

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

Reserved on : 06.01.2022

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Pronounced on : 27.04.2022

+ **W.P.(CRL) 1934/2021**

BABLU TIWARI @ JATA SHANKAR TIWARI Petitioner

Through: **Mr. Saurav Sharma, Advocate.**

versus

STATE OF NCT OF DELHI

.... Respondent

Through: **Mr. Piyush Singhal, Advocate for Mr. Ashish Aggarwal, ASC for the State with Sub – Inspector Mohit, P.S.: Punjabi Bagh.**

CORAM:

HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

JUDGMENT

RAJNISH BHATNAGAR, J.

1. The present petition under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973, has been instituted by the petitioner seeking the following reliefs: -

“(i) Remand the instant matter back to the trial court, and order a denovo trial against the Petitioner in SC No. 58222 of 2016, which is sub-judice before the Ld. Addn. Sessions Judge – 01, West, Special Court, THC, Delhi titled as, “State V. Jatashankar Tiwari @ Bablu”. whereby the petitioner is able to advance an adequate defence, and/or

(ii) *Pass any other appropriate order(s) or direction(s) in favour of the Petitioner which this Hon'ble Court may deem just and proper in the facts and circumstances of the case, in the interest of justice."*

2. The brief facts of the case are that an FIR No. 545/2016 was registered against the petitioner on 02.09.2016 with the Police Station Punjabi Bagh under Sections 354/354A of the Indian Penal Code, 1860 (IPC) and Sections 8 and 12 of the Protection of Children from Sexual Offences Act, 2012 (POCSO) alleging that on 31.08.2016, when the prosecutrix was returning from tuition, an unknown male person touched the breasts of the prosecutrix and attempted to flee, however, the prosecutrix caught hold of the said unknown person and raised alarm, as a result of which, a huge crowd gathered and, in the meanwhile, the prosecutrix phoned her father who, thereafter, arrived at the place of the incident and called the Police and the petitioner was apprehended on 31.08.2016, on the same date of the incident. It is further alleged that the statements of the prosecutrix and her father were recorded on 02.09.2016 at Police Station Punjabi Bagh.

3. It is submitted by learned counsel for the petitioner that by admitting by and large all the evidences of the prosecution without the knowledge of the petitioner and refusing to bring out the defence evidence, the defence counsel of the petitioner, who was representing him in the trial court, virtually conceded to the case of the prosecution. It is further submitted that the defence counsel of the petitioner did not build any defence and failed to demolish the case of the prosecution, therefore, the petitioner did not get the fair opportunity to establish his defence. It is further submitted that when an

application under Section 294 Cr.P.C. was filed on behalf of the petitioner, learned Trial Court did not intervene and did not separately explain the nature and consequences of the said application. It is further submitted that during the cross-examinations of the prosecutrix and her father, no relevant questions were put to them. It is further submitted that the defence counsel of the petitioner in the learned Trial Court only cross-examined four (04) out of fourteen (14) witnesses and even those witnesses who had been cross-examined were not cross-examined properly. It is further submitted that at the time of the recording of the statement under Section 313 Cr.P.C., the petitioner was not aware about the line of defence and was taken by a surprise and gave mechanical answers. It is further submitted that the defence counsel of the petitioner closed the defence evidence without any knowledge of the petitioner. It is further submitted that the petitioner being an illiterate and poor person posed his complete trust in the DLSA counsel which was appointed by the learned Trial Court, however, the said counsel did not conduct the trial in a proper manner. Learned counsel appearing on behalf of the petitioner relied upon *Salamat Ali vs. State* (Crl. Appeal No. 242 of 2010), *Kishore Chand vs. State of Himachal Pradesh* [AIR 1990 SC 2140], *State vs. Mohd Afzal and Ors.* [107 (2003) DLT 385] and *K.L. Tripathi vs. State Bank of India and Ors.* [(1984) 1 SCC 43].

4. On the other hand, it is submitted by learned ASC appearing on behalf of the State that an application under Section 294 Cr.P.C. was moved and all the documents have been duly admitted during the course of the admission and denial as per the mandate of Section 294 Cr.P.C. It is further submitted by the learned ASC that the statement under Section 313 was recorded on

29.09.2020 and even a certificate has been issued by the learned ASJ, certifying that the petitioner has been examined in the presence and hearing and the record of the examination contained full and true account of the statement made by the petitioner/ accused before the learned Trial Court. It is further submitted that in case the petitioner is not satisfied with the cross-examination, he could have moved an application under Section 311 Cr.P.C. for recording of witness and cannot claim de novo trial which is yet to complete.

5. First of all, coming to the statement recorded under Section 313 Cr.P.C. Section 313 of Cr.P.C. reads as follows:-

“Power to examine the accused.—(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court—

(a) may at any stage, without previously warning the accused put such questions to him as the Court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:

Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under sub-section

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

(5) The Court may take help of Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the accused as sufficient compliance of this section.”

