

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

CRIMINAL WRIT PETITION NO.991 OF 2018

Dilip S/o Waman Rokade
Age 53 years, Occ : Labour
R/o Temburani, Tq. Shirur (Kasar)
Dist.Beed.
[At present in District Jail Beed]

.. PETITIONER

VERSUS

- 1] The State of Maharashtra
Through Police Station Shirur,
Tq. Shirur (Kasar)
Dist.Beed.
- 2] Kusum w/o Ambadas Karad
Age 47 years, Occu-Household,
R/o Temburani, Tq.Shirur (Kasar)
District Beed.

.. RESPONDENTS

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Shri A.L.Kande, Advocate for petitioner
Smt.R.P.Gaur, A.P.P. for respondent No.1-State.
Mrs. V.H.Sangole for Respondent no.2 (appointed)

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CORAM : MANGESH S. PATIL, J.
DATE : 10.02.2021

ORAL JUDGMENT :-

Heard. Rule. The rule is made returnable forthwith. The learned A.P.P. waives service for the respondent-State and Advocate Mrs.Sangole waives service for respondent no.2. With the consent of both sides, matter is heard finally at the stage of admission.

2] The petitioner is facing a charge for the offences punishable under Sections 376(1) and 323 of the I.P.C. and Section 3 of the Maharashtra Prevention and Eradication of Human Sacrifice and other Inhuman, Evil and Aghori Practices and Black Magic Act, 2013. When the trial reached the stage of argument he submitted application (Exh.82) seeking to recall the respondent no.2 who was examined as (P.W.1) for further cross examination. He mentioned that since his Advocate was absent while recording her testimony, he was required to conduct her cross examination himself, which has resulted in omission to put vital questions to her.

3] The Prosecutor opposed the application on the ground that attempt was being made to fill up the lacuna. By the impugned order, the learned Additional Sessions Judge rejected the application (Exh.82) by making following observations :

"4] Perused the record and proceeding of the case. The evidence of P.W.1 was recorded on 14/7/2017. Her evidence was recorded in the presence of accused. The learned advocate for accused was absent when repeatedly called for cross-examination. He was also absent in morning session when her examination-in-chief was partly recorded. It is also surprise to note that on the same day the evidence of P.W.2 was also recorded and at that time learned advocate for accused was present. He filed an application Exh.25 seeking adjournment for cross-examination and same was allowed. At that time he did not file an application to recall P.W.1 for cross examination. Even he has not filed the said application after completion of evidence of P.W.2. That too the learned advocate for accused did not move the present application even after prosecution closed its evidence by filing pursis Ex.81 on 15-3-2018. On 4-4-2018, the

statement of accused U/sec. 313 of Cr.PC. was recorded. On that day also he did file such application. Then the matter was kept for argument. Hence they obtained the certified copy of deposition. At that time it was revealed to them that advocate has not cross-examined P.W.1. The aforesaid scenario show that accused and his advocate are negligent to conduct the trial promptly.

5] Sufficient opportunity was given to accused to cross-examine the witness. Accused himself has cross-examined P.W.1 at that time he has not shown his inability to cross-examine the witness. Hence now at this stage his advocate can not be allowed to cross-examine the witness to fill up the lacuna left in the cross-examination conducted by the accused in person. The matter is listed for compliance of the directions in Inspection Notes. The case is to be disposed of early. Under such circumstances I am of the opinion that application being devoid of merits, deserves to be rejected. Hence following order.

4] The learned advocate for the petitioner would submit that a serious prejudice is likely to be caused to him if his request is rejected. He is facing a serious charge. His advocate was absent. He himself had to conduct the cross-examination. Cross examination on vital aspects remained to be conducted. The learned Additional Sessions Judge ought not to have rejected the application on technical grounds. The error on the part of the learned advocate should not be allowed to cause any prejudice to the petitioner. He is ready to conduct the cross examination without seeking any adjournment and even ready to pay costs if awarded by this Court.

5] The learned A.P.P. and the learned advocate for the respondent no.2 would submit that the applicant could have sought adjournment instead of going ahead and undertaking cross-examination of the respondent no.2.

Having once availed that opportunity and having allowed the trial to proceed as it is till the stage it has reached, there is a serious lapse on his part. He cannot be allowed to take advantage of his own wrong. The trial is held up since the year 2018 and the petition may be dismissed.

6] I have carefully gone through the papers including affidavit in reply filed by the respondent no.2. As can be gathered from the impugned order, the learned trial Judge seems to have been influenced by some irrelevant things. He points out that on the very day on which cross examination of the respondent no.2 was conducted by the petitioner in person, one more witness was examined by the prosecution and the advocate for the petitioner also cross examined that witness. However, no request was made then and there to recall respondent no.2 (PW.1). The learned Additional Sessions Judge has also observed that the application was filed belatedly and at the fag end of the trial. Lastly, the learned Additional Sessions Judge seems also to have been influenced by direction in the Inspection Note conducted by the High Court to decide the matter early.

7] True it is that the petitioner and his learned advocate could have promptly made a request for recalling the respondent no.2 (PW.1) but waited till the fag end of the trial. It is trite that *Actus Curiae neminem gravabit* means that the act of the Court shall prejudice no one. This is what precisely seems to have happened in the matter in hand. The learned advocate besides being absent during the cross-examination of the respondent no.2, he could have but does not seem to have instructed the petitioner to prefer any application of the kind preferred at the fag end seeking to recall her for cross-examination on the same day.

8] It is therefore quite clear that the petitioner alone is not to be blamed for the circumstances. His learned advocate simultaneously could have advised him appropriately to avoid any prejudice being caused.

9] As can be seen, the cross-examination of the respondent no.2 (P.W.1) conducted by the petitioner in person is indeed cryptic. He has been facing serious charge of rape on a mentally challenged girl. A serious prejudice is certain to cause to him if the witness is not recalled. Though there is some delay, the cost is considered to be a right panacea in every sore of the litigation. The learned Judge could have allowed the application by imposing some costs to compensate the respondent no.2.

10] All in all the impugned order is illegal and deserves to be quashed and reversed subject to imposition of some costs.

11] The Writ Petition is allowed. The impugned order is quashed and set aside. The application (Exh.82) stands allowed subject to petitioner depositing Rs.5000/- in the trial Court. The respondent no.2 shall be entitled to receive the costs. The costs to be deposited in the trial Court on 26/2/2021. The respondent no.2 shall remain personally present before the trial Court on that day. The petitioner shall conduct her cross-examination on the very same day and shall not seek any adjournment.

12] The Rule is made absolute in above terms.

13] The learned advocate for the respondent no.2 is appointed by this

Court. Her fees is quantified at Rs.3000/-.

[MANGESH S. PATIL, J.]

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