



\$~

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

%

Reserved on: 01.09.2023
Pronounced on: 04.09.2023

+ **CRL.REV.P. 913/2023 & CRL.M.A. 23661/2023**

VISHWA PRATAP @ BOPY

..... Petitioner

Through: Mr. Randheer Singh,
Advocate

versus

THE STATE GOVT OF NCT OF DELHI THROUGH SHO P
S BHALSWA DAIRY

..... Respondent

Through: Mr. Naresh Kumar Chahar,
APP for the State with SI
Sushila (Special Branch) and
SI Aarti, P.S. Bhalswa Dairy,
Delhi

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The instant petition under Section 397 read with Section 401 of the Code of Criminal Procedure, 1973 ('Cr.P.C') has been filed on behalf of petitioner seeking setting aside of impugned order dated 11.08.2023, passed by learned Additional Sessions Judge (POCSO), North, Rohini Courts, New Delhi ('Trial Court'), in case arising out of FIR bearing no. 396/2017, registered at Police Station Bhalswa Dairy, Delhi for offences punishable under Sections 376/451/506 of the Indian



Penal Code, 1860 (*'IPC'*) and Section 6 of Protection of Children from Sexual Offences Act, 2012 (*'POCSO Act'*).

2. Briefly stated, the facts of the case are that the present FIR was registered on the complaint of the victim, aged about 13 years, who had stated that on 03.07.2017, when she was alone at her house, the accused had entered the house at about 9:00 PM and had closed the door. It was alleged that thereafter, he had pressed her mouth and switched off the lights and had forcibly taken off her clothes and had committed rape upon her. Thereafter, he had run away from the spot. He had also threatened to kill her in case she will disclose the same to her father. The victim did not disclose the incident to her father on that day, however, on 05.07.2017, she narrated the incident to her father and thereafter, the present FIR was registered on the complaint of the victim. After completion of investigation, chargesheet in this case was filed and charges were framed.

3. Learned counsel for the petitioner states that an application seeking recall of witnesses i.e. PW-1 and PW-2 had been moved on behalf of accused/petitioner but the same was erroneously dismissed by the learned Trial Court *vide* order dated 11.08.2023. It is argued that the previous counsel had not effectively cross-examined the witnesses and certain questions had not been put to the witnesses which are crucial for the defence of the accused. It is stated that it will cause grave prejudice to the accused in case permission is not granted to recall the witnesses for further cross-examination.



4. Learned APP for the State, on the other hand, has opposed the present petition and states that more than 13 witnesses have already been examined in this case, the prosecution evidence has been closed and the case is listed for recording the statement of the accused. It is also stated that the present petition has been filed only to delay the trial proceedings. It is further stated that the previous counsel has cross-examined both the witnesses at length and merely a change of counsel cannot be a ground for recalling witnesses, especially in cases of sexual assault under POCSO Act.

5. This Court has heard arguments addressed on behalf of both the parties and has perused the material on record.

6. A perusal of record reveals that there are specific allegations levelled in the FIR that the present petitioner/accused had entered the house of the victim at night and had closed the door of the house, and thereafter, he committed rape upon the victim, who was a minor i.e. 13 years of age at the time of incident. The testimony of PW-1 i.e. the victim was recorded on 03.05.2018 and she was cross-examined on the same day, and the testimony of PW-2 i.e. the aunt of victim was recorded on 25.07.2018 and she was also cross-examined on the same day by the learned counsel for the accused.

7. Five years thereafter, the accused/petitioner had moved an application under Section 311 of Cr.P.C. before the learned Trial Court for recalling of PW-1 and PW-2 on the ground that previous counsel for the accused had not conducted the cross-examination of these witnesses properly. The said application was dismissed by the learned



Trial Court *vide* impugned order dated 11.08.2023, which reads as under:

“ This is an application u/s 311 Cr.P.C., moved on behalf of accused/applicant for recalling of witnesses i.e. PWI and PW2.

Arguments on the aforesaid application heard.

It is submitted by Ld. Counsel for accused/applicant that PWI/victim and PW2/Bua of victim have already been examined, cross examined by the previous counsel, but vital questions were not put to the aforesaid witnesses. It is further contended that the accused has now changed his counsel and certain vital questions are required to be put from PWI and PW2. It is further submitted by the Ld. Counsel for accused that accused is facing serious charges under the provisions of POCSO Act and if these witnesses are not recalled for further cross examination, this would amount to no defence resulting in grave prejudice to the accused. Hence, Ld. Counsel for accused has prayed for recalling of PWI and PW2 for the purpose of cross examination.

