

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL REVISION APPLICATION NO.32 OF 2016**

Shri Sebastian Gabriel Marshall
S/o Late Anthony P. Marshall,
Married, Business,
R/o Ravindra B, F2,
Bablo Naik Colony, St. Inez
Panjim ... Applicant

Versus

State (through)
Central Bureau of Investigation
The Officer in charge
Office of the Supdt. Of Police,
CBI, Anti-Corruption Branch,
Bungalow No.F-1, Type-VI,
GMC Quarters, National Highway
NH-17, Bambolim, Goa- 403202 ... Respondent

Mr. Rohan Pandurang Dessai, Advocate for the
petitioner.

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

Coram :- C. V. BHADANG, J.

Date :- 14th July, 2016

ORAL ORDER :

Heard the learned Counsel for the petitioner
and Shri Vaz, the learned Special Public Prosecutor
for the respondent.

2. The applicant along with others is facing prosecution for the offences punishable under Sections 120-B, 420, 471, 468 of Indian Penal Code (IPC, for short) and Section 13(1)(d) of Prevention of Corruption Act. There are in all seven accused and the petitioner happens to be accused no.2 before the learned Special Judge. It appears that the prosecution had closed its evidence and the statement of the accused was also recorded. Thereafter, the prosecution made an application for modification of the charge in which, Section 468 of IPC was added. The charge was modified on 08/01/2016. Indisputably, neither the prosecution nor any of the accused is seeking recall of any of the prosecution witnesses on the ground that the charge has been modified with addition of Section 468 of IPC. The special case is ripe for final arguments.

3. On 27/04/2016, the petitioner filed an application (Exh.438-D) seeking recall of PW7 Sadik

Katwali and PW14 Mr. Jagdish Wadhwa for further cross-examination. The said application has been partly allowed by the learned Sessions Judge by an order dated 14/06/2016, allowing recall of PW7 Sadik on the ground that the cross-examination of PW7 was deferred on 02/04/2014 and thereafter, the said cross-examination was not conducted and remained to be recorded as the said witness was not present. The learned Special Court, however, has refused to recall PW14 Jagdish Wadhwa, which is subject matter of challenge in this petition.

4. I have heard the learned Counsel for the petitioner and Shri Vaz, the learned Special Public Prosecutor for the respondent.

5. The learned Counsel for the petitioner has strenuously urged that the Court can, at any stage of the proceedings, recall a witness under Section 311 of Cr.P.C., if such recall is necessary for the just decision of the case. It is submitted that PW14, who is a Branch Manager of Uco Bank, has

deposed about the procedure in the matter of sanction of loan and has also produced certain documents, which are exhibited on record. The learned Counsel submits that although on 31/07/2014, the cross-examination of the said witness on behalf of the petitioner was declined, it is necessary to recall the said witness for the just decision of the case. The learned Counsel has placed reliance on the decision of Hon'ble Supreme Court in the case of **P. Sanjeeva Rao Vs. State of Andhra Pradesh**, (2012) 7 SCC 56 and a decision of this Court in **Prashant Zore Vs. State of Maharashtra**, 2015 ALL MR (Cri) 4687. He submits that when the question is about affording a fair trial to the accused, the witness can be recalled, notwithstanding some inconvenience to the prosecution. The learned Counsel also submits that on 31/07/2014, the Counsel representing the petitioner was unwell and his Junior had attended the case, wherein, it is recorded that cross-examination was declined.

6. The learned Special Public Prosecutor

submits that the cross-examination on behalf of the petitioner was declined, as far back as, in July, 2014 and the present application is made on 27/04/2016, after the prosecution evidence is over. He submits that the Special Judge has rightly considered the application and has partly allowed the same permitting recall of PW7 Sadik as his cross-examination was deferred. He submits that once the learned Sessions Judge has found that recall of PW14 is not necessary, this Court may not interfere with the same. The learned Special Public Prosecutor has placed reliance on the decision of the Supreme Court in the case of **AG Vs. Shiv Kumar Yadav and another**; AIR 2015 SC 3501.

7. I have carefully considered the rival circumstances and the submissions made.

8. The material facts are not in dispute. It can be seen that PW14 was examined on 31/07/2014 when the accused no.1 had cross-examined the said witness in person, while the cross-examination on

behalf of the accused no.2 and accused nos.3, 6 and 7 was declined and it is recorded that cross-examination on behalf of the A-2, A-3, A-6 and A-7 as "Nil". Thereafter, the prosecution examined several witnesses and the statement of the accused was also recorded. It is true that the prosecution had applied for modification of the charge, which was, accordingly, modified by addition of the offence under Section 468 of IPC. However, neither that ground is made out in the application for recall, nor that is the ground made out in the present Criminal Revision Application. The only case made out in the application seeking recall is that there was no effective cross-examination of the witnesses PW7 and PW14. As noticed earlier, the recall of PW7 is allowed. Thus, the considerations are limited, as to whether PW14 can be recalled. The Supreme Court in the case of **Shiv Kumar Yadav** (supra), after taking a survey of the decisions holding the field, including the case of **P. Sanjeeva Rao** (supra), has, in para 29 of the judgment, held thus :

"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. "

9. It can, thus, be seen that while considering such an application for recall, the Court has to balance the conflicting considerations about the accused getting a fair trial and opportunity and also to ensure that the trial is conducted with due expedition and the victim and/or the witnesses, are not unduly harassed. The material consideration is whether such recall is necessary for the just decision of the case.

10. Coming back to the present case, it is apparent that the cross-examination on behalf of the petitioner was declined. For this reason itself, the judgment in the case of **P. Sanjeeva Rao** (supra) would be distinguishable, in which case, there was no cross-examination as the Counsel representing the appellant accused had expressed intention to cross-examine the trap witnesses, after cross-examination of Raiding Officer, which was found to be logical. I have carefully gone through the evidence of PW14, who is a Branch Manager, who has primarily deposed about the procedure followed by the Bank while

advancing loan and presumably because of that the cross-examination on behalf of the petitioner was declined. I may hasten to add that it is neither necessary nor appropriate to appreciate the nature of the evidence given by the witnesses at this stage. Considering the fact that the cross-examination on behalf of the petitioner was declined, way back in July, 2014 and the prosecution is at the fag end in which the statement of the accused is also recorded, I do not find that a case for interference in the impugned order is made out.

11. Criminal Revision Application is without any merit and is, accordingly, dismissed. Needless to mention that the learned Special Judge shall not be influenced by any of the observations made herein, at the trial.

C. V. BHADANG, J.

SMA