

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 4509 OF 2021

BSE Limited

...Petitioner

Versus

The State of Maharashtra & Ors.

...Respondents

Mr. Vijay H. Kantharia a/w Ms. Shubhada Salvi for the Petitioner.

Mr. M.G. Patil, APP for the Respondent No.1/State.

Mr. S.P. Salkar for the Respondent No.2.

Mr. Gulshan Gera, Respondent No.2 (in person present in the Court).

CORAM : SARANG V. KOTWAL, J.

DATE : 4th JULY, 2023.

PC. :

1. Learned counsel Shri. S.P. Salkar states that he has instructions to appear on behalf of Respondent No.2, who is present in the Court. He undertakes to file his Vakilpatra within a period of one week from today. Since learned counsel Shri. Salkar waives service for the Respondent No.2, I have proceeded to hear the matter, with consent of both the parties.

2. The Petitioner, who is the original complainant, has challenged the order dated 9th March, 2020 passed by the Metropolitan Magistrate, 16th Court, Ballard Pier, Mumbai below

Exhibit No.22 in C.C. No. 70/PW/2006. The Respondent No.2 is the accused in the said complaint. The Respondent No.2 was prosecuted for the offences punishable under Sections 408, 420, 465, 467, 468, 471 of the Indian Penal Code, 1860 (for short 'I.P.C.').

3. Learned counsel for the Petitioner submitted that the complainant's witness PW-1 Mr. P. S. Reddy was examined and his examination-in-chief was completed on 15th November, 2018. After the examination-in-chief was concluded, the Petitioner-complainant made an application through the prosecuting-state for alteration in the charge under Section 420 of I.P.C., mentioning more facts relying on more documents. The learned trial Judge vide his order dated 20th April, 2019 allowed that application and additional facts were noted in the charge under Section 420 of I.P.C. Thus, there was alteration and amendment in the charge, which was framed against the Respondent No.2. By that time, the cross-examination of the first prosecution witness had already commenced. At that stage, an application was moved vide Exhibit No.22 in the said proceedings for permitting re-examination of the said witness. The said application was opposed on behalf of the Respondent No.2, as the cross-examination was in progress.

4. Learned Magistrate considered these submissions and arrived at a conclusion that, there was no procedure of stopping the cross-examination when it was going on and re-examination could be permitted only after the cross-examination is over. On these reasons, the learned Magistrate rejected the application for re-examination of the said witness before the cross-examination was concluded. Learned counsel for the Petitioner submitted that the alteration of charge necessitated bringing certain other facts on record relying on further documents; therefore, re-examination of the said witness was absolutely necessary. In that view of the matter, the application at Exhibit No.22, for conducting re-examination before completion of cross-examination, was made. He submitted that if re-examination was not permitted, serious prejudice would be caused to the prosecution. He relied on the provisions of Section 217 of Cr.P.C. He submitted that Section 217 Cr.P.C. and Section 138 of the Indian Evidence Act, 1872 need to be read together harmoniously.

5. Learned counsel for the Respondent No.2 supported the impugned order. He submitted that, there was no procedure to permit re-examination of the witness until the cross-examination was over.

6. I have considered these submissions. To understand the submission of learned counsel for the Petitioner, it is necessary to

reproduce Section 217 of Cr.P.C. and Section 138 of the Indian Evidence Act, which reads thus :

Section 217 of Cr.P.C. :

“217. Recall of witnesses when charge altered.—

Whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed—

- (a) to recall or re-summon, and examine with reference to such alteration or addition, any witness who may have been examined, unless the Court, for reasons to be recorded in writing, considers that the prosecutor or the accused, as the case may be, desires to recall or re-examine such witness for the purpose of vexation or delay or for defeating the ends of justice;
- (b) also to call any further witness whom the Court may think to be material.”

Section 138 of the Indian Evidence Act, 1872 :

“138. Order of examinations.— Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination.— The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.”

7. As rightly held by the learned Magistrate, the re-examination can only be conducted after the cross-examination is over, as is indicated under Section 138 of the Indian Evidence Act, 1872.

8. In the present case, Section 217 of Cr.P.C. is also important. It provides for permission to recall or re-summon the witness, who is already examined with reference to such alteration of the charge. The Section also refers to “re-examination” of such witness. Thus, it is more than clear that, after alteration of charge, both the parties get an opportunity to make an application for recalling or re-examining the witness with reference to such alteration. Section 217 of Cr.P.C. also provides that both the parties can also call further witnesses whom the Court thinks to be material.

9. Thus, after alteration of charge, both the parties are required to be given sufficient opportunity to lead further evidence and to examine any witness including the witness who was already examined by either of the parties.

10. In this view of the matter, the procedure adopted by the learned Magistrate was absolutely correct. In fact, in paragraph No.10 of his order, he has observed that he did not understand as to why the prosecution wanted to re-examine the witness at that particular stage

only and why it could not wait till the cross-examination was over. There are indications that the learned trial Court had not precluded the prosecution from re-examining the witness, who was under cross-examination, at that particular stage.

11. Thus, I do not find any infirmity in the impugned order. The prosecution of course is at liberty to re-examine the said witness with reference to the alteration of the charge and to produce any other document. It is needless to add that the accused also gets further opportunity to cross-examine the said witness, after the re-examination, if the new material is introduced in the re-examination. In this manner, no prejudice will be caused to either of the parties. Hence, in my opinion, this Application is filed at a pre-mature stage. The learned Magistrate has not closed the possibility of re-examination of the said witness.

12. The Writ Petition is disposed of, with these observations. The trial is expedited.

(SARANG V. KOTWAL, J.)