

Form No. J(1)

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:

Hon'ble Justice R. K. Bag, J.

CRR No.1285 of 2015

Sujay Mitra
V.
State of West Bengal

For the Petitioner : **Mr. Kushal Pal,**
Mr. B. Chakraborty,

For the State : **Mr. Manjit Singh,**
Mr. Ayan Basu,

Heard on : **08.06.2015**

Judgment on : **17.06.2015**

R. K. Bag, J.

The petitioner has challenged the order dated February 18, 2015 passed by Learned Additional Sessions Judge, 8th Court, Alipore in S.C. No.1(10) of 2013 corresponding to S.T. No.1(8) of 2014 by filing this revisional application under Section 482 of the Code of Criminal Procedure, 1973.

2. The petitioner is facing trial as an accused in S.T. No.1(8) of 2014 arising out of Kalighat Police Station Case No.164 of 2013 dated 1st June, 2013 under Section 376 of the Indian Penal Code. The de facto complainant of the criminal case is one Louise Florence who is currently residing in Dublin, Ireland. It appears from record that charge was framed against the present petitioner under Section 376 of the Indian Penal Code on August 6, 2014 and the evidence of four prosecution witnesses was recorded by the trial court. On September 17, 2014 the trial court passed the order for examination of the victim Louise Florence (here in after only victim) as P.W.5 through video conference on the basis of prayer of the prosecution. The trial court fixed the date for examination of the victim through video conference on January 6, 2015. The trial court made detailed discussion about the pros and cons of recording of evidence of the victim through video conference in the order dated September 17, 2014, which has not been challenged by the petitioner before any higher forum. The evidence of the victim was not recorded through video conference on January 6, 2015 as she did not appear in the Embassy of India for the purpose of video conference. On January 21, 2015 the victim was examined in part through video conference

without any demur from the defence. The examination of the victim (P.W.5) was deferred till January 29, 2015 on prayer of the prosecution, but the Presiding Officer of the court was absent on January 29, 2015 and as such the next date for further examination of the victim (P.W.5) was fixed on February 18, 2015. On February 18, 2015 the petitioner moved an application before the trial court praying for adjournment of hearing on the ground that the petitioner would like to move before the High Court for recording of evidence of the victim (P.W.5) through video conference without following the guidelines laid down by the Supreme Court. The said application of the petitioner was rejected by the trial court by passing the impugned order which is under challenge in this revisional application.

3. The petitioner has also brought to the notice of this court the order dated March 9, 2015 by which the trial court deferred the schedule of examination of the prosecution witnesses from the month of March to 27.04.2015, 28.04.2015 and 29.04.2015.
4. With the above factual matrix, Mr. Kushal Pal, Learned Counsel appearing on behalf of the petitioner submits that Learned Judge of the trial court proceeded to record the evidence of the victim residing in Ireland through video conference, though there is no extradition

treaty between India and Ireland. According to Mr. Pal, the evidence of the victim cannot be examined through video conference as there was no extradition treaty between India and Ireland. Mr. Pal further submits that Learned Judge did not record his satisfaction that there was no other person present in the Indian Embassy in Ireland at the time of recording of evidence of the victim (P.W.5) in the Embassy through video conference. Mr. Pal also contends that the trial court did not give any direction to the victim or the prosecution to file an affidavit disclosing the identity of the victim appearing in the Indian Embassy in Ireland for the purpose of recording of evidence through video conference. Mr. Pal argues that the trial court did not record his satisfaction about service of summons on the victim residing in Ireland for recording of evidence. Mr. Pal has strenuously argued that the petitioner is highly prejudiced as the victim was not looking at the camera at the time of giving evidence through video conference. Mr. Pal has relied on the decision of the Supreme Court reported in AIR 2003 SC 2053, decision of our High Court reported in 2004(3) Cal L.T. and decision of Karnataka High Court reported in AIR 2003 Kant 148 in support of his above contention.

5. Mr. Ayan Basu, Learned Counsel appearing on behalf of the opposite party State has also drawn my attention to the guidelines of the Supreme Court for recording of evidence through video conference in the case of “State of Maharashtra V. Praful B. Desai” reported in AIR 2003 SC 2053. Mr. Basu submits that the existence of extradition treaty between Ireland and India is not required for recording of evidence of the victim through video conference directly by the court and the guidelines of the Supreme Court in the case of “Dr. Praful B. Desai” (supra) about the existence of extradition treaty will be attracted only when the evidence of the witness is recorded through video conference by commission. Mr. Basu also submits that the trial court has followed the guidelines of the Supreme Court in recording the evidence of the victim (P.W.5) through video conference and as such this revisional application is liable to be dismissed having no merit. Mr. Basu has relied on the decision of the Supreme Court in “Dr. Praful B. Desai” (supra) and in the decision of the Supreme Court reported in 1972 SCC (Cri) 861 in support of his above contention.
6. On scrutiny of copy of the application filed by the petitioner before the trial court on February 18, 2015 (Annexure P3 to the revisional

