

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 1825 OF 2019

Abhishek s/o Dinesh Parihar

...Petitioner

Versus

The State of Maharashtra

...Respondent

.....

Ms. M.N.Ghanekar, Advocate holding for Mr. N.S.Ghanekar,
Advocate for the Petitioner

Mr. S.P.Sonpawale, A.P.P. for Respondent-State

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CORAM : R. G. AVACHAT, J.

DATE : 06.12.2019

JUDGMENT :

Issue notice to the respondent.

02. The learned A.P.P. waives service of notice for the State. Heard finally with the consent of the parties.

03. The challenge in this petition is to the Order dated 11.10.2019 passed below Exh. 65 in Special Case POCSO No. 31/2015.

04. The petitioner is an accused in the aforesaid

case. He preferred an application Exh. 65 for recall of the witness (victim/complainant) for her further cross-examination. The matter was fixed for cross-examination of the said witness. On the given date, the petitioner/accused could not appear before the Court as he was indisposed. Advocate representing him, therefore, preferred an application seeking adjournment. The learned Trial Judge rejected the said application with the following observations :

ORDER

Witness is present before Court; he is attending Court from Hyderabad. Already material cross-examination is concluded. The presence of accused is not necessary to conduct further corss-examination, as stated in application, matter is of 2013. As per mandate of special Act of 2012 for children, present application is allowed will caused delay and it is an harassment for victim, which is not expected. Hence application stands rejected. Matter be proceed without further cross-examination and victim. Application stands rejected.

05. The petitioner, therefore, preferred the

application for recalling of the witness for further cross-examination. The learned Trial Judge rejected the said application with the following observations:

"6. In this backdrop, the grounds of adjournment application and the grounds stated for recalling of witness in present application are not consistent. The case specifically of sexual abuse of the child when fixed for conducting further cross-examination of child as per convenience of both Advocate for the parties, it was not expected on the part of this Court to adjourn the matter in routine manner only for the sake of absence of accused. The learned Advocate was representing the accused since beginning. Hence, there was no reason to adjourn the matter only for the sake of presence of accused specifically in case when the material cross-examination has already been completed. It was not the case of challenging the identity of the accused. Therefore, the present application is devoid of merits.

The underlining object of the Section 311 of Cr. P.C. that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined for other side. It is to be remember that this section confers a very wide power on the Court for summonsing witnesses. The discretion conferred to be exercised judiciously. The evidence is essential to just decision of the

case has to be brought on record, however, recalling of witness that too a child witness, no party can take advantage of his own wrong and if the powers are exercised under this Section, the victim will certainly subject to the harassment only because of delaying tactics of the accused. The accused will not be prejudiced as material cross-examination has already been conducted. No justified ground are put forth for recalling of witness except that she is a material witness. In such case, the accused on his own has lost the opportunity and it can not again claim as of right at the cost of delay in the proceeding and harassment to the witness. Hence, no case is made out for recalling of the victim prosecution witness No. 2 for further cross-examination. Hence, application stands rejected."

06. Heard the learned Counsel for the parties.

The learned Counsel for the petitioner would submit that the witness could not be cross-examined since the petitioner could not appear before the Court due to his ill-health. His Advocate did not have necessary instructions to conduct further cross-examination. The learned Trial Judge could have imposed costs and allowed the application. According to the learned Counsel, the said witness was the main witness in the case. Conviction or acquittal of the petitioner is mainly dependent on the

testimony of the said witness. The learned Counsel, therefore, urged for allowing the petition.

The learned A.P.P. would, on the other hand, support the impugned Order.

07. On the given date, the petitioner accused could not make it to the Court as he was hospitalized. Advocate representing him, therefore, sought adjournment. True, the witness had come from Hyderabad to give evidence. The Trial Court could have directed the petitioner to pay necessary costs to the witness as a condition precedent for allowing the application. The Trial Court should not have observed that the material cross-examination of the witness had already been concluded. Accused has every right to defend himself. It is his Advocate, who is in the best position to know as to whether further cross-examination of the witness is required.

Admittedly, on the given date, the petitioner was in hospital. His Advocate did not have necessary instructions to further cross-examine the witness. In the given circumstances, the Trial Court should have imposed costs and allowed the application. Since, it has not been

done, interference with the impugned Order is called for.
Therefore, the writ petition is allowed.

O R D E R

(i) The writ petition is allowed in terms of prayer clause "B".

(ii) The petitioner shall pay to the victim/PW-2 a sum of Rs. 10,000/- (Rs. Ten Thousand Only) towards costs as a condition precedent to conduct her further cross-examination.

[R.G.AVACHAT]

JUDGE

Dahibhate/-