Ld. Substitute Special PP for the State has vehemently opposed the present application stating that since 13 witnesses have already been examined and cross examined in this case and matter is now fixed for recording of statement of accused under section 313 Cr.P.C., recalling of witnesses i.e. PWI/victim and PW2/Bua of victim would necessarily cause harassment to them and would also delay the trial.

Submissions made on behalf of the parties are taken into consideration. Record perused. Perusal of record shows that testimony of PWI/victim was recorded on 03.05.2018 and testimony of PW2/Bua of victim was recorded on 25.07.2018. Perusal of record further shows that both these witnesses have been cross examined at length by Ld Defence counsel. Record further reveals that since the beginning of trial, accused kept on changing his counsel and the accused cannot take it as a matter of right to ask for recalling of Witnesses as and when he changes his counsel.

It is pertinent to mention here that present case pertains to the year 2017 and the prosecution evidence have been closed in this case vide order dated 25.07.2023 and then the matter was adjourned for recording statement of accused under section 313 Cr.P.C. in these circumstances, recalling of PWI/victim and PW2/Bua of victim at this stage for the purpose of further cross



examination when both these witnesses have already been cross examined at length way back in the year 2018 would certainly be a cause of unnecessary harassment to the witnesses. In view of my above discussion I do not find any merits in the present application and, hence the same is hereby dismissed.

Application stands disposed of accordingly...”

8. This Court notes that the FIR in this case was registered in the year 2017. The victim i.e. PW-1 was examined and cross-examined on 03.05.2018 and the paternal aunt of the victim i.e. PW-2 was examined and cross-examined on 25.07.2018, i.e. more than five years ago. Thereafter, 11 more witnesses were examined by the prosecution and evidence could be closed only on 25.07.2023 i.e. after about six years of registration of the present FIR. During this period of time, no application was moved on behalf of petitioner/accused between the period from July, 2018 till August, 2023 for recalling the witnesses. It is only after five years of recording of the testimonies of PW-1 and PW-2, that the application seeking re-call of witnesses has been moved and that too on the ground that the previous counsel had not properly cross-examined the witnesses.

9. Considering the facts of the present case and the contentions raised before this Court, it shall be appropriate to take note of the observations of the Hon'ble Apex Court in case of *State (NCT of Delhi) v. Shiv Kumar Yadav (2016) 2 SCC 402* wherein it was held that mere incompetence of a previous counsel cannot be the ground to re-call a witness for examination and fairness of a trial was to be seen also from the lens of victim and society. The relevant observations on this aspect read as under:



“11. It is further well settled that **fairness of trial has to be seen not only from the point of view of the accused, but also from the point of view of the victim and the society. In the name of fair trial, the system cannot be held to ransom.** The accused is entitled to be represented by a counsel of his choice, to be provided all relevant documents, to cross-examine the prosecution witnesses and to lead evidence in his defence.

15. While advancement of justice remains the prime object of law, it cannot be understood to mean that recall can be allowed for the asking or reasons related to mere convenience. **It has normally to be presumed that the counsel conducting a case is competent particularly when a counsel is appointed by choice of a litigant.** Taken to its logical end, the principle that a retrial must follow on every change of a counsel, can have serious consequences on conduct of trials and the criminal justice system. The witnesses cannot be expected to face the hardship of appearing in court repeatedly, particularly in sensitive cases such as the present one. It can result in undue hardship for the victims, especially so, of heinous crimes, if they are required to repeatedly appear in court to face cross-examination...

29. We may now sum up our reasons for disapproving the view of the High Court in the present case:

**

(vii) **mere change of counsel cannot be ground** to recall witness...”

(Emphasis supplied)

10. However, in order to appreciate the contentions raised on behalf of petitioner, this Court has also gone through the testimony of PW-1 i.e. the victim. The cross-examination of PW-1 was conducted by the learned counsel for the petitioner at length and the questions pertaining to the incident in question and the defence of the accused have been put in the cross-examination to PW-1. Further, PW-2 who is the aunt of the victim has also been cross-examined by the defence counsel and the defence of the accused was put to her also.



