

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 615 OF 2019

Babulkhan Wali Mohammad Khan Pathan,
Age : 55 years, Occu. : Labour,
R/o Halimpura, Bidkin, Tq. Paithan,
Aurangabad. ...Petitioner

Versus

The State of Maharashtra ...Respondent

.....
Mr. S.G.Ladda, Advocate for Petitioner.
Mr. S.Y.Mahajan, A.P.P. for Respondent.
.....

CORAM : V.M.DESHPANDE, J.

DATE : 11TH APRIL, 2019

ORAL JUDGMENT :

01. Rule. Rule made returnable forthwith and heard finally by consent of parties, i.e. Mr. S.G.Ladda, the learned Counsel for the petitioner, Mr. S.Y.Mahajan, the learned A.P.P.

02. By the present writ petition, the petitioner is challenging the Order passed by the learned Special Judge – Additional Sessions Judge-13, Aurangabad on 2.3.2019 below Exh.70 in Special POCSO Case No. 38/2017 whereby the learned Judge has rejected the application for re-calling of

witnesses. Few facts which are necessary for final decision of this writ petition are enumerated herein.

03. Petitioner is an adoptive father of the victim. On the basis of the report lodged by the victim herself, which came to be culminated into Crime No. 410/2016 being registered with Bidkin Police Station, petitioner was arrested on 18.12.2016 and since then he is in jail.

04. The F.I.R. culminated into the registration of Special (POCSO) Case No. 38/2017 and a charge was framed by the learned Special Judge against the petitioner for the offences punishable under Sections 376, 506 of I.P.C. and under Sections 4,6,8,10 and 12 of the Protection of Children from Sexual Offences (POCSO) Act, 2012. The petitioner adjured his guilt and claimed for his trial.

05. Trial proceeded. The petitioner was represented by his Advocate. The case was fixed on 20.11.2017 for recording of evidence of the prosecution witnesses. The petitioner was produced from jail. His Advocate filed an application (Exh. 24) for adjournment. It was rejected. After the

rejection of the adjournment application, the learned Judge of the Court below proceeded with the recording of the evidence of victim. After the examination-in-chief of the victim was over, it was noticed by the learned Judge of the Court below that the Counsel for the petitioner is not present. Therefore, the petitioner was asked to cross-examine the victim, which he refused and moved an application Exh. 32 for adjournment and the said was granted. It was kept on 21.11.2017.

06. It appears that on the said day also, the application for adjournment was moved on behalf of the learned Counsel for the petitioner and said was granted and matter was kept on 4.12.2017 for recording the evidence. On 4.12.2017, thereafter, on 18.12.2017, the petitioner was not produced from jail. From the *roznama* it does not appear that there was any request on the part of the prosecution to produce the petitioner through video conferencing. Consequently, the matter was adjourned to 30.12.2017.

07. On the said day, though the petitioner was produced from jail, the learned Judge was on leave, witnesses were bound over and the matter was fixed

for 12.1.2018. On that date the petitioner was not produced. On subsequent date i.e. on 25.1.2018 also the petitioner was not produced and on the said date Exh. 37-adjournment application was moved by the learned A.P.P. Then, the trial was fixed on 8.2.2018.

08. On 8.2.2018 the petitioner was produced. The learned A.P.P. and his witnesses were also present. However, the Counsel for the petitioner -accused was absent. The learned Judge proceeded to record the evidence of PW-2-Latabai and PW-3-Mahesh. PW-3-Mahesh proved search and seizure panchnama (Exh. 40). Exh. 41 was an application for issuance of summons to the witnesses. Obviously it must have been filed by the learned A.P.P. Thereafter, the case was fixed on 22.2.2018.

09. On 22.2.2018, the petitioner was produced. Exh. 42 the application for production of document was filed by the A.P.P. and deposition of PW-4 Shaikh Asifa was recorded. Roznama shows that extract of admission leaving register was proved and it is at Exh. 45. Exh. 46 is the original admission form. The case was adjourned to 6.3.2018.

10. On 6.3.2018, the petitioner was not produced from the jail and the learned A.P.P. filed an application Exh. 48 for issuance of summons to witness. The matter was adjourned till 17.3.2018.

11. On the said day, the petitioner was not produced from jail and the learned A.P.P. was required to file another application (Exh. 49) for re-issuance of summons to the witnesses.

12. Same occurred on 28.3.2018. On the said day, another application Exh. 50, as Exh. 49, was moved. Similar was the position on 11.4.2018. On the said day Exh. 51 was required to be filed by the learned A.P.P. for re-issuance of summons to witnesses. The case was fixed on 25.4.2018.

13. On 25.4.2018 roznama shows that the accused-petitioner was not produced from the jail and the report in respect of service of witnesses were received as un-served. On that day, two applications were moved by the learned A.P.P., as it could be seen from the roznama that the one at Exh. 52 for issuance of summons to the witnesses and another at Exh. 53 for issuance of bailable warrant. The matter was adjourned to 14.5.2018.

