IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL WRIT PETITION NO.276 OF 2020

State of Maharashtra through
Police Station Mangrulpir,
District Washim. ..... **PETITIONER**

...V E R S U S...

Prakash Lalsingh Chavan
Aged about 55 years,
Occ: Doctor, R/o Golwadi,
Tq. Mangrul, Dist. Washim. ..... **RESPONDENT**

Mr. M.K. Pathan, APP for Petitioner/State.
Mr. Zeeshan Z. Haq, Advocate holding for Mr. Anand Deshpande, Advocate for Respondent.

CORAM: **ROHIT B. DEO, J.**
DATE: **12th FEBRUARY, 2021.**

ORAL JUDGMENT:

With consent the petition is finally heard at the admission stage.

2. The State is assailing the order dated 11.02.2020 rendered by the Additional Sessions Judge, Link Court, Mangrulpir, District Washim in Special Child Case 18 of 2017 whereby the application preferred by the accused which is styled

as “application to examine Investigating Officer before taking decision to examine victim” is allowed.

3. The accused is facing trial for offences punishable under Section 376 and 506 of the Indian Penal Code (IPC) and Sections 3, 4, 5, 6 and 7 of the Protection of Children from Sexual Offences Act (POCSO Act).

4. The genesis of the trial is report dated 11.08.2017 lodged by the mother of the victim at Police Station Mangrulpir on the basis of which Crime 286 of 2017 is registered and culmination of investigation resulted in the submission of the final report.

5. The substratum of the prosecution case is that the accused repeatedly raped the minor victim, who conceived and gave birth a girl child. The DNA profiling of the blood samples collected from the victim, the child and the accused opines that the accused is the biological father of the child.

6. The prosecution has examined as many as thirteen witnesses. The prosecution case is that the victim is intellectually

challenged and consequently the prosecution moved an application under Section 119 of the Indian Evidence Act, 1872 (Evidence Act) seeking appointment of Translator and/Interpreter particularly, since the mother tongue of the minor victim is '*wadari*' and she is unable to speak any other language.

7. During the pendency of decision on the application preferred by the prosecution seeking appointment of Translator and/Interpreter, the accused moved an application to examine the Investigating Officer "before taking decision to examine victim".

8. The substratum of the application preferred by the accused is that the victim is intellectually challenged, that the evidence of the Doctor and that of the other witnesses examined, is inconsistent, no witness states that the victim can converse in '*wadari*', the Investigating Officer has not recorded her statement with the aid of Translator or Interpreter, either under Section 161 or 164 of the Criminal Procedure Code, 1973 (Code) and therefore, it is necessary to examine the Investigating Officer to "clear reasoning" for not recording her statement (the expression in force is culled out from the application). The prosecution asserts that the statement of the victim is as a fact recorded.

9. The control of the prosecution, and one facet is the unfettered discretion to examine the witnesses of choice and the order of the examination, is in the exclusive domain of the Public Prosecutor. Rarely, if at all, can the discretion of the Public Prosecutor be interfered with or controlled. In any event, in the factual matrix, there is absolutely no conceivable reason for the trial court to pass the order which it did.

10. The alleged inconsistency or *inter se* discrepancies between the statements of the witnesses can hardly be a reason to compel the Investigating Officer to step into the witness box before the victim. Similarly, even if it is assumed *arguendo*, that the statements of the witnesses could have been recorded under Section 161 and 164 of the Code, and are not recorded, it would be for the trial court to consider the effect and implication of such omission while appreciating the evidence on record. The prosecution cannot be forced to examine the Investigating Officer before the examination of the victim. Likewise, the fact that the accused alleges that the victim cannot speak in '*wadari*' or that no witness examined so testifies, cannot be a ground to force the prosecution to change the order or preference of examination

of witnesses.

11. Mr. Zeeshan Haq invites my attention to a decision of the learned Single Judge in *Kishore Singnapurkar & Ors. v. State of Maharashtra & Ors. 2012 (3) Bom.C.R. (Cri.) 616.* The factual matrix of the said decision was, that after the trial had progressed substantially, the prosecution moved an application for examining Mr. Chaskar as witness under Section 311 of the Code, which came to be allowed. The accused approached the High Court. Mr. Chaskar was not cited as a witness in the list of witnesses contained in the charge-sheet. This Court noted that Mr. Chaskar's statement, which according to the prosecution was recorded under Section 161 of the Code, was not on record nor is a copy thereof available in the charge-sheet.

12. In the backdrop of the factual matrix, it is observed that though there cannot be a general prohibition for examining a witness whose statement had not been recorded during the course of investigation, propriety requires that the statement of such a person should be recorded at least before entering the witness box. The learned Judge reasons that if such statement is recorded before permitting Mr. Chaskar to enter the witness box, the Court

would be in a position to form an opinion as to whether the evidence of such witness would be necessary.

13. With due respect to the articulation in the said decision, I am not in a position to fall in line. The sweeping observation that ordinarily statement of a witness must be recorded, even after a substantial progress in the trial, before he is permitted to enter the witness box, is inconsistent with the position of law. I need not however, delve deeper since the said decision, in any event, has no relevance whatsoever to the issue involved in the present matter. The reliance placed on the said decision is misconceived and is indeed inexplicable.

14. The order impugned is manifestly erroneous and is quashed.

15. The trial court is directed to conclude the trial as expeditiously as possible and in any event within ninety days. Every endeavour shall be made to proceed with the trial on a day-to-day basis and adjournment shall be granted only if an exceptional case is made out.

16. The application is allowed in the afore-stated terms.

JUDGE

NSN