

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL WRIT PETITION NO.148 of 2015

Mr. Prashant Madrekar
S/o late Anand Mandrekar
43 years of age,
r/o H. No.39,
Tulshimol, Sankhali,
Goa.

.. Petitioner

VERSUS

1. Police Inspector
ACB/ Vigilance,
Altinho, Panaji, Goa.

2. State through Public Prosecutor
High Court of Bombay at Goa
Altinho, Panaji, Goa.

.. Respondents

Mr. D. Vernekar, Advocate for the petitioner.

Mr. S. R. Rivankar, Public Prosecutor for the respondents.

CORAM :- C. V. BHADANG, J.

Reserved on : 27th November, 2015

Pronounced on : 2nd December, 2015.

JUDGMENT :

Rule. Rule made returnable forthwith. Mr. Rivankar, learned Public Prosecutor waives service on behalf of the respondents. Heard finally with the consent of the parties.

2. By this petition, the petitioner/ accused is challenging the order dated 16/10/2015, passed by the learned Special Judge, Panaji in Special Case No.2/2014. By the impugned order, the

application filed by the petitioner under Section 311 of Cr.P.C., for recalling PW1 Thomas Menezes, for further cross-examination, has been rejected.

3. The brief facts are that the petitioner is facing trial under the Prevention of Corruption Act before the learned Special Court at Panaji. It appears that earlier, the petitioner was represented by Advocate Mr. De Sa. PW1 Thomas Menezes, who is the complainant and a material witness, came to be examined and was cross-examined on behalf of the petitioner by Advocate Mr. De Sa. On 21/12/2010, further cross-examination was deferred. It appears that, subsequently, there is yet another endorsement dated 14/03/2011, recording that no further cross-examination was sought for. It appears that subsequently, the petitioner changed his Counsel and engaged Advocate Shri Vernekar, who cross-examined the witnesses from PW4 to PW12. It was at this stage that an application under Section 311 of Cr.P.C. came to be filed, for recalling PW1 for further cross-examination. It was contended that the copy of deposition of PW1, which the petitioner had received from his earlier Advocate, did not contain an endorsement about closure of the cross-examination of PW1 (which is recorded on 14/03/2011). It was, thus, contended that the petitioner was under a bonafide impression that further cross-examination of PW1 is reserved. It

was contended that even Advocate Shri Vernekar was under the same impression. It is also contended that the new Counsel was under a disadvantage, in as much as, he was unable to know, as to the scheme of defence or the strategy under which, initially, the further cross-examination of PW1 was reserved deferred. It is also contended that the prosecution has dropped several witnesses, as a result of which, they could not be cross-examined. It was, thus, contended that, it is necessary to recall PW1 for further cross-examination and no prejudice would be caused to the prosecution.

4. The application was opposed on the ground that PW1 has been extensively cross-examined by the earlier Counsel appearing for the petitioner and his cross-examination was complete as per the endorsement dated 14/03/2011. It was contended that the trial is at a fag end and the witness cannot be recalled after a long period. It was contended that it is an attempt merely to protract the trial. It is also contended that dropping of certain witnesses by the prosecution, has no bearing on the question of recall.

5. The learned Special Judge, after hearing the parties, found that the evidence of PW1 was completed as per the endorsement dated 14/03/2011. The subsequent Counsel had

also cross-examined the prosecution witnesses from PW4 onwards and till the filing of the application as many as 13 witnesses were already examined. It was found that mere change of Advocate cannot afford a reason or a ground to recall a witness. In that view of the matter, the application came to be rejected. That is how, the petitioner is before this Court.

6. I have heard Shri Vernekar, the learned Counsel for the petitioner and Shri Rivankar, the learned Public Prosecutor for the respondent State. With the assistance of the learned Counsel for the parties, I have gone through the impugned order, as also the deposition of PW1 Thomas Menezes.