14. On 14.5.2018, the petitioner was produced from jail. However, on the said day, it appears that the witnesses were not present and therefore, the application Exh. 54 was moved for issuance of fresh summons to the witnesses. Then, the matter was taken on 28.5.2018.

15. On the said day the petitioner was not produced from jail. The learned A.P.P. was required to file an application Exh. 55 for re-issuance of summons to witnesses. The matter was kept on 8.6.2018.

16. On 8.6.2018 the petitioner was produced from jail and on this date it appears from the Order-sheet that the petitioner has changed his Advocate and the present Advocate filed his vakalatnama (Exh. 56) and he filed an application (Exh. 57) for adjournment, however, it was rejected. As per the submission of the learned Counsel for the petitioner on the said day the evidence of PW-5 Ratndeeep was recorded. He proved certain documents i.e. Exh. 59 to 61. Thereafter, the matter was kept on 21.6.2018. The Order-sheet of 21.6.2018 shows that the Advocate for petitioners-accused was present. The petitioner was also produced by jail

authority. However, the Order-sheet does not reflect anything as to why the case was adjourned. The matter was adjourned to 5.7.2018.

17. On 5.7.2018, the learned A.P.P. filed an application (Exh.60) for issuance of summons to the witnesses. On the same day, the Counsel for the accused moved application (Exh.61) for re-calling of the witnesses. The matter was adjourned to 19.7.2018 for giving reply on the said application and also for evidence.

18. On 19.7.2018 the petitioner was not produced. Though the learned Counsel for the petitioner was present, the learned A.P.P. also gave his say to Exh. 61. The case was then fixed on 7.8.2018.

19. On the said day, the accused was presented in the Court by the jail auhtority. The learned Judge was busy in another matter and, therefore, the matter was adjourned to 13.8.2018 for passing of Order on Exh. 61 and evidence, part heard.

20. On 13.8.2018, the accused was produced from jail. His Counsel was also present. Arguments were heard and those could not be concluded on the

said day on Exh. 61. Therefore, the matter was fixed on 27.8.2018.

21. On 27.8.2018, though the petitioner was produced from the jail authority and his Advocate was present, for non-availability of the Stenographer the learned Judge did not pass any Order and case was fixed on 3.9.2018 and ultimately on the said day the learned Judge allowed the application (Exh. 61) on behalf of the petitioner for re-calling of witnesses. Therefore, the matter was fixed on 26.9.2018.

22. On 26.9.2018 from the Order-sheet it is crystal clear that the Advocate and the accused were present, but, the witnesses were not present for the simple reason. The said Order-sheet reflects the endorsement of issue summons to the witnesses. Thereafter the matter was fixed on 11.10.2018.

23. On the said day, the petitioner and his Counsel were present. The report of the witnesses was received as served, but, it does not appear from the Order-sheet that the the witnesses were present on the said day. Then, the matter was kept on 24.10.2018.

24. On the said day the Counsel for the petitioner filed application (Exh. 63) for adjournment. The matter was adjourned to 1.11.2018.

25. On 1.11.2018 though the accused was not presented from the jail, his Counsel proceeded with the cross-examination of PW-2. The matter was then adjourned to 15.11.2018.

26. On the said day, the Counsel assisting the incharge of the brief Counsel of the accused filed an application (Exh. 65) on the ground that the Counsel is suffering from fever. A very detailed Order was passed on 15.11.2018 giving all history and the learned Judge rejected the application.

27. On the said day, the learned Judge also passed an Order below Exh. 1 that no-cross Order was passed against the accused for PW-1. Thereafter, the matter was fixed on 30.11.2018.

28. On 30.11.2018 though the accused was produced, the prosecution witnesses were absent. Therefore, the application (Exh. 66) was filed on behalf of the prosecution for re-issuance of summons to the witnesses. Then matter was kept on 12.12.2018.

29. On 12.12.2018 the petitioner was not produced from jail. The report of the service of the witness summons was not received. The witnesses were absent. Thereafter, the matter was kept on 24.12.2018.

30. On the said day, the accused was not produced. The junior Counsel for the accused was present. However, the witnesses were not present. The matter was then posted to 8.1.2019.

31. On the said day, the accused was not produced from the jail. The report of the witness summons was received un-served. Therefore, the application (Exh. 67) was filed by the learned Counsel for the petitioner to comply. Then the matter was kept on 21.1.2019.

32. On the said day, the petitioner and his Counsel were present, as he was produced from the jail. The report of the issuance of witness summons was returned un-served. Hence, another application (Exh. 68) was filed by the learned A.P.P. Thereafter, the matter was taken on 5.2.2019.