application) I find that the petitioner has only pleaded that the trial court was not following the guidelines of the Supreme Court for recording evidence through video conference and that summons was not issued to the victim/de facto complainant for appearance in the court as witness. The petitioner has not spelt out which guideline of the Apex Court was not followed by the trial court for recording of evidence of the victim (P.W.5) through video conference. The petitioner along with his Learned Counsel participated in the court proceeding on January 21, 2015 when the evidence of the victim (P.W.5) was recorded in part through video conference and no objection was raised on behalf of the petitioner before the trial court on that date. However, Mr. Pal has urged this court to consider that the trial court proceeded to record the evidence of the victim (P.W.5) from the Indian Embassy in Ireland through video conference without ensuring the following points: (i) the summons was not served on the victim for appearance in the trial court, (ii) the affidavit was not filed by the victim or the prosecution disclosing the identity of the victim before recording of evidence, (iii) the Judge did not record his satisfaction that there was no other person in the Indian Embassy to prompt the victim at the time of recording of her evidence through

video conference, (iv) there was no extradition treaty between Ireland and India and as such the evidence of the victim cannot be recorded through video conference, (v) the Judge did not record the demeanour of the victim that she was not looking directly at the camera at the time of recording of evidence.

7. In “State of Maharashtra V. Dr. Praful B. Desai” reported in AIR 2003 SC 2053: 2003 SCC (Cri) 815 the Supreme Court has laid down the guidelines for recording of evidence of the witness through video conference by issuing commission. It is held by the Supreme Court in paragraph 19 as follows:

“Video Conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you i.e. in your presence. In fact he/she is present before you on a screen. Except for touching one can see, hear and observe as if the party is in the same room. In video conferencing both parties are in presence of each other. Thus it is clear that so long as the accused and/or his pleader are present when

evidence is recorded by video conferencing that evidence is being recorded in the 'presence' of the accused and would thus fully meet the requirements of Section 273, Criminal Procedure Code. Recording of such evidence would be as per 'procedure established by law.' The witness can be confronted with documents or other material or statement in the same manner as if he/she was in Court. All these objects would be fully met when evidence is recorded by video conferencing. Thus no prejudice, of whatsoever nature, is caused to the accused. Of course, evidence by video conferencing has to be on some conditions.”

In this reported case the Supreme Court has laid down some guidelines for recording of evidence through video conference by issuing commission. The question of existence of extradition treaty between India and the country from where the evidence of the witness will be recorded on commission may be of some importance. If the witness commits contempt of court or perjures himself, the witness can be brought to book by taking recourse to the extradition treaty.

However, in the instant case, the Presiding Officer of the trial court is recording the evidence of the victim (P.W.5) through video conference and recording of evidence has already been done in part without any objection from the side of the petitioner, and as such the issue whether any extradition treaty between Ireland and India is in existence will be merely academic. Accordingly, I do not find any merit in the submission made on behalf of the petitioner that the victim (P.W.5) cannot be examined through video conference from Ireland as there is no existence of extradition treaty between India and Ireland.

8. The guidelines given by the Supreme Court for recording of evidence through video conference in “Dr. Praful B. Desai” (supra) indicate that an Officer from Indian Embassy/Consulate in the country where the evidence will be recorded will remain present and will ensure that there is no other person in the room where the witness is sitting at the time of recording of evidence through video conference. It appears from the order passed by the trial court on January 21, 2015 that Learned Judge of the trial court was satisfied with the arrangement made by the prosecution for recording of evidence of the victim (P.W.5) through video conference and one Benjamin Besra,

First Secretary of Indian Embassy in Ireland identified the victim (P.W.5) and confirmed that the victim is present in the chamber of the Embassy of India, which indicates that Learned Judge of the trial court was satisfied about the identity of the victim and about the fact that there was no other person in the Embassy of India in Ireland except the victim for the purpose of recording of her evidence through video conference. Thus, I do not find any merit in the submission made by Learned Counsel for the petitioner that Learned Judge did not record his satisfaction that there was no other person in the Indian Embassy except the victim at the time of recording of her evidence through video conference, particularly when Learned Defence Counsel will get ample opportunity to cross-examine the victim (P.W.5) on these points to elicit any information in favour of the defence.

9. The contention on behalf of the petitioner that summons was not issued to the victim in Ireland is without any substance because the prosecution filed application before the trial court praying for recording of evidence of the victim (P.W.5) through video conference on the ground that the attendance of the victim as witness cannot be procured without an amount of delay, expense or inconvenience,

which under the circumstances of the case, will be unreasonable. The next submission made on behalf of the petitioner that Learned Judge of the trial court did not record the demeanour of the victim who was not looking at the camera has also no substance, because the victim of a rape case while giving evidence in court cannot be compelled to look at the face of the Learned Defence Counsel or to look directly at the accused in the dock. The trial court must not be oblivious that if the victim of a rape case is asked to look at the camera whereby she can see the accused, the trauma undergone by the victim may be repeated for the second time during the trial of the case. The trial court will record only such demeanour of the witness which is essential for evaluation of the evidence of the said witness. When Learned Defence Counsel will get the opportunity to cross-examine the victim and to put any question to the victim under Section 146 of the Indian Evidence Act, I do not think that the petitioner is at all prejudiced for not recording the demeanour of the victim by Learned Judge of the trial court at the time of recording of her evidence through video conference.

