

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION***

CRIMINAL WRIT PETITION NO. 4027 OF 2018

Brijesh Phoolsingh Parihar

...Petitioner

Versus

The State of Maharashtra

...Respondent

Mr. Shailesh Kharat, for the Petitioner.

Ms. Anamika Malhotra, A.P.P for the Respondent – State.

CORAM : REVATI MOHITE DERE, J.

DATE : 7th JANUARY 2022

(THROUGH VIDEO CONFERENCING)

P.C. :

1. Heard learned counsel for the parties.
2. By this petition, the petitioner has impugned the order dated 29th March 2018, passed by the learned Special Judge (POCSO Act), Pune, below Exhibit – 30 in Special POCSO Case No.42 of 2015.
3. Learned Counsel for the petitioner submits that it is imperative that PW1 to PW3 be examined as the earlier advocate has not conducted the cross-examination properly. He submits that certain questions need to be

asked on the age certificate produced by the prosecution. He submits that the learned Judge ought to have allowed the petitioner's application seeking recall of PW1, PW2 and PW3.

4. Learned APP vehemently opposed the petition. Learned APP has tendered two orders passed by the trial Court subsequently i.e. order dated 27th September 2018, passed below Exhibit – 67 and order dated 9th March 2021, passed below Exhibit – 73. She submits that on one pretext or the other the petitioner (original accused) is trying to delay and protract the trial. She further submits that there is no infirmity in the impugned order warranting interference in writ jurisdiction.

5. Perused the papers. The petitioner is facing prosecution for the alleged offences punishable under Sections 363, 366 and 376 of the Indian Penal Code and under Section 4 of the Protection of Children from Sexual Offences Act. After charge was framed as against the petitioner, the trial commenced. The prosecution examined PW1 father of the prosecutrix, PW2 the prosecutrix and PW3 the doctor who examined the prosecutrix. It appears that during the examination of witnesses the petitioner filed an

application dated 6th November 2017 seeking recall of the witnesses PW1 to PW3. A perusal of the application shows that the ground on which recall was sought is that the earlier advocate had not questioned the witnesses on certain important aspects. The details have not been spelt out in the application. The learned Special Judge after hearing the parties has passed a detailed order dated 29th March 2018, observing that mere change of counsel cannot be a ground to recall the witnesses. The Court further observed that there is no basis for holding that any prejudice will be caused to the petitioner – accused unless the witnesses were recalled and accordingly rejected the petitioner's application (Exhibit – 30). A perusal of the evidence of PW1, PW2 and PW3 shows that they have been cross examined. Mere change of counsel cannot be a ground for allowing recall application. The application (Exhibit – 30) does not disclose on what aspect there was no cross-examination or reasons for recalling the said witnesses, hence no infirmity can be found in the impugned order rejecting the petitioner's application seeking recall of the witnesses PW1 to PW3.

6. Infact, it appears from the orders tendered by the learned APP, which are taken on record, that the petitioner – accused has been taking

adjournments from time to time. Infact the cross-examination of PW7, the investigating officer was granted, subject to payment of costs by the petitioner – accused to the State of Maharashtra. From the perusal of both the orders dated 27th September 2018 and 9th March 2021, it appears that the petitioner – accused has been delaying the conduct of the trial on the ground that the aforesaid writ petition is pending before this Court. Section 35(2) of the POCSO Act, contemplates that the Court shall complete the trial as far as possible within one year from the date of taking cognizance of the offence. The case is of 2014 and till date is pending. It is informed that the matter is posted for argument. The learned Judge shall decide the case, as expeditiously as possible and in any event within 2 months from the date of receipt of this order.

7. Petition is accordingly disposed of on aforesaid terms. The trial Court shall decide the case on its own merits uninfluenced by the observations made in this order.

8. All concerned to act on the authenticated copy of this order.

REVATI MOHITE DERE, J.