

\$~J-1

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

Order reserved on :13/09/2022
Order pronounced on: 29/11/2022

+ **CRL.M.C. 4217/2022**

SH. PHOOL SINGH @PHOOL CHAND Petitioner
Through: Mr Faisal Nassem, Mr Jitender
Choudhary, Mr M. Azhar and Mr
Vinay Garg, Advocates.

versus

STATE (NCT OF DELHI) Respondent
Through: Ms Priyanka Dalal, APP for the State
SI Jeniffer Lalnunthieng, PS Vasant
Vihar

CORAM:
HON'BLE MS. JUSTICE POONAM A. BAMBA

POONAM A. BAMBA, J.:

1.0 This is a petition under Section 482 of the Code of Criminal Procedure, 1973 (**Cr.P.C**) seeking setting aside of order dated 10.05.2022 (**'impugned order'** in short) passed by the court of Learned ASJ-01 (POCSO) New Delhi District, Patiala House Court in Sessions Case No. 209/2018 titled as "State Vs Pool Singh @ Phool Chand" arising out of FIR No. 145/2018, under Section 354 of the Indian Penal Code, 1860 (IPC) & 9(K)/10 POCSO Act, PS Vasant Vihar, **whereby petitioner's application under Section 311 Cr.P.C for recalling of PW-1/victim for her cross examination, was dismissed.**

2.0 The facts relevant for disposal of this revision petition are that the present FIR came to be registered on the complaint of the petitioner's sister. The complainant stated that on 06.02.2018 at about 4 pm, she had left the house along with her younger daughter to bring ration. When she returned home, her daughter 'S' told that her mama (maternal uncle)/petitioner had come in her absence and gave Rs. 100 to her father and sent him to the market to bring some eatables. Thereafter, finding her alone, the petitioner had touched her breasts and when she objected to the same and told him that she will inform her mother, he ran away.

2.1 After filing of charge sheet, the victim 'S' was cross examined and discharged on 30.05.2019. Other witnesses PW-2 & 3 (parents of the victim girl) have also been examined. Subsequently, on 10.05.2022, the petitioner filed an application under Section 311 Cr.P.C praying for recalling of victim 'S'/PW-1 for her cross examination pleading that main counsel was not present on the given day and the proxy counsel could not properly cross examine the witness/PW-1. Therefore, her recalling is necessary. Said application was dismissed by the Learned ASJ-01 vide impugned order dated 10.05.2022.

3.0 The petitioner also challenged the impugned order *inter alia* on the grounds that the learned Trial Court failed to appreciate that the revisionist/accused was represented by a proxy counsel on the given day and could not properly cross examine PW-1 on material particulars ; Learned trial court did not also appreciate that the petitioner faces a minimum imprisonment of five years which may extend to seven years, in case

convicted; and if the witness is not allowed to be recalled to be cross examined, it shall defeat the petitioner's right to fair trial.

3.1 Learned counsel also argued that the petitioner undertakes to complete PW-1's cross examination on a single date of hearing, if given an opportunity.

4.0 On the other hand, the Learned Prosecutor strongly opposed this petition seeking its dismissal with cost. It is submitted that the victim/PW-1 was cross examined in May 2019 and the application for recalling her was filed nearly after three years of her examination ; and even after the parents of the victim i.e., PW-2 and PW-3 were examined. Nothing prevented the petitioner to take immediate steps if he was so aggrieved. Such belated application clearly shows that the petitioner after examination of other witnesses, is now attempting to fill in the loopholes, which cannot be allowed. More so, in view of the serious allegations against the petitioner.

4.1 Ld. Prosecutor also submitted that the victim is a special child with mental disability of 50 per cent. Thus, the Learned ASJ rightly dismissed the petitioner's application considering these facts and also taking into account that the POCSO Act requires that the child witness be not called repeatedly to testify in the Court. Ld. Prosecutor also submitted that the possibility of PW-2 and PW-3, sister and brother-in-law of the petitioner (and parents of the victim), being influenced can not be ruled out and that was the reason, the petitioner waited for the conclusion of their examination before filing the application for recalling of victim/PW-1.

5.0 I have duly considered the submissions made by both the sides.

6.0 It would be pertinent to refer to Section 311 Cr.P.C at the outset, which reads as under:

“311. Power to summon material witness, or examine person present :- Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.”

