

statement of the applicant – accused commenced, the applicant filed an application and sought recall of PW 14 – Wasim Khan. He submits that the ground on which recall of PW 14 – Wasim Khan (panch witness) was sought was that the said witness was not questioned on certain procedural aspects i.e. drawing of seizure panchnama, search, seizure etc. in detail and for certain other questions which could not be disclosed, at that stage. He submits that no doubt PW 14 – Wasim Khan has been cross-examined, however, the advocate for the applicant has not questioned him with respect to the seizure panchanama, as according to the applicant, PW 14 – Wasim Khan was not present at the time when the seizure panchanama was drawn. Learned Counsel for the applicant submits that under Section 311 of Code of Criminal Procedure, the said witness be permitted to be recalled. According to the learned counsel, by permitting recall of the said witness i.e. PW 14, the same would not amount to filling up of the lacunae and that the said recall is essential for the just decision of the case. Learned Counsel relied on the judgments in the cases of ***Rajendra Prasad v/s Narcotic Cell through its Officer-in-charge, Delhi¹, U.T. of Dadra and Haveli and Another v/s Fatehsinh Mohansinh Chauhan²; Mohanlal Shamji Soni v/s***

1 AIR 1999 SC 2292

2 Criminal Appeal No.834 of 2006 dated 14.08.2006

Union of India and Another³, Narendra Pratap Singh v/s State of U.P. and others⁴, V. N. Patil v/s K. Niranjana Kumar and Others⁵, Vijay Kumar v/s State of Uttar Pradesh and Another⁶ and Swapna Kumar Chatterjee v/s Central Bureau of Investigation⁷, in support of his submission.

4. Mr. Shirsat, learned counsel for the respondent No.1 opposed the application. He submits that no interference was warranted in the impugned order. He submits that PW 14 – Wasim Khan had been examined at length, with respect to his presence at the time of seizure of the narcotic substance and other aspects. He submits that the trial is at the fag end and that the matter is posted for arguments. He submits that recalling of a witness cannot be routinely permitted on the ground that the cross-examination was not properly conducted. He submits that it is not a case where there is no cross-examination of the witness at all or that any new material is unearthed or some information is subsequently gathered, on the basis of which further cross-examination of the witness is essential for the just decision of the case. He submits that there also cannot be presumption

3 1991 Cri. L.J. 1521

4 1991 Cri. L.J. 1531

5 Criminal Appeal No.267 of 2021 decided on 4th March 2021

6 (2011) 8 SCC 136

7 Criminal Appeal No.15 of 2019 decided on 4th January 2019

that denial or recall of a witness would be necessarily prejudicial to the defence. In support of his submission, learned counsel relied on the judgments in the cases of ***State of Haryana v/s Ram Mehar and Others***⁸ and ***Laxman s/o Vitthal Mate v/s The State of Maharashtra***⁹. He further submits that in the facts no infirmity can be found in the impugned order.

5. Perused the papers, in particular the evidence of PW 14 – Wasim Khan, the application filed by the applicant seeking recall of PW 14 – Wasim Khan, as well as the impugned order passed on the said application.

6. A perusal of the application seeking recall of PW 14 – Wasim Khan shows that recall of the said witness was sought on the following grounds:- (i) that due to oversight, many aspects of the search and seizure operations were not controverted in the cross-examination of PW 14 – Wasim Khan and therefore in order to discredit his testimony, he will have to be extensively cross-examined by the defence; (ii) that the Court should be magnanimous in permitting such mistakes to be rectified, inasmuch as,

8 (2016) 8 SCC 762

9 Criminal Writ Petition No.847/2019 decided on 13/03/2020 (Nagpur Bench).

the ambit and scope of Section 311 of the Code of Criminal Procedure is wide; (iii) that PW 14 – Wasim Khan, was gainfully employed as a Supervisor with Oswal Builders at the relevant time and factually a panchanama was never drawn in presence of this witness. It was also stated in the application that several aspects of the prosecution case about the events that allegedly transpired in the presence of PW 14 – Wasim Khan remained to be covered during his previous cross-examination conducted on behalf of applicant/accused and besides some procedural aspects with respect to drawal of panchanama, search, seizure etc., were also not covered in greater details and as such recall of PW 14 – Wasim Khan is eminent. It is further stated that the other details for which the presence of this witness is necessary cannot be obviously disclosed in detail, at this stage of the proceeding.