7. It is submitted by Shri Vernekar, the learned Counsel for the petitioner that earlier, the petitioner was represented by a different Counsel, who had sought the cross-examination of PW1 to be deferred. It is submitted that after the present Counsel entered appearance on behalf of the petitioner, he was all along under impression that further cross-examination of PW1 is deferred. It is thus submitted that he was unaware of the subsequent endorsement dated 14/03/2011, by which, it was recorded that no further cross-examination is required. It is submitted that the present Counsel of the petitioner was also handicapped, in as much as, he was not aware of the line of

defence adopted by the earlier Counsel and the circumstances and the reasons for which, initially, the further cross-examination of PW1 was deferred. It is submitted that the Court has ample powers under Section 311 of Cr.P.C. for recalling a witness, if it is necessary for the just decision of the case. The learned Counsel has placed reliance on the decision of the Hon'ble Apex Court in the case of ***P. Sanjeeva Rao Vs. State of Andhra Pradesh***, reported in (2012)7 SCC 56, in order to submit that in similar circumstances, the Hon'ble Apex Court had directed the prosecution witness to be recalled for the purpose of cross-examination.

8. On the contrary, it is submitted by Shri Rivankar, the learned Public Prosecutor for the respondents that the Counsel who subsequently appeared for the petitioner had cross-examined several witnesses of the prosecution and as such, it cannot be accepted that he was unaware of the fact that the cross-examination of PW1 was closed. It is submitted that the deposition of the PW1 was started, as far back as on, 04/04/2007 and the same was, complete on 14/03/2011, when it was recorded that no further cross-examination is required. It is submitted that the said witness cannot be recalled at this distance of time. It is submitted that the learned Special Court has rightly rejected the application.

9. It is further submitted that PW1 has also since been prosecuted for an offence under the provisions of the Prevention of Corruption Act. It is submitted that PW1 is sought to be recalled only with a view that he will not now support the prosecution as he himself is facing trial. It is submitted that in either case, the recall of PW1 is neither justified nor warranted and the same would cause serious prejudice to the prosecution. He, therefore, submitted that the petition be dismissed.

10. I have given by anxious consideration to the rival circumstances and the submissions made. The material facts are not in dispute, apart from being matters of record. It is undisputed that the evidence of PW1 was started on 04/04/2007 and after the earlier Counsel appearing for the petitioner had cross-examined this witness, initially, there was an endorsement made on 21/12/2010, stating that the further cross-examination was reserved. A perusal of the deposition, further shows that, by a subsequent endorsement dated 14/03/2011, the cross-examination is shown to be over. It is further a matter of record that after the present Counsel put in appearance on behalf of the petitioner, he has cross-examined the prosecution witnesses from PW4 to PW13. It is not possible to accept that although several prosecution witnesses were cross-examined, the line of defence earlier taken was not known. It would be significant to note that

except the ground about a change of Counsel and the consequent aspect of the Counsel being unaware of the line of defence, no other ground was arrayed in the application under Section 311 of the Cr.P.C. Although the petitioner is not expected to disclose his specific defence and the questions, which he intends to put to the witness on recall, it would be necessary to set out a general ground as to the reason for which the recall would be necessary for the just decision of the case. The learned Counsel for the petitioner in this regard submitted that although PW1 has been cross-examined on the pre-trap panchanama, he needs to be cross-examined on the happenings during the trap and the post trap panchanama. I have gone through the evidence of PW1 and I find that PW1 has been extensively cross-examined by the earlier Counsel, including on the happenings during the course of laying of the trap and the events subsequent thereto, leading to the recording of the post trap panchanama. Thus, in my considered view, this ground cannot be accepted.

11. In the case of ***Haffman Andreas Vs. Inspector of customs, Amritsar***, reported in (2000)10 SCC 430, there was death of earlier Counsel and in that view of the matter, it was held that the new Counsel was unaware of the scheme of defence strategy. It was also found that the former Counsel had not put questions on certain aspects and in the peculiar facts of that case,

it was found that it was necessary to recall the witness.

