

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPLICATION (MAIN) NO.148 OF 2015**

SATISH KUMAR KAJAL,
s/o Sahadev Singh Kajal,
major of age, married,
resident of GPD, 2/6
Government Quarters,
Porvorim, Bardez, Goa

... Petitioner/Applicant

Versus

STATE
(through the Police Inspector
CBI/ACB/GOA, having its
Office at Bambolim)

... Respondents

Mr. Ryan Menezes, Advocate for the applicant.

Mr. J. Vaz, Special Public Prosecutor for the respondent.

CORAM :- C. V. BHADANG, J.

Date : 2nd July, 2015.

ORAL ORDER :

By this application, under Section 482 of the Code of Criminal Procedure (the Cr.P.C., for short), the applicant is challenging the order dated 04/06/2015, passed by the learned Special Judge, Panaji in Special Case No.2/2013/T. By the impugned order, the learned Special Judge has rejected the application filed by the applicant for recall of the witness PW15, Anurag Prakash.

2. The brief facts are that the applicant is facing prosecution before the learned Special Judge under Sections 7 and 13(1)(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 and Sections 109, 193, 201 and 203 of Indian Penal Code. On behalf of the prosecution, PW15 Anurag Prakash, who is presently a Branch Manager, working in Jammu and Kashmir, was called as a witness, being panch witness at the trap. His evidence was due to be recorded on 16/03/2015. According to the applicant, he was represented by Advocate Shri Rohan Dessai on record. Advocate Sangram Dessai was to conduct cross-examination. It is contended that Advocate Rohan Dessai was merely an instructing Advocate. Further, according to the applicant, it had transpired that the witness would not be attending the Court on 16/03/2015 and as such, the applicant and his Advocate were under impression that the matter would be adjourned. However, on 16/03/2015, the applicant was taken by surprise when the witness was found in attendance, contrary to the information previously received. It appears that there was also a nationwide abstention call, given by the Bar Council of India on 16/03/2015 and that was also one of the reasons why the Counsel for the applicant was not present. The Chief-examination was recorded partly on 16/03/2015 and thereafter, on 17/03/2015.

It appears that Advocate Rohan Dessai had filed an application for adjournment and for grant of time to cross-examine the said witness on the ground that the Counsel Shri Sangram Dessai is not available. The learned Special Judge rejected the said application on the ground that the matter was kept consecutively on 2 days i.e. on 16th and 17th March, 2015, as the witness from Srinagar was in attendance. It was also found that after the examination-in-chief was recorded, an opportunity was granted to cross-examine the witness and in the morning, it was informed to the Court that Advocate Sangram Dessai would be appearing at 11 a.m. However, subsequently, at 2.30 p.m., an application for adjournment came to be made. The Court found that the reason for not attendance, is not sufficient and thus, rejected the application. Thereupon, Advocate Rohan Dessai cross-examined the witness PW15, which was concluded on the same day. Thereafter, on 17/04/2015, an application purportedly under Section 311 of the Cr.P.C. came to be filed on behalf of the applicant, seeking to recall the witness PW15 for further cross-examination. This was opposed on behalf of the respondent. The learned Special Court, by the impugned order, has rejected the said application and that is how, the applicant is before this Court.

3. I have heard Shri Menezes, the learned Counsel for the

applicant and Shri Vaz, the learned Special Public Prosecutor appearing for the respondent, at length. It is submitted by the learned Counsel for the applicant that as per the instructions received, the Counsel for the applicant was under the impression that the witness would not attend the Court. It is also submitted that there was a nationwide call for abstention on 16/03/2015. It is submitted that although the matter was adjourned on the following day for cross-examination, Advocate Rohan Dessai could not cross-examine the witness effectively, for want of proper instructions. It is submitted that in the interest of fair trial, opportunity needs to be granted to the applicant, by recalling the witness as PW15 is a material witness, being the panch on trap panchanama. It is submitted that otherwise, serious prejudice would be caused to the applicant. The learned Counsel has placed reliance on the decision of this Court in ***Tukaram Limbaji Londhe and Ors. Vs. State of Maharashtra***, reported in 2014 All MR (Cri.) 1053, in order to submit that for fault of the Counsel, the applicant /accused cannot be made to suffer. It is submitted that the Court below had only found that on account of the absence of the Advocate that the witness could not be cross-examined and in that view of the matter, the witness needs to be recalled. The learned Counsel would submit that the powers under Section 311 of the Cr.P.C. are wide enough and the Court

can recall a witness at any stage of the proceedings, provided the same is “essential to the just decision of the case”. Reliance is also placed on a decision of Madras High Court in ***State Vs. Smt. Indirakumari and others***, reported in (2003) Cri.L.J. 4749, in order to submit that the power to summon material witness is exercisable at any stage, so long as the Court is in seisin of the proceedings. It is submitted that in the said case, it has been held that the witness can be called for re-examination/ cross-examination even when the matter was fixed at the stage of arguments. The learned Counsel for the applicant submitted that the applicant is ready and willing to abide by any condition that may be imposed. In so far as the necessity for further cross-examination is concerned, it is submitted that there are some important aspects, on which there is discrepancy between the witnesses *interse* and PW15 needs to be cross-examined on these aspects.

