

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 1741 OF 2018

Santosh s/o Chattarsing Bahure,
Age: 25, Occu: Labour,
R/o Beblyachi Wadi, Near Aadul,
Dist. Aurangabad. ... **Petitioner**

Vs.

The State of Maharashtra ... **Respondent**

Mr. Abhishek Kulkarni, Advocate for the Petitioner.
Mr. S.P. Deshmukh, Advocate for the Respondent-State.

CORAM : MANGESH S. PATIL, J.
DATE : 31.01.2019

ORAL JUDGMENT :

Heard.

2. Rule. The Rule is made returnable forthwith. Learned advocate for the respondent-state waives service of rule. With the consent of both the sides the matter is heard finally at the stage of admission.

3. The petitioner who is facing a charge for the offence punishable under Section 376, 363 and 366-A of the I.P.C. as also for the offence punishable under Section 4, 6 and 8 of the Protection of Children from Sexual Offences Act, 2012 (P.O.C.S.O Act) is before this

Court being aggrieved and dissatisfied by the rejection of his application (Exhibit-24) whereby a request was made to recall the prosecution witnesses no.1 and 2 for further cross-examination on the ground that some important facts could not be brought on record by him earlier during recording of evidence. The learned Additional Special Judge rejected the application on the ground that the application (Exhibit-24) did not mention any reasons for recalling the witnesses and the petitioner could not be allowed to fill up the lacuna. There was no reasonable ground to recall the witnesses and for these reasons the application was rejected.

4. The learned advocate for the applicant submits by referring to the decision in the case of **Rajendra Prasad V/s. Narcotic Cell; (1999) 6 SCC 110**, that though the application was deficient in as much as it did not disclose the precise reason for recalling the witnesses, there was no question of any prejudice being caused to the prosecution even if witnesses were recalled and cross-examined further. It is a right of an accused to have a fair trial. There was no inordinate delay in moving the application. The petitioner is ready to bear the cost and by payment of some cost the order be quashed and set aside and the application (Exhibit-24) be allowed.

5. The learned A.P.P. opposes the petition. He submits that fair opportunity was extended to the petitioner. Both the prosecution

witnesses were elaborately cross-examined on his behalf. The application is as vague as it could be. No reason was disclosed as to what lapse the earlier lawyer had committed. The matter is old and part heard and is getting prolonged.

6. I have carefully gone through the copies of the deposition of the both the prosecution witnesses i.e. the informant father and the victim-girl, so also the application (Exhibit-24) and the impugned order. It is apparent that the application (Exhibit-24) does not disclose the precise reasons why the witnesses are being sought to be recalled. Only a vague statement has been made that the previous lawyer had not brought on record some important facts. It is important to note that it is only because of this reason that the learned Judge has rejected the application.

7. It is trite that it is a fundamental right of an accused to have a fair trial. It has been reiterated time and again by the Supreme Court and even by this Court. In **Rajendra Prasad** (supra) following observations were made in paragraph no.8:

“8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was

not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.”

In the case of **Wasudeo Gulabrao Dhoke V/s. State of Maharashtra; 2017 ALL MR (Cri) 4117**, following observations have been made in paragraph no. 10:

“10. ...Even otherwise, there is a difference between what is called as an attempt to fill up the lacuna in the prosecution case and what is called as an attempt to strengthen the defence. While the former, if allowed, may cause prejudice to the accused, the later, if allowed would not cause any prejudice to the prosecution and would only strengthen the right of the accused of fair trial.”

8. These observations make it abundantly clear that case of the prosecution and that of the defence as far as filling up the lacuna is concerned stand on different footings. An accused is entitled to a fair trial. There is no material to show that he was not conducting the trial efficiently and was protracting it. Similarly, even there is no material to show that there was some inordinate delay in moving the application (Exhibit-24).

9. Considering all these aspects, in my considered view, the petitioner deserves to be extended an opportunity to recall the witnesses for further cross-examination subject to payment of some cost which is considered to be a panacea in every sore of the litigation.

10. The writ petition is allowed subject to payment of cost of Rs.3,000/- to be paid to the prosecution witnesses no.1 and 2 in aggregate.

11. On depositing the cost with the trial Court the witnesses (PW-1 and PW-2) be recalled who shall be cross-examined on the same day.

12. The rule is made absolute in the above terms.

(MANGESH S. PATIL, J.)