11. In view of settled position of law, mere change of counsel cannot be a ground for recalling witnesses, especially in cases of sexual assault. The victim in this case at the time of incident was about 13 years of age, and cross-examining her again after 6 years of the incident will amount to making her go through an incident which would have traumatized her several times in the past during investigation as well as at the time of recording of her statement before the learned Trial Court.

12. It is also crucial to note that Section 33(5) of POCSO Act puts an embargo on the Special Courts to repeatedly call the victim to testify in the Court.

13. This Bench recently in *Rakesh v. State of NCT of Delhi* 2023 SCC OnLine Del 4774, in a petition seeking identical prayer under similar set of facts and circumstances, had observed that balance of rights needs to be maintained under Section 33(5) of POCSO Act and Section 311 of Cr.P.C. and the discretion vested in the Court to re-call a witness needs to be exercised with caution and sensitivity, especially in cases of sexual assault. The observations, relevant for the purpose of this case, are extracted as under:

“10. While the bar under Section 33(5) POCSO Act may not be absolute and balance of rights needs to be maintained under Section 33(5) of POCSO Act and Section 311 of Cr. P.C., at the same time, the Court's discretion in exercising its power to re-summon a witness for cross-examination has to be exercised with circumspection, caution and utmost sensitivity. The crucial word used in Section 33(5) of POCSO Act is “called repeatedly”. This Section thus has to be interpreted to balance and applied with the right under Section 311 Cr. P.C. of accused and right to fair trial of an accused depending on facts and circumstances of each case.



19. The trial in this case has already been prolonged to seven years and the **application under Section 311 Cr.P.C. was filed after almost six years of recording of testimony of the witnesses concerned. All this while, for the six years, when the testimony of other witnesses was being recorded, there was no whisper from the side of the petitioner/accused to recall the present witnesses.** The present revision petition as well as application filed under Section 311 Cr. P.C. before the learned Trial Court thus seems to be an attempt to delay the trial, which is already delayed.

20. Learned counsel for the petitioner also argued that in case the present petition is not allowed, it will amount to violation of right of fair trial to the accused/petitioner.

21. **While this Court cannot dispute that the right to fair trial is a crucial and precious right of the accused, so is the complainant's right to a fair trial which requires that they should not unnecessarily be harassed, especially in the cases of sexual assault-.** This Court notes that at times, people may not even report such cases of sexual assault of children of tender age as in this case, she was only seven years of age for fear of being harassed by continuous visits to the Courts or fear of embarrassment and traumatic cross-examination. It would have been a different decision in case the record would have revealed that the witnesses' cross-examination consisted of only asking few formal questions and not of the incident, but in the present case, to the contrary, as already observed above, the cross-examination had been conducted at length and all relevant aspects had been covered by the previous counsel for the petitioner. In view of the same, though the accused has to be granted and ensured a fair trial, it cannot mean being afforded unjustified repeated opportunities of cross-examination in every case to indicate fair trial. The case of an accused has to be meritorious where a relief as prayed for in the present case, can be granted.

22. The other contention that in case the present application is not allowed, the case may end into conviction is also without merit since, at the cost of repetition, **it is to be taken note of that the previous counsel has cross-examined the witnesses at length and only due to apprehension or fear of the accused that cross-examination did not result in answers that would have helped him, cannot be a ground to recall the witnesses after six years of conclusion of their testimony.**

23. While balancing the right of the accused to a fair trial and upholding the intent of the legislation, the courts are duty bound to



remain sensitive to the plight of the seven-year-old sexual assault victim. **She and her mother cannot be recalled to relive the entire trauma only because the new counsel is dissatisfied with the elaborate cross-examination of these witnesses.** Thus, this Court also has a duty to ensure an expeditious and fair trial, preventing misuse of such applications for delaying the proceedings before the learned Trial Court...”

(Emphasis supplied)

14. Thus, having perused and examined the records of the case, this Court finds no infirmity or illegality with the order passed by the learned Trial Court whereby the application under Section 311 of Cr.P.C. filed by the petitioner/accused to re-call PW-1 and PW-2, five years after the recording of their testimonies, was dismissed.

15. Accordingly, the present petition alongwith pending applications if any, stands dismissed.

16. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

SEPTEMBER 4, 2023/zp