

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO.111 OF 2016

Shabbir @ Noor Ahmed Munshi
s/o Abdul Haque Munshi,
37 years of age, married,
Businessman,
R/ at Flat No.A, Reliance
Cal Bebiu Apartment,
Alto-Betim, Bardez, Goa,
Presently lodged in Judicial
Custody, Colvale, Bardez,
Goa. .. Petitioner/ applicant

V/s

1. Police Inspector,
Porvorim Police Station,
Goa Police, Porvorim,
Bardez, Goa.
2. State
Through PP
High Court of Bombay at Panaji .. Respondents

Mr. Arun Bras De Sa, Advocate for the petitioner.

Mr. P. Faldessai, Additional Public Prosecutor for
the respondents.

CORAM :- C. V. BHADANG, J.

DATE : 5th August, 2016

ORDER :

By this petition, the petitioner, who is the

accused no.1 in Special Case No.28/2014 before the Children's Court at Panaji, is challenging order dated 22/04/2016 (below Exh.D-57), whereby the application filed by the petitioner under Section 311 of Cr.P.C., seeking recall of PW1, PW2 and PW5 has been rejected.

2. The brief facts are that the petitioner along with others, is facing trial before the learned Children's Court for the offences punishable under Sections 324, 307, 302 and 392 read with Section 34 of Indian Penal Code (IPC, for short) and Section 8(2) of the Goa Children's Act, 2003. According to the prosecution, in the incident, which had occurred on 04/01/2014, the petitioner along with the co-accused, in furtherance of their common intention, had assaulted the complainant Mohammad Ikram and his sons, in which one of the sons of the complainant named Mohammad Usman died, while others suffered injuries. It appears that the petitioner had lodged a counter complaint in respect of the said incident

on 15/01/2014 alleging that the complainant (PW1) along with three boys Danish, Usman and Hussain had accosted him why the petitioner had assaulted his sons in the previous incident, which had occurred at 09.00 a.m. on 04/01/2014. It was alleged that the complainant and his sons abused the petitioner and he was threatened with dire consequences. The petitioner further claimed that all of a sudden, Danish assaulted him from behind with iron pipe on the head, because of which, he suffered grievous injuries.

3. It appears that the police did not register any FIR on the basis of the complaint dated 15/01/2014 lodged by the petitioner and the petitioner was required to approach the Magistrate under Section 156(3) of Cr.P.C. The petitioner had further approached this Court in Criminal Writ Petition No.40/2016 in which the learned Magistrate was directed to decide the application filed under Section 156(3) of Cr.P.C. Subsequently, the

Magistrate passed an order on the basis of which the FIR is registered against the complainant in the present case and others, which is under investigation.

4. In pursuance of the complaint lodged by PW1 Mohammad Ikram, the petitioner and others were chargesheeted before the Children's Court in the aforesaid Special Case, in which the prosecution has, till date, examined in all nine witnesses, including PW1 Mohammad Ikram, PW2 Danish and PW5 Abu Bakar. PW2 and PW5 are the minor sons of the complainant. The cross-examination of the PW5 was conducted on 29/02/2016 after which the prosecution has examined four more witnesses.

5. The petitioner filed an application Exh.D-57 on 10/03/2016 before the Children's Court under Section 311 of Cr.P.C., seeking recall of PW1, PW2 and PW5. It was contended that as the application

under Section 156(3) of Cr.P.C. filed by the petitioner was pending before the learned Magistrate, the learned Counsel for the petitioner did not cross-examine these witnesses on the version of the petitioner as stated in his complaint dated 15/01/2014, which according to the petitioner "gives diametrically a different version and/ or counter complaint, as regards the genesis of the incident." For this reason, the petitioner sought recall of these three witnesses.

6. The application was opposed on behalf of the State, *inter alia*, on the ground that these witnesses have been extensively cross-examined on behalf of the petitioner and that the trial has proceeded further.

7. The learned Children's Court, by the impugned order, has dismissed the application, *inter alia*, holding that the nature of the incident as claimed by the petitioner in his complaint dated

15/01/2014 is already brought on record in the cross-examination of the said witnesses. Thus, in the opinion of the Children's Court, recall of witnesses was not necessary for a just decision of the case.

8. I have heard Shri De Sa, the learned Counsel for the petitioner and the learned Additional Public Prosecutor for the respondents. With the assistance of the learned Counsel for the parties, I have perused the impugned order and I have also gone through the evidence of the three witnesses, whose recall is sought.

9. On behalf of the petitioner, reliance is placed on the decision of the Supreme Court in the case of ***Rajendra Prasad Vs. Narcotic Cell through its Officer-in-Charge, Delhi***; AIR 1999 SC 2292, in order to contend that the Court has plenary power to summon or recall a witness, at any stage of the trial, if the Court considers it necessary for a just decision.

It is submitted that if on a bonafide belief that an application under Section 156(3) of Cr.P.C. was pending before the learned Magistrate, no cross-examination was conducted on the aspects as mentioned in the complaint dated 15/01/2014, recall of the witnesses was just and necessary.

10. In my considered view, the submission cannot be accepted. It is clear that the complaint was lodged on 15/01/2014 and thus, there was no impediment in cross-examining the prosecution witnesses on the counter complaint lodged by the petitioner. Merely because an application under Section 156(3) of Cr.P.C. was pending before the Magistrate, can neither be sufficient nor can it preclude the accused from cross-examining the prosecution witnesses on his defence version. Thus, the contention based on pendency of the application under Section 156(3) of Cr.P.C. has rightly been rejected by the Children's Court. That apart, a perusal of the cross-examination of PW1, PW2 and PW5

would show that they have been extensively cross-examined. A perusal of the cross-examination shows that the aspect as to the counter version has already been put to them. Thus, in my considered view, the Children's Court has rightly found in para 18 of the judgment that the nature of the incident, as claimed by the petitioner in his complaint, is already brought on record, in the cross-examination by way of suggestions.

11. The judgment in the case of **Rajendra Prasad** (supra), was brought to the notice of the Children's Court. In that case, the Supreme Court was concerned as to what would mean by a 'lacuna' in a prosecution case. In the said case, the prosecution had moved an application seeking permission to recall two witnesses for proving certain documents, which was allowed by the Trial Court. The prosecution further sought permission to examine PW21 and two other persons which was allowed. That order was unsuccessfully challenged before the High Court and

the matter thereafter, went to Supreme Court. Following observations in the said judgment in para 6 can be reproduced with profit :

"6. It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act by saying that the Court could not fill the lacuna in the prosecution case'. A lacuna in prosecution is not to be equated with the fallout of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage 'to err is human' is the recognition of the possibility of making mistakes to which humans are proved. A corollary of any such laches or mistakes during the conducting Of a case cannot be understood as the lacuna which a court cannot fill up."

12. It can, thus, be seen that the Court was basically concerned with what would mean by lacuna in

the prosecution case and it has been held that the lacuna would mean an inherent defect or latent wedge in matrix of the prosecution case, of which the advantage should normally go to the accused. It has been held that if proper evidence was not adduced or relevant material was not brought on record due to inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.

13. It is evident that the question whether in the context of the allegations a witness needs to be recalled or not, would depend upon the facts and circumstances of each case. In the present case in hand, the said witnesses have been cross-examined extensively, including on the version as claimed in the complaint lodged by the petitioner. In that view of the matter, I do not find that the impugned order calls for interference. The petition is without any merit and is, accordingly, dismissed.

C. V. BHADANG, J.

SMA