7. The said application was opposed to, by the learned Special Public Prosecutor. It was stated in the said reply that PW 14 – Wasim Khan was extensively cross-examined by the applicant's advocate and as such the question of recall of the said witness did not arise. It is stated that on the day of examination of PW 14 – Wasim Khan, the advocate was neither

prevented by the prosecution nor restrained by the Court from cross-examining the said witness on the aspects which the advocate now wishes to cross-examine and that fair opportunity was given to the applicant's advocate to cross examine PW 14 – Wasim Khan and that there was no substance in the application, inasmuch as, the applicant was trying to delay the conduct of the case.

8. The learned Sessions Judge rejected the said application vide order dated 4th December 2021, which is impugned in the present application. At the outset, it is made clear that there is no dispute with regard to the propositions laid down in the various judgments relied upon by the respective parties and as such it is not necessary to reproduce in detail the said judgments. A perusal of the evidence of PW 14 – Wasim Khan, which is at Exhibit – 'D', page 84 of the application, shows that he was examined at length, both by the learned Special Public Prosecutor as well as by the defence. In the examination-in-chief, the said witness has stated that he was working with Oswal Builders as a Supervisor and that he was residing in the building, where the incident had taken place i.e. on 25th February 2015. He has stated that on 25th February 2015 at about 9:30

p.m., one officer from the NCB approached him with a request to accompany him to Flat No.202 of Sanjay Jain (applicant), for the purpose of search. He has further set out in detail, how the panchanama and seizure was carried. He has also identified the applicant as well as his signatures on the panchanama.

9. A perusal of the cross-examination of the said witness shows that he was questioned on the search warrant as well as on the panchanama and on the seizure that allegedly took place in the applicant's flat. In paras 6, 7 and 8 of the cross-examination, the details of cross have been spelt out. Infact in para 8, he had denied the suggestion that he was not called to act as a panch on 25th February 2015 and that he had neither visited any flat nor had witnessed any search and seizure operation or that he had not signed on the panchanama (Exhibit – 214) and carton etc. It therefore appears that questions have been put to the said witness with respect to his presence at the time of recording of the panchanama as well as on the search and seizure operation. Merely because the advocate for the applicant is of the opinion that a few more questions are required to be asked with respect to the panchanama, search and seizure operation, does not warrant invoking

of Section 311 Cr.PC. It is not in dispute that an application under Section 311 Cr.PC can be filed at any stage. The only question that arises for consideration is whether the application ought to be entertained on the ground on which it is sought, more particularly when PW 14 – Wasim Khan, was cross-examined, on this very aspect.

10. The present case, is not a case where the witness has not been cross-examined at all or that some additional material was unearthed by the applicant, after which further cross-examination of the witness was necessary and essential. Merely because a few questions were left to be asked, cannot be a ground, for allowing an application seeking recall of the said witness, more particularly when there are questions put to PW 14, with respect to his presence at the spot. It is well settled that a witness cannot be recalled merely because the lawyer is of the opinion that cross-examination was not properly conducted or that a few questions were left to be asked. In the facts, having perused the impugned order dated 4th December 2021, passed by the learned District Judge-2 and Additional Session Judge, no infirmity can be found in the same.

11. Considering the aforesaid, no interference is warranted in the impugned the order dated 4th December 2021, passed by the learned District Judge-2 and Additional Session Judge, Thane, below Exhibit – 350, in NDPS (Spl.) Case No.31 of 2015.

12. Application is dismissed and accordingly disposed of.

REVATI MOHITE DERE, J.