6.1 As is evident from the plain reading of this Section, this court has wide power to recall a witness if it appears to be essential to the just decision of the case. Needless to mention that although, wide powers have been conferred on this Court, such discretion has to be exercised judiciously. Need for such recalling of a witness has to be weighed in the light of facts and circumstances of every case.

7.0 Now reverting to the facts of the present case, it is seen that the victim/PW-1 was examined on 30.05.2019. Thereafter the matter came up for hearing on about eight dates of hearing i.e., 08.11.2019, 16.12.2019, 13.04.2020, 02.02.2021, 29.07.2021, 18.12.2021 and 23.04.2022. PW-2, mother of the victim was examined on 18.12.2021 and was discharged; and thereafter, on the next date of hearing i.e., 23.04.2022, PW-3, father of the victim was examined. Only thereafter, on 10.05.2022, an application under

Section 311 Cr.P.C for recalling of PW-1/victim for cross examination, was filed by the petitioner.

7.1 From the above, it is evident that application for recalling of PW-1/victim was filed approximately after three years of victim's examination. There is no averment in the petition explaining such a delay in filing the application under Section 311 Cr.P.C.

7.2 Learned counsel for the petitioner himself submitted that PW-2 and PW-3 i.e., mother and father of the victim, respectively have not supported prosecution case, which lends credence to the argument of the Ld. Prosecutor that the petitioner waited for the conclusion of their examination before filing he application for recalling of victim/PW-1 and the possibility of them having been influenced cannot be ruled out.

7.3 The main plea taken before this court challenging the impugned order declining recalling of victim is, that the proxy counsel could not properly cross examine PW-1 on material particulars and that the same shall prejudice the petitioner's case. Perusal of order dated 30.05.2019 of the learned ASJ, the date on which the victim was cross examined by Ms Richita Garg, learned proxy counsel for the petitioner, shows that the Ld. counsel did not make any submission that she was unable to cross examine the witness/PW-1. Order dated 30.05.2019 reads as under :

“

***FIR No. 145/18
PS – Vasant Vihar
State Vs. Phool Singh.***

30.05.2019

InVWDC

*Present: Sh. Dheeraj Kumar, Ld. Addl. PP for the State.
Accused on bail (He is sitting in the accused room.)
Ms. Richita Garg, Ld. Proxy Counsel for accused.
Ms. Bedashree Borah, Ld. Counsel from DCW.
Victim X (She is sitting in the evidence room in the VWDC with the support person Ms. Priya Gulia.)*

Victim X has been examined as PW-1. She has been cross-examined and discharged.

Matter be listed for PE on 08.11.2019. Mother of the victim be summoned for the said date.

*(Ruby Alka Gupta)
Special Court POCSO/ASJ-01
PHC/New Delhi/30.05.2019/M
,,*

7.4 From the above, it is evident that the Ld. counsel did not take any plea that she was not conversant with the facts or was unable to cross examine the witness. If it was felt that the proxy counsel was not capable of cross examining/had not cross examined the witness on material particulars, the learned counsel for the petitioner did not take any steps for recalling of PW-1 for three long years. Rather, they waited for examination of other material witnesses i.e. PW-2 and PW-3, to be over, to take such steps.

8.0. It would also be pertinent to mention here that the special legislation- POCSO Act was brought into being to effectively deal with sexual exploitation and sexual abuse of children and to punish the offenders of such heinous crimes against children. In line with the spirit of the Act, Chapter 8

of the POCSO Act prescribes 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 object of POCSO Act, a special procedure has been adopted for recording of evidence of the child witness. Sub-Section (5) of Section 33 POCSO Act, directs that the Special Court shall ensure that the child is not called repeatedly to testify in the court.

8.1. It would also be pertinent to mention here that in **Alakh Alok Srivastva vs. Union of India (2018) 17 SCC 291**, considering the spirit of the POCSO Act, the Hon'ble Supreme Court issued the following directions :-

"25.1The 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

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

25.5

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."

9.0 Admittedly, the child/victim is a special child with mental disability of 50 per cent.

10.0. Considering the above facts and circumstances in entirety and the reasons recorded hereinabove, exercise of discretion under Section 311 Cr.P.C is not called for in the present case. Therefore, I find no reason to interfere in the impugned order.

11.0. The petition is accordingly dismissed.

(POONAM A. BAMBA)
JUDGE

NOVEMBER 29,2022/g.joshi

Click here to check corrigendum, if any