33. On the said day, the accused was not produced by the jail authority. The learned Judge

was also on leave. The report of the witness summons was also not received. Though the defence Counsel was present, hence, the matter was kept on 16.2.2019.

34. On the said day also the Order-sheet shows that the learned Presiding Officer was on leave. The matter was kept on 2.3.2019.

35. On the said day, the report of the witness summons was received un-served. Therefore, the application (Exh. 69) was moved by the learned A.P.P. for recording of evidence of doctor through video conferencing. Application was granted. I am informed that the evidence of the doctor was recorded on the next day through video conferencing i.e. on 14.2.2019. However, on 2.3.2019 the learned Counsel for the petitioner filed an application (Exh. 70) for re-calling of the witnesses and the said is rejected. Hence, this writ petition.

36. From the aforesaid chronology of the events, it is clear that the petitioner is facing a very serious charge and for which he can be sentenced to suffer a life imprisonment, if the charge is proved against him. Fullest opportunity

is required to be given to the accused, who is facing such a serious charge. Chronology shows that his earlier Counsel used to remain absent and since the petitioner is in jail, in my view, he was helpless and was unable to control the situation. It appears that the present Counsel after appearing, putting his vakilpatra has moved adjournment application only twice i.e. on the day of appearance. Such was most natural, since on the very same day, he was instructed to appear and on another i.e. 15.11.2018 which is incorrectly recorded in the application as 14.11.2018, on the ground that the accused was suffering from fever. Sufferance of fever to any person is not in his control. The learned Court below, in my view, ought to have allowed the said application, however, the same was rejected by passing a very detailed Order giving a previous history. As observed in his Judgment, with the previous history, present Counsel was not having any concern.

37. Be that as it may, even thereafter, the learned A.P.P. was required to file various application for securing presence of the prosecution witnesses and in fact the learned Counsel for the

petitioner has also conducted the cross-examination of the learned Doctor through video conferencing. It shows that attempts were made on the part of the defence side to assist the learned Court for early disposal. However, it appears that the witnesses had not remained present and therefore, the learned Prosecutor was required to move various applications as detailed in the preceding paragraphs for securing their presence.

38. Examination-in-chief of the victim was completed on 20.11.2017. Admittedly, on the said day, the Counsel for the petitioner did not remain present and the petitioner was required to move an application for deferring the cross-examination, which was no doubt granted by the Court below.

39. In my view, nothing could be achieved by rejecting the application (Exh. 70). The cross-examination of the victim is of utmost importance. Similarly, the cross-examination of the other witnesses is also important, who are yet to be cross-examined from the point of defence. What will be the value of cross-examination will be the subject which falls within the arena of appreciation of evidence and that will be for the Court after

conclusion of the trial.

40. The Court below has lost sight that if without permitting the cross-examination of the victim, the trial is proceeded and passed a Judgment then it will give rise to a ground in appeal that opportunity was not granted to accused and in that circumstance, the Appellate Court may remand the matter. So, it will be nothing but consuming not only the time of the parties, but also the precious public time. Therefore, in my view, the Court below ought to have given opportunity to the petitioner permitting him to cross-examine the witnesses, who are remained to be cross-examined through his Advocate even by obtaining undertaking from the learned Counsel for accused that he will not seek any adjournment on any avoidable reasons. Consequently, in the interest of justice though this Court is not of the view that the adjournment be granted just for asking it, but, fair opportunity to the petitioner to cross-examine the witnesses is required to be given.

41. Cursorily, I would like to observe in this Judgment that the certified copy of the deposition of the victim handed over to this Court, which is

taken on record as Exh. "X" shows that the learned Judge has mentioned a name of the victim not only in deposition but also in the Order-sheets the name of the victim is appearing. It is expected from the Court below not to repeat such act since it is expected that the name of the victim should not come on record.

42. Conspectus of the aforesaid leads me to pass following Order;

ORDER

- (i) Writ petition is allowed.
- (ii) The order passed below Exh. 70 in Special (POCSO) Case No. 38/2017 dated 2.3.2019 is hereby quashed and set aside.
- (iii) The petitioner is permitted to cross-examine the victim (PW-1) and the other prosecution witnesses, who are remained to be cross-examined. The learned Prosecutor is directed to take all necessary steps for securing the presence of the victim as well as other witnesses immediately.
- (iv) The production of the material

witnesses, who are remained to be cross-examined and exercise of their cross-examination is to be completed within a period of 20 days from the receipt of this Order.

(v) The undertaking given by the learned Counsel on behalf of the accused is recorded to the effect that no unnecessary adjournments will be sought by him or on his behalf.

(vi) The learned Judge of the Court below is directed to complete the trial and decide the same in accordance with law within a period of two and half months from the receipt of this Order.

(vii) Rule is made absolute in above terms.

(viii) With this, the writ petition is disposed of.

[V.M.DESHPANDE]

JUDGE

Dahibhate/-