

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION

Present:-

THE HON'BLE JUSTICE CHAITALI CHATTERJEE (DAS)

CRR NO.4984 of 2023

**FIROJ ALI @ BABU @ BABLU & ANR.
VS.
THE STATE OF WEST BENGAL**

**For the Petitioners : Mr. Deepak Prahladka, Adv.,
Ms. Reshmi Khatun, Adv.**

**For the State : Mr. Debasish Roy, learned Public Prosecutor,
Mr. Arijit Ganguly, Adv.,
Mrs. Debjani Sahu, Adv.**

Last heard on : 11-12-2025.

Judgement on : 11-12-2025.

Uploaded on : 12-12-2025.

CHAITALI CHATTERJEE (DAS), J. :-

1. This is an application under Section 397 read with Section 482 of the Code of Criminal Procedure, 1973 filed by the petitioners being accused in the complaint lodged on behalf of the opposite parties against an order dated 29th August, 2023 passed by the learned Judge, Special Court, 2nd Additional Sessions Judge, Alipore, 24-Parganas (South) in Special ST -18(01)17 whereby an application under Section 311 of the Code of Criminal Procedure, 1973 was rejected.

- 2.** It is the case of the present petitioners that the petitioners have been arraigned as accused persons in connection with Canning Police Station Case No.179 of 2016 dated 22-03-2016 and on completion of investigation, charge sheet was filed and charge was framed under Sections 363/120B/366A/368/370/370A/372/373/323/506(II) of the Indian Penal Code and Sections 6/17 of the Protection of Children from Sexual Offences (POCSO) Act against the present petitioners. After that, the trial commenced and out of total charge-sheeted witnesses, the evidence of nine witnesses including the victim girl has been recorded.
- 3.** On 18th January, 2018, while the cross examination of the victim girl was going on, the learned advocate for the present petitioners/accused prayed for an adjournment regarding cross examination of the said PW 1 on the ground that the counsel for the petitioners was busy with a case before this Court. However, the prayer was initially not considered and time was extended and the court had to wait till 5 P.M. However, the advocate could not reach and when the learned defence counsel prayed before the learned court to proceed with the cross examination, he refused to cross examine and, accordingly, the said cross examination was concluded. After that, in the month of January, 2019, the then learned advocate prepared one petition for recalling of the order for cross examination of P.W. 1 but was filed on December 02, 2019 and the hearing of that petition was not heard. On 29th August, 2023, the learned advocate withdrew the said petition and filed a fresh petition for recalling of the order for cross examination of the PW 1. The learned court by the impugned order dated 29th August, 2023 refused to allow such prayer with the

observation that the recalling application was filed at a belated stage and also on the settled principle of law that the minor child cannot be recalled for several times for cross examination and further that the petition for cross examination of the victim remains silent as regards the area for which the cross examination is necessary.

4. Mr. Prahladka, learned advocate, representing the petitioners, files a supplementary affidavit before this Court whereby the order passed on 18th January, 2018 by which such cross examination was closed and the copy of the petition initially prepared on 31st January, 2019 have been annexed. It is the specific contention of the learned advocate for the petitioners that admittedly there is a delay in filing the application for recalling. However, subsequently new advocate was engaged and he immediately after going through the entire facts and circumstances, filed a fresh application for recalling of the witness on the ground that the right of the accused person has been violated as he was not allowed to cross examine the P.W. 1 when the allegation is very serious in nature.

5. The learned advocate further submits that when the adjournment was refused, the learned court did not take recourse to Section 304(1) of the Code of Criminal Procedure by offering legal aid to the accused and, therefore, the accused was not given any right to be defended. The learned advocate appeared on behalf of the accused before the learned court was not prepared and hence, it was recorded that he declined to cross examine further but the learned court failed to consider that in this manner the valuable right as

enshrined in the Constitution to the accused person has been thwarted. In this connection, he relied upon a decision of the Kerala High Court in the case of ***Down Victor Vs. State of Kerala & Anr***¹

