



\$~23

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**% *Order pronounced on 28.04.2022*

+ CRL.REV.P. 123/2022

DHARMENDER@ MEDICAL Petitioner

Through: Mr. Murari Tiwari and Mr. Rahul
Kumar, Advs.

versus

STATE Respondent

Through: Mr. Ravi Nayak, APP for State with
SI Bintu, PS Nand Nagri.**CORAM:****HON'BLE MR. JUSTICE TALWANT SINGH****TALWANT SINGH, J.**

1. The petitioner has filed the present review petition assailing the order dated 15.12.2021 passed by the learned ASJ in Sessions Case No. 44294/2015. The said case was registered under Section 341/323/308/394/397/34 IPC and Section 3 of SC/ST Act registered at PS Nand Nagri vide FIR No. 402/2008.

2. The charges in the present case were framed vide order dated 14.10.2011. The said charges are reproduced here under:

“That on 16.8.2007 at 5.00 p.m. at DDA Market E-4, near Sewerage Pump within the jurisdiction of Police Station Nand Nagri. you all in furtherance of your common intention wrongfully restrained Rahul and thereby committed an offence punishable-under section 341/34 IPC and within my cognizance.

Secondly on the above said date time and place, you all in furtherance of your common intention voluntarily caused simple injuries on the person of complainant Rahul and and thereby committed an offence punishable under section 323/34 IPC and within my cognizance.



Thirdly, you all in furtherance of your common intention, committed robbery on the person of Rahul and robbed Rs. 4000/- cash and inflicted injuries on his person and thereby committed an offence punishable under Section 394/34 IPC and within my cognizance.

Fourthly, on the above said date, time and place, you all intentionally insulted and humiliated the complainant Rahul member of Scheduled Caste sub caste 'Bhangi' at the place within public view while he was coming to his house he was wrongfully restrained by you and you all abused him by uttering words 'this Bhangi should not be allowed to live alive how he dare to protest them' and also passed caste related remarks to her and thereby committed an offence punishable offences punishable u/s 3(1)(x) SC & ST (POA) Act 1989 and within my cognizance."

3. Now, the matter is listed for recording of the statement of the present petitioner/accused on 02.05.2022. The petitioner had moved an application under Section 311 Cr.P.C. for recalling of PW-1/Rahul for his further cross-examination, which was dismissed by the learned Sessions Judge vide order dated 15.12.2021, which is the impugned order in the present matter.

4. The prayer clause of the present petition is as under:

"a) Call for the record of the lower court and after the perusal of the same, may kindly be pleased to grant only one opportunity to the Petitioner for cross-examination of PW-1 namely Rahul with any terms and conditions setting aside the order dated 15.12.2021 passed by the Ld. Court of Sh. Devender Kumar, ASJ, North-East District, Karkardooma, Delhi in Session Case No. 44294/2015."

5. To understand as to why the present petition has been filed, it is necessary to consider the impugned order dated 15.12.2021 passed by the



learned ASJ, which is reproduced here under:

“15.12.2021

Present: None for the State
 Both accused on bail with Ld. Counsel

An application u/s 311 Cr.P.C. for recalling PW1 Rahul is pending for disposal.

Ld. Counsel for accused has submitted that PW1 Rahul could not be cross examined completely on behalf of the accused as Ld. Counsel could not appear on the day of his cross examination due to some unavoidable circumstances, whereas complete cross examination of PW1 is necessary for the proper adjudication of this case. It is prayed that PW1 Rahul may be recalled for cross examination and application may be allowed.

Perusal of the file shows that charges in this case were framed on 14.10.2021 and case was fixed for PE on 19.11.2011. On 19.11.2021, PW1 Rahul was present, but discharged unexamined and bound down for next date of hearing as Ld. Presiding Officer was on leave. On 13.12.2021, PW1 Rahul was partly examined and further examination was deferred for 12.01.2012. On 12.01.2012, cross examination of PW1 was deferred on the request of accused persons as their counsel was not available and case was adjourned for 15.02.2012. On 15.02.2012, PW1 was present, but again counsel for accused was not available due to engagement ceremony of his brother and case was adjourned for 24.03.2012. On 24.03.2012, PW 1 was present but again Ld. Counsel for accused showed inability to cross examine the witness due to some personal difficulty and the case was adjourned for 21.04.2012. On 21.04.2012, one application was filed by accused Rupesh for transfer of this case to Juvenile Justice Board, due to PW1 Rahul and Ct. Sunil discharged unexamined and case adjourned for 19.05.2012. On 19.05.2012, said application was dismissed as withdrawn and case again adjourned for 07.07.2012. On 07.07.2012, one application u/s 7A of J.J. Act was filed and one accused was declared juvenile and



charge-sheet was separated and this case again fixed for PE on 07.09.2012. On 07.09.2012, PW1 Rahul was partly cross examined and further cross examination was deferred on the request of Ld. Defence counsel. PW1 remained present before this Court on 05.01.2013, 19.03.2013, 13.05.2013 and on 27.07.2013, but Ld. Counsel failed to cross examine this witness and ultimately opportunity of accused to cross examine PW1 was closed on 14.08.2013.

