the Special Courts to fast track the cases by not granting unnecessary adjournments and following the procedure laid down in the POCSO Act and thus complete the trial in a time-bound manner or within a specific time-frame under the Act.

25.4 The chief Justices of the High Courts are requested to constitute a Committee of three Judges to regulate and monitor the progress of the trials under the POCSO Act. The High Courts where three judges are not available the Chief Justices of the said courts shall constitute one Judge Committee.

25.5 The Director General of Police or the officer of equivalent rank of the States shall constitute a Special Task Force which shall ensure that the investigation is properly conducted and witnesses are produced on the dates fixed before the trial courts.

25.6 Adequate steps shall be taken by the High Courts to provide child-friendly atmosphere in the Special Courts keeping in view the provisions of the POCSO Act so that the spirit of the Act is observed.”

18. A Coordinate Bench of this Court in Bimla Devi vs. State reported as **2017 SCC OnLine Del 11425** while taking note of Section 33(5) of the POCSO Act rejected the prayer to recall the witness and to the similar effect are the decisions of the Calcutta High Court In Re: Debashis Mondal reported as **2017 SCC OnLine Cal 1191** and Punjab and Haryana High Court in Avtar Singh vs. State of Haryana & Anr., **CRM-M-8524-2015 (O&M) decided on 9th December, 2016.**

19. In view of the aforesaid discussion, I am of the opinion that recalling the child witness who would be only 10 years of age by now would make her re-live the mental trauma and the same may play havoc on her psyche. Resultantly, the impugned order passed by the trial court is upheld. Consequently, the present petition is dismissed.

20. Copy of this order be communicated to the trial court.

(MANOJ KUMAR OHRI)
JUDGE

DECEMBER 12, 2019

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