6. Non one appears to represent the private opposite party. However, the State is represented.
7. On behalf of the State, it was submitted that there is a prolong delay in filing of the application and no substantial explanation is there in the application itself for which any interference to such order is required. That apart, already all other witnesses have been examined and, therefore, if at this stage, this petition is allowed, it would cause serious prejudice to the victim girl when the charges are under POCSO Act.
8. Heard the submissions of learned advocates for the parties. Perused the record. On careful perusal of the contents of the petition and the case record, in the year 2018, the victim was examined as PW 1 after the learned Special Court framed the charges. She was cross examined by the learned advocate represented the other accused. After that when the it was the turn of the cross examination by this accused person the learned advocate then representing the present petitioners/accused before the learned court, prayed for an adjournment for further cross examination on the ground of the unavailability of his senior. The learned court initially refused to grant the same and then till 5 PM, when none appeared to represent the petitioner, the learned court directed the learned defence counsel present before the court to cross examine

¹ 2025 Ker-76713

on that day which he declined and hence, the learned court recorded the same in his order dated January 18, 2018 considering the specific provision of 33(5) of the POCSO Act regarding calling the victim repeatedly to testify in court, closed the evidence and fixed for further evidence. After that, the PW 2 was examined for several days and in the year 2019, the learned advocate of the present petitioners filed the application for recalling the P.W 1 and the copy of the same was served on 31st January, 2019. Admittedly, there is a long delay in filing of such petition which did not contain any such explanation regarding such delay in preferring the application. The court further cannot brush aside the fact, that application kept pending since 2019 and thereafter the work was suspended due to COVID-19. After such suspension order was withdrawn, then also the application originally filed for recalling was not taken up for hearing and ultimately, the present advocate who was engaged and prayed for withdrawal of the previous one filed the fresh application for recalling in the year 2023 specifically taking the ground that it was necessary to elicit the truth for a just decision of the case.

- 9.** The laches on the part of the learned advocate or on the part of the petitioner is very much apparent and it cannot be disputed that there was gross negligence on the part of the petitioner to exert their grievance before the learned court at appropriate time. The provisions of Section 33(5) of the POCSO Act are also very clear that the court must ensure that the victim is not called repeatedly for examination, but at the same time, this Court cannot be oblivious of the fact that in this case, no cross examination was made on

behalf of the present petitioners which in a way curtailing his fundamental right to defend himself. In the decision relied upon, the identical case was there before the Hon'ble High Court at Kerala and there it was observed that it is mandatory in terms of Section 304 of the Code as well as 39A of the Constitution of India that a duty has been cast upon the State to provide free legal aid to needy citizens. In the decision of ***Khattri and Ors. Vs. State of Bihar and Ors***² it is held that the right to free legal services is an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and implicit in the guarantee of Article 21. Section 304 of the Code reads as follows:

“304. Legal aid to accused at State expense in certain cases.-

(1) Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State.”

- 10.** Learned Court while refusing to grant any further time to the learned defence counsel to cross examine should have approached the petitioner as to whether any legal aid assistance in terms of Section 304(1) of the Code and when it is a mandate in case the petitioner remained undefended, that opportunity ought to have been given to the accused who is also arraigned as an accused in connection with a case of very serious nature. It is not a case

² [1981 KHC 517]

where part cross examination was allowed but where no cross examination of the victim girl was effected. In this case the allegation levelled against the petitioner is serious in nature and hence in order to arrive at a just decision the accused ought to have given an opportunity. The mandate of Section 33(5) of POCSO Act the victim minor should not be called repeatedly to testify and the intention is not to harass the child. However the accused also cannot be deprived of his right to cross examine in the trial and it is always necessary for just decision. In this case the victim was aged about 16 years while adducing evidence before the court in the year 2018 and at present she is no longer a minor.

11. Therefore, in view of the above facts and circumstances and as no such opportunity was given to the present petitioners to cross examine the witness should have been given an opportunity to cross examine in terms of the law laid down and for the purpose of arriving at the just decision . Hence, this Court is inclined to allow prayer of the petitioners.

12. Therefore the instant criminal revisional application stands allowed. The order passed by the Learned court dated 29.8.2023 is hereby set aside.

The Learned court is directed to fix a date as per convenience of the parties prior to the date of argument and to ensure the cross examination is concluded within an hour and no further adjournment be granted to the petitioners.

It is made clear that in case of failure on the part of the petitioner to cross examine on the date fixed by the learned court, no further opportunity will be

given to them. Accordingly, in view of the same, this revisional application is disposed of. The order passed by the learned court is hereby set aside.

13. All parties shall act on the server copies of this judgment duly downloaded from the official *website* of this Court.

14. Urgent Photostat certified copies of this order, if applied for, be supplied to the parties upon compliance of all necessary formalities.

[CHAITALI CHATTERJEE (DAS), J.]

