

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
WRIT PETITION NO. 2661 OF 2023

Akhtar Ayyub Khan .. Petitioner
Versus
The State of Maharashtra .. Respondent

Adv. Priya Muthupandi a/w Adv. Tushar Malvi, Adv. Priti V. Tiwari
for the Petitioner.

Mr. S.R. Agarkar, APP for the State.

Mr. Kushal Amin, appointed Advocate for respondent no.2.

Mr. S.D. Patil, P.S.I, Shivaji Nagar, Police Station.

CORAM: BHARATI DANGRE, J.

DATED : 30th AUGUST, 2023

P.C:-

1 The present Writ Petition is filed, being aggrieved by an order passed by the Special Judge under the POCSO Act, on 5/08/2022, on an application seeking recall of two witnesses.

 The impugned order has rejected the application by referring to the sequence of events.

2 When the petition is called out, the learned Advocate Mr. V.S. Tiwari appearing for the petitioner is informed to be not available.

 Ms. Priya Muthupandi, learned Advocate, who is present in the Court seek an adjournment on behalf of the counsel, representing the petitioner. This adjournment is strongly opposed by the learned APP as well as Mr. Amin appointed by this Court to represent the respondent no.2, the reason being that, the trial court is now at the fag-end and this Court, had made it clear that the petition

shall be heard finally and by order dated 11/08/2023, had directed the trial to be deferred beyond 25/08/2023.

Despite this clear indication of the petition being heard, the counsel has chosen not to remain present.

3 In the wake of the above, since the counsel who is present for petitioner seek adjournment, with the able assistance of appointed counsel for respondent no.2 and the learned APP, I have proceeded to decide the petition.

An application was moved on behalf of the accused no.1 for recalling of the witnesses in the trial ongoing before the Special Judge, where he is facing charge under Section 366 (A), 376, 506, 406 r/w 34 of IPC and Sections 4, 8, 12, and 17 of the POCSO Act. The application prayed for recall of the two witnesses, being the Investigating Officer (PW-10) and (PW-8), who was working with the Jeweller.

The application is moved on the ground that they are material witnesses and they have not been cross-examined by Advocate Tiwari, representing the accused no.1.

4 The application was strongly contested by the Special Public Prosecutor by pointing out that sufficient opportunity was given for cross-examining the said witnesses and now the matter is posted for recording of the statement of the accused under Section 313 of Cr.P.C and as the accused is released on bail, an attempt is made to protract the trial.

The objection, was considered by the learned Judge, who on referring to the Roznama of proceedings, recorded that on 3/12/2021, the Advocate for the accused no.1 declined to cross-examine the witness, whereas on the very same date, the Advocate

for accused no.2 cross-examined PW-8. Thereafter, the evidence of PW-10 came to be recorded on 19/04/2022 and an application was filed by the Advocate for the accused no.1 praying for adjournment to cross-examine PW-10 and the Court granted the said request by imposing a cost and the matter was fixed on 17/06/2022. On that date, the Advocate for accused no.1 remained absent and failed to cross-examine the witness whereas the Advocate for accused no.2 cross-examined PW-10.

5 The counsel for the respondent no.2 has placed before me the Roznama of the Special case, and I could find that the observation by the Special Judge in the order dated 5/08/2022 are in conformity of the said roznama.

The learned Judge recorded the conduct of the Advocate of the accused no.1 in the following words:

“ As such conduct of learned Advocate for accused no.1 shows that he was aware about the witnesses No.8 and 10, being cross-examined. When this situation was brought to the notice of the Advocate, he immediately filed an application for withdrawal of his Vakalatnama for accused no.1. The record shows that the accused no.1 is deliberately trying to protract the trial. No ground is made out to recall the witnesses, hence the application is rejected.”

Thereafter the matter was directed to be posted for recording the statement of the accused under Section 313 of the Cr.P.C.

6 From the Roznama which is produced before me, it is apparent that the accused no.1 is attempting to protract the trial and it is evident that at the stage of the culmination of the trial every attempt is made to protract the same, as an application came to be filed in April, 2023 for alteration of charge and on 29/04/2023, the

said application came to be rejected.

Since the accused no.1 did not remain present, a non-bailable warrant was required to be issued and he came to be arrested on 28/01/2023 by the concerned police station. He moved an application for being released on bail and the Special Judge on 14/06/2023, directed his release on bail, subject to a direction that he shall attend the trial on each and every date. However, his conduct is reflected from the subsequent orders. The roznama reflect that on 24/07/2023, the matter was posted for final arguments to 4/08/2023, however, because of the interdiction of this Court, the same could not proceed.

7 On perusal of the impugned order, I do not find any legal infirmity, rather the conduct of the accused no.1 is clearly reflected from the roznama which is placed before me and taken on record, and being marked as 'X' for identification.

Upholding the impugned order, since there is no merit in the contention of prejudice as alleged, as despite sufficient opportunity, the witnesses were not cross-examined, the Writ Petition deserve a dismissal.

Needless to state that the Special Judge is at liberty to proceed with the stage of hearing of arguments since she has scheduled the matter on 4/09/2023.

(SMT. BHARATI DANGRE, J.)