10. In “Amitabh Bagchi V. Ena Bagchi” reported in (2004) 3 Cal L.T. 263 (HC) Learned Single Judge of our High Court has given some

guidelines in paragraph 10 for recording of evidence of any witness through Audio-Video link. These guidelines have been given for recording of evidence through video conference in a civil proceeding. According to the said guidelines, the witness must file an affidavit disclosing his identity as the person who would give evidence through video conference. The similar affidavit must be given by the party who wishes to examine the witness through video conference. The object of giving such affidavit is to establish the identity of the person giving evidence through video conference. In the instant case, the prosecution filed an application before the trial court praying for examination of the victim of a rape case from Ireland through video conference as the attendance of the victim cannot be procured before the trial court without an amount of delay, expense or inconvenience, which under the circumstances of the case, will be unreasonable. The trial court allowed the said application by a reasoned order after giving opportunity of hearing to both parties on September 17, 2014. The petitioner did not challenge the legality and validity of the said order dated September 17, 2015 and the same has attained finality. Moreover, the identity of the victim is established as the victim is identified by one Benjamin Besra, First Secretary, Embassy of India

situated in Ireland as per proposition of law laid down by the Supreme Court in “Dr. Praful B. Desai” (supra). While I fully agree with the guidelines given by Learned Single Judge in the case of “Amitabh Bagchi” (supra), I would like to point out that all those guidelines are more relevant for recording of evidence through video conference in a civil proceeding. The guidelines laid down in the case of “Amitabh Bagchi” (supra) have been followed in substance so far as the same are applicable in a criminal proceeding when Learned Judge of the trial court was satisfied about the identity of the victim Louise Florence and her presence in the Indian Embassy in Ireland for the purpose of recording of evidence through video conference by following the procedure laid down by the Supreme Court in “Dr. Praful B. Desai” (supra).

11. The guidelines given by the Karnataka High Court for recording of evidence through video conference in paragraph 10 of “Twentieth Century Fox Film Corporation V. NRI Film Production Associates” reported in AIR 2003 Kant 148 are almost the same which are given by our High Court in “Amitabh Bagchi” (supra). With regard to the guideline of filing affidavit by the witness and the party who wants to examine the witness before the court I have already observed that the

need of affidavit is to establish the identity of the witness. Since the identity of the victim has been established before the trial court before recording of evidence of the said witness through video conference, the non-filing of affidavit will not cause any prejudice to the defence. Moreover, the guidelines given by the Karnataka High Court in “Twentieth Century Fox Film Corporation” (supra) are relevant for recording of evidence of a witness in a civil proceeding and as such those guidelines may not have much bearing for recording of evidence through video conference in a criminal proceeding.

12. The proposition of law laid down by the Supreme Court in the case of “Ratilal Bhanji Mithani V. State of Maharashtra” reported in (1972) 3 SCC 793 is not relevant for the purpose of deciding the disputed issues in this revisional application, as the said case deals with issuing of commission for examination of the witness in a foreign country and not for examination of witness through video conference.
13. In view of my above findings, I do not find any illegality in the impugned order dated February 18, 2015 passed by Learned Judge of the trial court. Accordingly, Learned Judge of the trial court is directed to proceed with the recording of evidence of the victim Louise

Florence (P.W.5) through video conference from the office of Indian Embassy in Ireland without granting any adjournment to either of the parties and by fixing the schedule of examination of the witnesses on day-to-day basis till conclusion of the trial court. However, Learned Judge of the trial court must follow the following safeguards for the purpose of recording of evidence of the witness through video conference: (i) The court must be satisfied about the identity of the witness giving evidence through video conference, (ii) The court will administer the oath to the witness before recording of the evidence, (iii) The witness must be examined during the working hours of the Indian Courts, (iv) The copy of the documents to be proved by the witness must be sent to the witness in advance, (v) The court must ensure that the witness is alone in the room of the Indian Embassy from where the witness is giving evidence through video conference, (vi) The court must record the demeanour of the witness which is relevant for the purpose of evaluation of evidence of the witness, (vii) The recording of evidence of the witness once started through video conference must be continued on day-to-day basis till completion of recording of evidence of the said witness, (viii) The trial court can

impose any other condition to ensure smooth recording of evidence of the witness through video conference.

As I do not find any merit in the revisional application, the revisional application is dismissed. There will be no order as to costs.

14. As a result, the order dated February 18, 2015 passed by Learned Additional Sessions Judge, 8th Court, Alipore in S.C. No.1(10) of 2013 corresponding to S.T. No.1(8) of 2014 is hereby affirmed.

Let a copy of this judgment and order be sent down to the learned Court below forthwith for favour of information and necessary action.

The urgent photostat certified copy of the judgment and order, if applied for, be given to the parties on priority basis after compliance with all necessary formalities.

(R. K. Bag, J.)