12. In the case of **P. Sanjeeva Rao** (supra), the prosecution was under the Prevention of Corruption Act. In that case, there was a prayer for recall of PW1 and PW2, who were respectively the complainant and the witness, who allegedly had heard the conversation and observed the passing of bribe. It was contended that the cross-examination of PW1 and PW2 was deferred till such time, Trap Laying Officer (PW11) was examined. It was, in these circumstances, that after the evidence of PW11 was recorded, the accused had sought recall of PW1 and PW2. It was found that although there was no formal application or even a oral prayer made before the trial Court to the effect that the exercise of right to cross-examine the two witnesses be reserved till such time the Trap Laying Officer was examined, there was a personal affidavit filed by the Counsel supporting the fact that he intended to cross-examine two witnesses only after the deposition of Trap Laying Officer was recorded. The Hon'ble Apex Court also found on the peculiar facts of the case that PW1 and PW2, having supported the prosecution and in view of their incriminating nature of evidence, it was not plausible that their cross-examination would have been declined in its entirety. The Hon'ble Apex Court in such circumstances, accepted that notwithstanding that there was no formal application or oral

prayer regarding the deferral of the cross-examination of PW1 and PW2 till the examination of the Trap Laying Officer PW11, the same was acceptable. It would be significant to note that there was no cross-examination at all of PW1 and PW2 in that case.

13. In a more recent case, in the case of **AG Vs. Shiv Kumar Yadav and another**, reported in AIR 2015 SC 3501, the Hon'ble Apex Court, after taking a survey of the decisions holding the field, including in the case of **P. Sanjeeva Rao** (supra), has disallowed the recall of the witness.

It would be worthwhile to reproduce para 29 of the judgment in the case of **Shiv Kumar Yadav** (supra) as under :

"29. We may now sum up our reasons for disapproving the view of the High Court in the present case:

(i) The trial court and the High Court held that the accused had appointed counsel of his choice. He was facing trial in other cases also. The earlier counsel were given due opportunity and had duly conducted cross-examination. They were under no handicap;

(ii) No finding could be recorded that the counsel appointed by the accused were incompetent particularly at back of such counsel;

(iii) Expeditious trial in a heinous offence as is alleged in the present case is in the interests of justice;

(iv) The trial Court as well as the High Court rejected the reasons for recall of the witnesses;

(v) The Court has to keep in mind not only the need for giving fair opportunity to the accused but also the need for ensuring that the victim of the crime is not unduly harassed;

(vi) Mere fact that the accused was in custody and that he will suffer by the delay could be no consideration for allowing recall of witnesses, particularly at the fag end of the trial;

(vii) Mere change of counsel cannot be ground to recall the witnesses;

(viii) There is no basis for holding that any prejudice will be caused to the accused unless the witnesses are recalled;

(ix) The High Court has not rejected the reasons given by the trial court nor given any justification for permitting recall of the witnesses except for making general observations that recall was necessary for ensuring fair trial. This observation is contrary to the reasoning of the High Court in dealing with the grounds for recall, i.e., denial of fair opportunity on account of incompetence of earlier counsel or on account of expeditious proceedings;

(x) There is neither any patent error in the approach adopted by the trial court rejecting the prayer for recall nor any clear injustice if such prayer is not granted."

14. It can, thus, be seen that although the Court has wide powers to direct recall, it presupposes a finding that it is necessary for just decision of the case. It is further trite that wider the power, greater is the circumspection and restraint, required to be exercised.

15. Turning to the present case, it is clear that PW1 has been extensively cross-examined, including on the happenings during the course of trap and subsequent to the trap. Although the initial cross-examination was deferred, after examination of two more witnesses, the cross-examination is shown to be closed. The Counsel subsequently appearing has also cross-examined several other prosecution witnesses and the recall is sought about 8 years after the deposition of PW1 had started. On giving my anxious consideration to the submissions made on behalf of the petitioner, it is not possible to accept that the recall is necessary for the just decision of the case. In that view of the matter, I do not find that any case for interference in exercise of extraordinary jurisdiction of this Court, is made out.

16. In the result, the petition is dismissed.

C. V. BHADANG, J.