However, accused again moved an application u/s 311 Cr.PC which was allowed. After allowing application of accused u/s 311 Cr.PC, PW 1 Rahul remained present on 22.11.2013, 20.01.2014, 03.03.2014, 11.04.2014, 22.05.2014, 16.07.2014, 20.08.2014, 26.09.2014, 13.11.2014, 12.12.2014, 21.01.2015, 02.03.2015, 07.07.2015, 19.01.2016 and 20.02.2016, but accused failed to cross examine the PW1 despite many opportunities and opportunity for further cross examination was closed on 11.08.2016.”

6. Notice was issued. Status report has been filed.
7. I have heard both the sides.
8. Mr. Murari Tiwari, learned counsel for the petitioner submits that the petitioner may be given one opportunity to cross-examine the complainant/PW1 on whatever terms and conditions this Court imposes, as inspite of the best efforts of the present petitioner, he was unable to fully cross-examine PW1.
9. On the other hand, learned APP has submitted that enough opportunities were granted to the petitioner but he has intentionally not cross-examined the complainant/PW1 and hence, the learned Trial Court has no other option but to deny further opportunity for cross-examination and close the evidence of complainant.
10. The important point to be noted here is that the opportunity to the



petitioner to cross-examine PW1 was closed way back in 1986 vide the following order:

“11.08.2016

Present: Sh. Dharam Chand, Ld. Addl. PP for the state.

Both accused are on bail with Ld. Proxy counsel

Ms. Kavita.

PW/Complainant Sh. Rahul

Adjournment is sought on the ground that Ld. Main Counsel has gone to attend a cremation.

Perusal of file shows that the complainant/PW1 was examined in chief on 13.12.2011 and 12.02.2012. His cross examination was deferred. He was party cross examination on 07.09.2012. Over the next few dates, the PW1 was absent on couple of dates, Ld. Addl. PP was not available on one while the Ld. Defence counsel was not available for a couple of dates. The opportunity for cross examination was ultimately closed on 14.08.2013 vide order dated 26.09.2013 he was re-summoned on an application u/s 311 Cr.P.C. being allowed.

Perusal of file further shows that PW1 absented himself since then a couple to times. He was present and not cross examined on about 9 dates and cross examination only on 2 dates. The accused have availed ample opportunities to cross examine the witness. No further opportunity can be granted. Cross Nil. Opportunity given. PW1 discharged unexamined.

Matter be listed for PE on date already fixed i.e., 12.08.2016.”

11. The application under Section 311, Cr.P.C. seeking opportunity to cross-examine the complainant/PW1, was filed at the fag end of the year 2021, i.e., after five years, for the reasons best known to the present petitioner. During this period, the evidence of all the witnesses had been recorded and the matter is now ripe for recording of the statement of the



accused and for the said purpose, it is now listed for 02.05.2022.

12. The plain reading of the impugned order dated 15.12.2021 makes it clear that ample opportunities were granted to the petitioner to cross-examine PW1 Rahul but he was not cross-examined by the learned counsel for the petitioner on one pretext or the other.

13. Initially, the opportunity to cross-examine PW1 was closed on 14.08.2013 after giving ample opportunities on 05.01.2013, 19.03.2013, 13.05.2013 and 27.07.2013. The petitioner moved an application under Section 311 Cr.P.C., which was allowed, and thereafter, the witness was present in Court on 16 occasions but further cross-examination of the said witness Rahul was not conducted, hence, the same was closed vide order dated 11.08.2016. As mentioned earlier, there is a delay of more than five years in moving the application under Section 311 Cr.P.C. before the learned Sessions Judge, which remained explained.

14. Since the prosecution evidence has been already closed after giving ample opportunities to the accused/petitioner, I do not find any ground to set aside the order dated 15.12.2021 passed by the learned ASJ, rejecting the application moved by the present petitioner/accused under Section 311 Cr.P.C.

15. The revision petition is without any merit and the same is hereby dismissed.

TALWANT SINGH, J

APRIL 28, 2022/pa

[Click here to check corrigendum, if any](#)