

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/CRIMINAL REVISION APPLICATION NO. 1232 of 2022**=====
IMRAN KARIMBHAI MADAM

Versus

STATE OF GUJARAT
=====

Appearance:

MR R D CHAUHAN(6865) for the Applicant(s) No. 1

MS.MANJULA R CHAUHAN(6871) for the Applicant(s) No. 1

MR UTKARSH SHARMA, APP for the Respondent(s) No. 1
=====**CORAM:HONOURABLE MR. JUSTICE UMESH A. TRIVEDI****Date : 15/12/2022****ORAL ORDER**

1. This revision application is filed challenging an order passed below Exhibit-68 by the learned 7th Additional Sessions Judge, Rajkot, dated 02.06.2022, whereby application given on behalf of the accused to recall the prosecution witness Nos. 5, 7 and 8 for the purpose of cross-examination, came to be rejected.

2. Mr. R.D. Chauhan, learned advocate for the petitioner - accused - Imran Karimbhai Madam, submitted that if the prosecution witness Nos. 5, 7 and 8 are recalled, as important questions were left out to be asked to them in a cross-examination, there is no prejudice caused to the prosecution.

2.1 He has further submitted that even the petitioner - accused is ready to pay the cost to the witnesses for the purpose of recalling them for further cross-examination.

2.2 He has further submitted that by now, 12 prosecution witnesses have been examined and there are 47 witnesses cited in the charge-sheet, and therefore, trial has yet not concluded.

2.3 He has further submitted that even during the pendency of this prosecution, petitioner - accused has been released on temporary bail on several occasions and nothing untoward has been reported, and therefore, there is no harm to recall the said witnesses.

2.4 On the aforesaid submissions, he requested that this revision application filed be admitted and allowed.

3. As against that, Mr. Utkarsh Sharma, learned APP, submitted that recalling of a witness on the ground mentioned in the application that certain important questions are left out to be put to the witness during the course of cross-examination is no ground to recall them. At the same time, according to him, to fill up the lacuna, no witness can be recalled even at the instance of the accused. Therefore, he has requested that this revision application be rejected.

4. Having heard the learned advocate for the petitioner as also the learned APP and going through the order, it appears that prosecution witness Nos. 5, 7 and 8 were fully examined and

cross-examined to their satisfaction on 14.02.2019, 13.05.2019 and 17.07.2019. Even prosecution witness No. 5 was further cross-examined on 21.02.2019, as his cross-examination was deferred for a week on an application made on behalf of the accused. Thus, it is clear that, to the fullest satisfaction of the learned advocate representing the accused, all the three witnesses for recall of whom this application is filed, were cross-examined. Therefore, there is no question of recalling them, that too, on an application made by the accused after approximately two and a half years of their examination concluded before the Court. Even giving benefit of Corona period, when Courts were closed, it had already started physical hearing in the year 2020 itself, maybe it might have been closed again in the second phase of Corona but thereafter also, physical hearing already started much prior into November, 2022. At any rate, on the ground that certain important questions were not put during the course of cross-examination of those witnesses could not be a reason for recalling those witnesses under Section 311 of the Code of Criminal Procedure, 1973. The petitioner - accused is facing a charge for an offence under Section 302 of the Indian Penal Code along with other offences and the alleged incident had also taken place much prior to their examination i.e. in the year 2019. It is

rightly concluded by the learned Judge that either to fill up lacuna or with the change of an advocate, no witness can be recalled at the instance of the accused.

5. A decision of the Supreme Court relied on by the learned advocate for the petitioner in the case of ***Mohanlal Shamji Soni v. Union of India***, reported in ***1991 (2) GLR 974***, is of no help to him as Supreme Court has said that Section 311 empowers the Courts to invoke its power in this regard at any stage until the judgment is pronounced but at the same time, it has also been said that the power must be used judiciously and not capriciously or arbitrarily. Since, as observed by the Sessions Court in para 3 of the impugned order that detailed cross-examination of each witness running into 2 to 7 page is made, nothing was left out to be asked to the witnesses. At any rate, the application given by the petitioner - accused is also lacking in detail that which of those important questions are left out to be asked to the witness on recall. Not only that, as observed by the learned Judge, thereafter also, prosecution witness Nos. 9 to 13 have also been examined and the case is on the verge of completion.

5.1. Another decision of the Bombay High Court relied on by the learned advocate for the petitioner, rendered in ***Criminal Application No. 40 of 2014*** decided on 22.04.2014, is on the

same principles as referred to in the aforesaid Supreme Court decision. However, as observed by the Bombay High Court, relying on a decision of the Supreme Court in the case of *Natasha Singh v. C.B.I. (State)*, reported in (2013) 5 SCC 741, for a proposition that the dominant consideration to exercise jurisdiction under Section 311 of the Code is, whether calling of a witness was necessary for the just decision of a case. However, petitioner has failed to show that without recalling the witnesses, Court is unable to deliver the judgment. Not only that, what is left out to be asked to the said witness is also not stated in the application praying for recalling of those three witnesses.

6. In view thereof, even the decisions relied on by the learned advocate for the petitioner in support of his case are also not applicable in the facts of the present case. Hence, I see no reason to entertain this revision application and it is hereby rejected.

Raj

(UMESH A. TRIVEDI, J.)