

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 1554 OF 2018

- 1) Shaikh Tayyab Shaikh Babulal,
Age 35 years, Occ. Labour.
R/o. Sunderwadi, Tq. & Dist.
Aurangabad.
- 2) Taleb Ali Shaukat Ali,
Age 23 years, Occ. Labour.
- 3) Shaikh Jamil Shaikh Husain Bagwan,
Age 22 years, Occ. Labour.
- 4) Shaikh Ashpak Shaikh Hussain,
Age 25 years, Occ. Labour.
Petitioner Nos. 2 to 4 are
r/o. Hinanagar, Chikhalthana,
Tq. & Dist. Aurangabad. ... **Petitioners.**

VERSUS.

The State of Maharashtra,
Through Police Inspector,
Police Station Chikhalthana,
Dist. Aurangabad. ... **Respondent.**

...

Mr. A. K. Bhosale, Advocate for petitioners.
Mr. S. P. Sonpwale, APP for respondent.

CORAM : MANGESH S. PATIL, J.

RESERVED ON : 07th February 2019.

**PRONOUNCED : 13th February, 2019.
ON**

JUDGMENT :

. Heard.

2. Rule. Rule is made returnable forthwith. The learned APP waives service of notice. At the request of both the sides the matter is heard finally at the stage of admission.

3. The petitioners are facing a trial for allegedly committing an offence punishable under section 376-D, 323, 504, 506 109, 114 read with section 34 of the Indian Penal Code, in the the form of Sessions Case No. 263/2015, pending on the file of learned Additional Sessions Judge-8, Aurangabad.

4. The charge was framed and the trial commenced. The prosecutrix and three other witnesses were examined. However, the learned advocates representing them at the trial failed to cross-examine the witnesses. They preferred application (Exh. 73) seeking to recall the prosecution witnesses for cross-examination. The learned Additional Sessions Judge by the impugned order dated 10.08.2018 rejected the application. Hence this writ petition.

5. The learned advocate for the petitioners submitted that the impugned order is illegal and is in breach of settled principles of law. An opportunity could have been easily extended to the petitioners, may be by imposing costs. The petitioners belong to down trodden class. They have no source of earning and still they are ready to pay the

costs. A fair opportunity ought to have been extended to the petitioners to cross-examine the prosecution witnesses. They were not to gain anything by failing to cross-examine the prosecution witnesses. There would be a serious prejudice if they are not permitted to cross-examine the prosecution witnesses. No prejudice is likely to be caused to the prosecution whose case stands on a different footings. Therefore by setting aside the impugned order the application may be allowed and the P.W. 1 to P.W. 3 may be recalled and they may be allowed to be cross-examined on their behalf. The learned advocate also placed reliance on the decision of the Supreme Court in the case of **P. Sanjeeva Rao V/s. State of Andhra Pradesh, (2012) 7 Supreme Court Cases 56.**

6. The learned Additional Public Prosecutor vehemently submitted that ample opportunity was extended to the petitioners to cross-examine the witnesses. The order passed by the learned Additional Sessions Judge particularly on the application (Exh. 46) demonstrates as to how the prosecutrix had attended the Court for the purpose of recording her deposition on as many as thirteen dates. She was so fed-up that she was reluctant to turn up to the Court. Her examination-in-chief could be recorded on 09.06.2017 with a specific direction to the petitioners to cross-examine her positively on the next

date, still the cross-examination was not taken. She was coming from Pune. Since she did not turn up because of such lapse on the part of petitioners that her presence had to be secured by issuing a bailable warrant. Therefore no fault can be found with the learned Additional Sessions Judge in rejecting the request of the petitioners to recall the witnesses.

7. It is indeed a fact that the petitioners are facing a charge inter alia of gang-rape. The offence is certainly serious and all the stake holders are expected to attend the trial equally seriously. However, as is pointed out by the learned Additional Public Prosecutor by referring to the order passed by the Additional Sessions Judge on the application of the petitioners (Exh. 46), she was in pains to demonstrate as to how the prosecutrix hails from Pune and had attended the Court/trial on as many as 13 dates. Her examination-in-chief was recorded on 09.06.2017 and inspite of specific direction the petitioners failed to cross-examine her on the next date still she was recalled by issuing a bailable warrant but to no avail. The petitioners failed to cross-examine her. Even the other prosecution witnesses P.W. 2, P.W. 3 and P.W. 4 were then examined and still the petitioners were indolent. It is now being tried to be demonstrated that they cannot be allowed to suffer because of the lapse on the part of their learned

advocates in not conducting the cross-examination.

8. It must be borne in mind that the petitioners are the under trial prisoners. They have inherent limitations in contacting their lawyer and must have faced difficulties in giving instructions to enable him to cross-examine the prosecution witnesses. Taking into account the serious charge which they are facing, it would be in the fitness of things to allow the Prosecution Witnesses No. 1 to 3 to be recalled enabling the petitioners to cross-examine them, by imposing adequate costs, instead of allowing the trial to be proceeded with this defect which may go to the root of the result of the trial.

9. Conversely, no prejudice is likely to be caused to the prosecution. At least none is demonstrated to be likely to cause to it.

10. Taking into account the overall conspectus of the matter, in my considered view the petitioners can be allowed to recall the witnesses subject however by imposing adequate costs which would compensate the prosecution witnesses.

11. The writ petition is allowed.

12. The impugned order is quashed and set aside. The application (Exh. 73) is allowed. The Prosecution Witnesses No. 1 to 3 be recalled subject to following conditions :

- (a) The petitioners shall deposit Rs. 25,000/- by way of costs in the Trial Court.
- (b) The petitioners shall not seek any adjournment when the Prosecution Witnesses No. 1 to 3 are recalled and attend the date and shall cross-examine them on the same day if and when they appear, irrespective of the sequence in which they appear.
- (c) The petitioners shall not henceforth protract the trial.
- (d) Out of the costs to be deposited by the petitioners, an amount of Rs. 15,000/- shall be paid to the P.W. 1, whereas P.W. 2 and 3 shall be paid Rs. 2500/- each.

13. Rule is accordingly made absolute.

(MANGESH S. PATIL, J.)

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