6. As per the recording of Statement under Section 313 Cr.P.C. is concerned, it is between the court and the accused. A perusal of the statements shows that all the incriminating evidence has been put by the Court to the accused and the answers given have been duly recorded by the learned ASJ, who has at the end of the statement under Section 313 Cr.P.C. issued the certificate in regard to the correctness of the statement made by the accused and having explained to the contents of the evidence put to him. The perusal of the statement under Section 313 Cr.P.C. further shows that the petitioner has not only given mechanical answers, but he has even given his explanations to question nos. 2, 3, 5, 12, 26, 29 and 32. All the documents which have been admitted during the course of the admission and denial were also put to the petitioner in the form of question no. 36 to which the reply has been given by the petitioner as the same being matter of record and the petitioner has also given an answer to question no. 37, explaining the reasons for his identification. Therefore, it cannot be said that the petitioner was not aware as to what was being put to him in the statement under Section 313 Cr.P.C. by the learned Trial Court and he has not afforded any

opportunity to lead defence evidence. In the essence, there was no role of the defence lawyer when the statement of the petitioner was being recorded under Section 313 Cr.P.C. directly by the court. As far as the contention that the documents were admitted by the DLSA counsel and the witnesses were not properly cross-examined, this contention, in my opinion, has no force in it.

“ Section 294 CrPC reads as under:-

294. No formal proof of certain documents. – (1) Where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list on the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document.

(2) The list of documents shall be in such form as may be prescribed by the State Government.

(3) Where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry, trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed.

Provided that the Court may, in its discretion, require such signature to be proved.”

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11. The object of Section 297 CrPC is to accelerate pace of trial by avoiding the time being wasted by the parties in recording the unnecessary evidence. Where genuineness of any document is admitted, or its formal proof is dispensed with, the same may be read in evidence.

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14. ... It is not necessary for the court to obtain admission or denial on a document under sub-section (1) to Section 294 CrPC personally from the accused or complainant or the

witness. The endorsement of admission or denial made by the counsel for defence, on the document filed by the prosecution or on the application/report with which same is filed, is sufficient compliance of Section 294 CrPC.....In case it is admitted, it need not be formally proved, and can be read in evidence.....”

7. The evidentiary value of the documents which have been admitted for deciding the controversy raised by the petitioner, the order dated 05.02.2018 becomes relevant which reads as under:-

“PW Father of prosecutrix is examined in camera. He is examined and discharged.

At this stage, accused and his counsel have submitted that accused admits the evidence of PWs Ms. Deepika Singh, Ld. MM, HC Balbir Singh, Ct.Jagdish, Ct. Kuldeep, HC Laxmi Narayan, Principal of the school of prosecutrix, Principal of the school of accused, Dr. C. P. Meena, as mentioned at sr. no. 3 to 7, 11 to 13 respectively in the list of prosecution witnesses as well as the documents prepared by and / or signed by them. It is further submitted that the documents prepared by and or signed by the above-mentioned witnesses may be exhibited. It is also submitted that the evidence of above-mentioned witnesses as well as the documents prepared by and / or signed by them may be read against the accused persons at the time of final disposal of the case.

The statement of the counsel for accused has been separately recorded.

Heard. Perused. Considered.

In view of submissions made and the statements of the counsel of the accused, PWs Ms. Deepika Singh, Ld. MM, HC Balbir Singh, Ct. Jagdish, Ct. Kuldeep, HC Laxmi Narayan, Principal of the school of prosecutrix, Principal of the school of accused, Dr. C. P. Meena, as mentioned at sr. no. 3 to 7, 11 to 13 respectively in the list of prosecution witnesses are not being examined as their evidence as well as documents prepared by and / or signed by them are admitted by the accused persons w/s 294 Cr.PC.

The documents prepared by and/or signed by the above-mentioned witnesses are being exhibited as follows:-

- 1. The statement of prosecutrix recorded us 164 of Cr.PC is already exhibited as Ex.PW1/B and it bears the signatures of Ms. Deepika Singh, Ld. MM at points X-1 to X-5.*
- 2. FIR is exhibited as Ex.PX-1 and it bears the signature of HC Balbir Singh point A.*
- 3. Endorsement on the rukka is exhibited as Ex.PX-2 and it bears the signature of HC Balbir Singh at point B.*
- 4. Certificate u/s 65-B Indian Evidence Act is exhibited as Ex.PX 3 and it bears the signature of HC Balbir Singh at point A.*
- 5. Arrest memo of accused Bablu Tiwari is exhibited as Ex.PX-4 and it bears the signature of Ct. Jagdish at point A and Ct. Kuldeep at point B.*
- 6. Personal Search Memo of accused Bablu Tiwari is exhibited as Ex.PX-5 and it bears the signature of Ct. Jagdish at point A and Ct. Kuldeep at point B.*
- 7. Disclosure Statement of accused Bablu Tiwari is exhibited as Ex.PX-6 and it bears the signature of Ct. Jagdish at point A.*

8. DD No.47 PP dated 31.08.2016, Punjabi Bagh is exhibited as Ex. PX-7 and the name of HC Laxmi Narayan is mentioned at point A.