4. On the contrary, it is submitted by Shri Vaz, the learned Special Public Prosecutor for the respondent that the program of the trial was fixed well in advance and the parties were aware that the witness would be examined on 16/03/2015. It is submitted that the aspect about there being a call for abstention, would not be material, inasmuch as the Court had

granted indulgence and fixed the matter on the following day. It is next submitted that in fact Advocate Rohan Dessai has cross-examined the said witness extensively. The learned Counsel was at pains to point out that Advocate Shri Rohan Dessai had cross-examined some of the earlier witnesses, examined on behalf of the prosecution and thus, it cannot be said that he was not having instructions or was not properly briefed. It is submitted that although there is a power in the Court to recall the witness, it has to be exercised in the facts and circumstances of each case and the discretion has to be exercised in a judicious manner. The learned Counsel has taken me through the impugned order, in order to submit that the learned Special Court has properly considered the rival circumstances and had come to the conclusion that the case for recall of the witness is not made out.

5. On hearing the learned Counsel for the parties and on perusal of the impugned order, I do not find that a case for interference is made out. At the outset, it needs to be mentioned that the aspect about there being an abstention on 16/03/2015 may not be significant as the learned Special Judge had adjourned the matter to the following day i.e. on 17/03/2015. The learned Special Judge has found that Advocate Shri Rohan Dessai had cross-examined PW1 Jaibir Singh, PW2 R. K. Srivastav, PW3

Rajendra Singh, PW4 V. V. Ramteke, PW12 Vasant Jadhav, PW13 Chandrakant Bhor, PW14 Vinod Kumar Rai. Thus, it cannot be said that Advocate Rohan Dessai was not having sufficient instructions. The learned Special Judge has also found on the basis of the application exhibit 42, which was filed for adjournment, that Advocate Sangram Dessai was attending some another Court. Furthermore, the witness PW15 has been cross-examined in this case by Advocate Rohan Desai and the cross-examination runs into not less than 10 pages. It is true that the substantial part of the cross-examination is in the nature of suggestions. However, it needs to be stated that the Court has neither a duty, nor it is possible for the Court to control the quality of the cross-examination except ensuring that the cross-examination is confined to relevant aspect. The fact remains that the witness was cross-examined by one of the Advocates for the applicant, who was on record and the cross-examination was ultimately concluded without any further request for adjournment. This was on 17/03/2015, while the present application under Section 311 of the Cr.P.C. came to be filed on 17/04/2015.

6. It needs to be mentioned at this stage that the applicant has not mentioned the reason for the witness to be recalled for cross-examination, namely about necessity of some

discrepancies *interse* between the witnesses to be put to (PW15) Anurag Prakash. That ground is neither made out in the application under Section 311 of the Cr.P.C. nor in the present application. During the course of the arguments at bar, it was argued that the witness needs to be recalled on such a ground. It is true that the applicant cannot be expected to disclose in details the area in which he wants to cross-examine the witness. However, some skeletal reason (as is now made out) was required to be given to show the necessity for the witness being recalled, which is not forthcoming in this case.

7. The legal position that under Section 311 of the Cr.P.C., the Court can recall a witness at any stage of the proceedings, cannot be disputed. However, such discretion is always judicial in nature, to be exercised in the facts and circumstances of each case. There cannot be a straitjacket formula for exercise of such discretion. In the case of **Tukaram Londhe** (supra), the concerned witness was not at all cross-examined. In that case, this Court had found that the conduct of the parties could not be approved. However, in the facts and circumstances of that case, it was found that in order to do substantial justice, interference in exercise of such discretion is necessary. In the present case, as noticed earlier, the witness has

been cross-examined by one of the Advocates appearing for the applicant.

8. For the reasons stated above, I do not find that the impugned order needs interference. Before parting with the final order, it may be mentioned that if at all, according to the applicant, there is any discrepancy *interse* between the evidence of the prosecution witnesses, the same being substantive part of the evidence already recorded, the applicant would always be at liberty to raise appropriate contentions and bring to the notice of the learned Special Judge said discrepancies. It is needless to mention that the learned Special Judge shall consider this aspect, while deciding the case finally.

9. In the result, no interference is called for and the Criminal Application (Main) is hereby rejected.

C. V. BHADANG, J.

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