

Rane

* 1/7 * WP=317-2017 (SR. 912)
Friday, 29.9.2017

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 317 OF 2017

Kishan Pandurang MazgaonkarPetitioner

V/s.

The State of Maharashtra
and Ors.

....Respondents

* * * * *

Mr. Ayaz Khan, Advocate for the petitioner.

Mrs. A.S. Pai, Additional Public Prosecutor for the
respondent, State.

CORAM :-

R.M. SAVANT &

SANDEEP K. SHINDE, JJ.

DATE :-

29TH SEPTEMBER, 2017.

P.C. :-

1. The order dated 3rd December, 2016 passed by the Learned Additional Sessions Judge rejecting the Application (Exhibit-7) filed by the petitioner is taken exception to by way of the above Writ Petition. The said application was filed invoking Section 273 of the Criminal

Procedure Code for claiming the relief that the petitioner who was the applicant be directed to be produced before the Sessions Court on each and every date of hearing till conclusion of trial and for issuance of the directions to the Superintendent of Yerwada Central Prison, Pune to transfer the custody of the applicant/accused to Mumbai Central Prison till the conclusion of the trial.

2. Suffice it would be to state that, the application has been rejected on the ground that the applicant who has been earlier convicted under Section 302 of the Indian Penal Code was released on parole and he jumped parole in the year 1977 and thereafter committed the present offence in the year 1993. The applicant is presently tried for the offences punishable under Sections 498A and 306 of the Indian Penal Code. The second ground on which the application has been rejected is that, evidence can be recorded by availing of the Video Conferencing facility. The third ground mentioned is that, there is a possibility of any other incident like jumping parole or other taking place. As indicated above, it is on

the aforesaid grounds that the application, Exhibit-7 filed by the petitioner came to be rejected.

3. The Learned Counsel appearing Mr. Ayaz Khan would submit that the charges have been framed against the applicant i.e. the petitioner herein and that the said Sessions case is ripe for trial. The Learned Counsel would submit that the recording of Video Conferencing would interfere with the right of a fair trial of the accused i.e. the petitioner herein. The Learned Counsel would submit that, the reasons mentioned by the Learned Additional Sessions Judge are not germane to the application filed under Section 273 of the Criminal Procedure Code. Per-Contra, the Learned Additional Public Prosecutor, Mrs. Pail would seek to support the impugned order. The Learned Additional Public Prosecutor would submit that the recording of evidence by Video Conference which is by now a known modality for interacting with the undertrials, would suffice the purpose.

4. Having heard the Learned Counsel for the petitioner and the Learned APP, the question that arises,

whether the accused is entitled to be present before the Court while the evidence is being recorded. To answer the said question, the provisions of Section 273 of the Criminal Procedure Code would be looked into. The same is reproduced hereunder for the sake of ready reference :

“Evidence to be taken in presence of accused.- Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader:

[Provided that where the evidence of a woman below the age of eighteen years who is alleged to have been subjected to rape or any other sexual offence, is to be recorded, the court may take appropriate measures to ensure that such woman is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused.]

Explanation.- In this section, “accused” includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code.”

2. Reading of the Section 273 postulates that the evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused or when his personal attendance is dispensed with, in the

presence of his pleader. The exception, if any, is contained in the proviso to the said Section 273 and is in respect of a woman below the age of eighteen years who is alleged to have been subjected to rape or any other sexual offence. Hence, the said provision confers a right on the accused to be present at the time of recording of the evidence. The presence of the accused would be necessary to facilitate instructions to be given to his lawyer who is appearing for him in the said case, so that there is an effective representative of the accused at the time of the trial. In our view, recording of evidence by Video Conferencing would have the effect of impinging upon the aspect of fair trial. Insofar as, reasons mentioned in the impugned order are concerned, we do not perceive the said reasons as reasons which can deprive the accused of being present at the time of recording of the evidence. The prosecution has to see to it that all such measures which are necessary to be taken are required to be taken insofar as the custody of the accused is concerned. He cannot be denied the facility of

remaining present on the specious ground that an untoward incident of he again escaping would arise. In our view, therefore the impugned order dated 3rd December, 2016 would have to be quashed and set aside and is accordingly quashed and set aside. However, the following directions are issued :-

(i) That as and when, the evidence in the case in question being Sessions Case No. 369 of 2016 is recorded, the petitioner/accused would be produced in the Sessions Court, Mumbai.

(ii) The accused would be entitled to remain present at the time of recording of evidence till its completion. The Court which is in seisin of the case would record the evidence on a day to day basis and complete the evidence expeditiously.

(iii) The Sessions Court which is in seisin of the matter would issue appropriate directions for the production of the accused before the Court on the date when the evidence is to be

recorded.

3. It would be for the Sessions Court to decide as to the jail in which the petitioner/accused is to be kept after he is produced before it for recording of the evidence, and also during the entire period of recording of the evidence in the said case.

4. With the aforesaid directions, the above Writ Petition is disposed of.

(SANDEEP K. SHINDE, J)

(R.M. SAVANT, J)