8. The School Certificate of prosecutrix is exhibited as Ex.PX-8 issued by the Principal of Hans Raj Model School, Punjabi Bagh Delhi and it bears the signature of Mr. Heemal H Bhat, Principal at point A.

9. The copy of mark sheet of High School Examination of accused Bablu Tiwari @ Jata Shankar Tiwari is exhibited as Ex.PX-9 and it bears the signature of Principal at point A.

10. The School Certificate of Janta Inter College, Patna, Khargora, Shrawasti of accused Bablu Tiwari @ Jata Shankar Tiwari is exhibited as Ex.PX-10 and it bears the signature of Principal at point A.

11. MLC no.17628 dated 12.09.2015 of the accused Bablu Tiwari @ Jata Shankar Tiwari is exhibited as Ex.PX-11 and it bears the signatures of Dr.C.P. Meena at point A.

The above documents and the evidence of the above-mentioned witnesses shall be read against the accused at the time of final disposal of the case.

The admission and denial of documents has been conducted u/s 294 Cr.PC.

The matter now listed for issuance of summons to PWS mentioned at sr. N o. 8 to 10 and 14 in the list of prosecution witnesses by ordinary process as well as through the IO for PE as well as admission and denial u/s 294 Cr.P.C on 23.03.2018.”

8. The prosecutrix in the instant case has been examined as PW-1 and her father has been examined as PW-2. Constable Sarita has been examined as PW-3. IO of the case, Sub – Inspector Sarmila, has been examined as

PW-4 and Sub – Inspector Pooja has also been examined as PW-4. All these witnesses have been cross-examined way back in 2018-2019 but no steps were taken by the petitioner to have them re-examined and now, even the statement under Section 313 Cr.P.C. of the petitioner has been recorded and he has also not led any defence evidence. As far as the quality of cross-examination is concerned, the same cannot be commented upon as it depends upon lawyer to lawyer and it is not always that a lengthy cross-examination is a good cross-examination. This is not the stage for this Court to express any opinion on the cross-examination conducted by the defence counsel representing the petitioner before the learned Trial Court. As far as the question of admission and denial of documents, having been done by the petitioner under Section 294 Cr.P.C., is concerned, the order dated 05.02.2018 reproduced hereinabove is self-explanatory and the same is for the purpose of expeditious trial.

9. As far as the judgments relied upon by the Ld. counsel for the petitioner are concerned, there is no dispute with regard to the proposition of law laid down in the said judgments, but with due regard, the same are not applicable to the facts of the present case as the judgments relied upon by the Ld. counsel for the petitioner were passed after conviction of the accused i.e., at the stage of appeal whereas the matter at hand, is at the stage of trial.

10. The judgments relied upon by Ld. counsel for petitioner shows that the appellant therein was permitted to be re-examined under Section 313 Cr.P.C. with reference to the incriminating circumstances brought out against him and was given another opportunity to produce defence witnesses

because the perusal of the cross-examination conducted clearly showed that the witnesses of the prosecution had not been cross-examined with reference to their testimony and the available material on record and further it was observed that the manner in which cross-examination got conducted, highlighted the ineffectiveness, inefficiency and low standards achieved by the defence counsel, however, this is not the case in the present matter.

11. Perusal of the record demonstrates that the instant matter is not the one where the petitioner can be said to have been refused the right to lead any defence evidence or that the petitioner was not aware as to what was being put to him in the statement under Section 313 Cr.P.C. by the learned Trial Court as the petitioner herein has not only given mechanical answers but in fact, has given clarifications and explanations in certain answers.

12. It is trite law that the right to defence includes right to effective and meaningful defence at the trial, however, an accused person cannot as a matter of right claim *de novo* trial and allege that he did not get the fair opportunity to establish his defence except when the defendant is able to show and prove his claim of ineffectiveness of counsel's assistance and his representation falling below an objective standard of reasonableness, to the satisfaction of court as the said relief is to be granted sparingly, in exceptional circumstances, where it appears *prima facie* that the apprehension of the defendant is sincere and bonafide and the defence counsel has utterly failed to build any defence owing to his incompetence.

13. The instant petition is dismissed being devoid of merit. Pending application, if any, is also disposed of accordingly.

RAJNISH BHATNAGAR, J

APRIL 27, 2022/p

