

IN THE COURT OF PRINCIPAL DISTRICT & SESSIONS
JUDGE, PORBANDAR

Order Below Exh.327 & 329
in
Sessions Case No.20 of 2021

[1] The application Exh.327 is filed by the learned Public Prosecutor seeking to re-open the right of prosecution to adduce evidence inasmuch as PW-8 Harish Pragjibhai Chavda examined by the prosecution is an important witness and despite numerous attempts, the deposition of PW-8 could not be completed on account of absence of the said witness and since the accused in the case at hand is under trial prisoner, the incomplete deposition of PW-8 was kept pending and other witnesses of prosecution were examined; and thereafter, the prosecution filed evidence closure memo and thereafter, further statement was recorded and the matter was taken for further argument, however, PW-8 was an important witness, an application Exh.327 is filed seeking to re-open the prosecution evidence and the application at Exh.329 seeks issuance of witness summon to PW-8.

[1.1] The learned Public Prosecutor submits that the witness PW8 Harish Pragjibhai Chavda is the key witness and only eye-witness of the case and he was called upon for being examined as PW-8, however, in his deposition before the Court recorded on 22.07.2022, the said witness claimed ignorance about the incident, but he confirmed about having given statement before the learned Judicial Magistrate and has also identified his signature in the statement recorded by the learned Judicial Magistrate in

terms of Section-164 of the Cr.P.C. which is produced at Exh.65. Learned Public Prosecutor submits that the prosecution attempted to show the CCTV footage to this witness on 22.07.2022, however, the defence took an objection in this regard and therefore, the learned Public Prosecutor as well as learned advocate for the defence were heard on the issue and the learned advocate for the defence sought time for citing case-laws in this regard and accordingly, the matter was kept on 25.07.2022 and on 25.07.2022 the case-law relied upon by the learned advocate for the defence were furnished; and vide order dated 26.07.2022 the objection taken by learned advocate for the defence was overruled and the prosecution was permitted to show CD/DVD containing the video footage showed therein.

- [1.2] It is the submission of learned Public Prosecutor that the *de facto* complainant filed an affidavit contending that the witness PW-8 has stated false facts and thereafter, on 02.08.2022 the witness PW-8 filed an application at Exh.71 declaring that he apprehends harm from the accused and seeks police protection for a period of one year whereby the Court was pleased to call for report of the L.C.B. Office, Porbandar seeking explanation as to what has been done by the Police Authority after receipt of such application for police protection, and the Police Sub Inspector of Kamlabag Police Station filed report seeking time citing that the investigation in respect of the application for police protection is in progress and that arrangement has been made for bringing the said witness to the Court and proceeding for further protection is in

progress.

- [1.3] It is urged that, vide report dated 08.08.2022 produced at Exh.75, it was conveyed by the D.S.P. Porbandar that till the application for police protection given by the witness Harish Pragjibhai Chavda is decided as an interim measure, arrangement for his protection has been made by the Police Department vide report produced at Exh.76 and it was conveyed by the Police Agency that adequate arrangement have been made for the protection till conclusion of the trial; and thereafter, an application Exh.78 was filed by the prosecution with the contention that the witness PW-8 is present before the Court, however, certain clarity with regards to his security is to be discussed and therefore, the witness PW8 is not ready to depose on the said date and accordingly, as the accused is an under trial prisoner with a view to avoid further delay, the prosecution may be permitted to examine other witnesses and the said application was allowed and accordingly, the matter was proceeded further.
- [1.4] Learned Public Prosecutor submits that non-examination of PW-8 would result in grave injustice to the prosecution in as much as he is an eye-witness to the incident. It is also argued that the initial stand of PW-8 is to the effect that he does not know anything about the incident, however, statement of PW-8 recorded by the learned Judicial Magistrate is indicative of PW-8 having witnessed the incident. It is further argued that the fact that the PW-8 is an important witness is also evident from the application produced at Exh.233 filed by the defence and it was prayed that the application Exh.233 prior to examining the

Investigating Officer the deposition of PW-8 may be completed so as to ensure that the defence is not prejudiced, however, the said application was rejected with an observation that the seriatim of the witness to be examined by the prosecution is to be determined to the Prosecutor and since the Investigating Officer who submitted the charge-sheet is yet to be examined, there is no question of prejudice to the defence. Learned P. P. submits that on account of conduct of PW-8 in not co-operating the prosecution his deposition could not be completed at the relevant time and therefore, other witnesses were examined keeping in view the fact that the accused No.2 is an under trial prisoner, however, thereafter on account of oversight the prosecution filed evidence closure memo and the matter was kept for final arguments after recording the statement of accused in terms of Section-313 of the Cr.P.C.; but since the PW-8 is an important witness and completion of his deposition is necessary to ensure true and correct fact pertaining to the incident are brought on record, this application may kindly be allowed and witness summon may be issued to the PW-8 for completing his deposition.

- [2] On the other hand, learned advocate for the defence has vehemently objected to grant of permission to re-open the stage of evidence for prosecution and re-call PW-8. It is argued that the PW-8 has specifically mentioned in his deposition before the Court that he does not know the name of deceased and has no information as to what happened in the incident and the statement of PW-8

recorded by the learned Judicial Magistrate under Section-164 of the Cr.P.C. produced at Exh.65 has been exhibited only to the extent that the said witness identified his signature in the said statement and has also specifically stated that he has not seen any person hitting another person with a knife. It is argued that the matter is kept pending for the evidence of prosecution for a long period of time and the accused No.2 is behind the bars since his arrest, hence, the grant of permission to re-open the right of prosecution to adduce evidence and to re-call the PW-8 is likely to result in further delay of trial and shall cause prejudice to the accused.

- [2.1] Learned advocate for the defence further submits that by preferring an application at Exh.233 the learned Public Prosecutor was informed about incomplete deposition of the PW-8 and the likelihood of prejudice on account of examining the Investigating Officer without completing the deposition of PW-8, however, the said application was dismissed by the Court and during the course of hearing of that application, it was contended by the learned Public Prosecutor that the PW-8 in spite of being present in the Court was not ready to depose and thereafter, other witnesses have been examined and the Investigating Officer Mr. M. D. Chaudhari is present but the defence has filed an application at Exh.233 with a view to avoid recording the deposition of the said Investigating Officer Mr. M. D. Chaudhari. It is contended that while rejecting the application Exh.233, the Court specifically observed that the deposition of the Investigating Officer Mr. J. B. Karmur is yet to be recorded and therefore, no prejudice is

likely to be caused to the defence by examining Mr. M. D. Chaudhari, (Police Inspector), however though the said issue was brought to the notice of prosecution, the prosecution proceeded to examine Mr. J. B. Karmur as PW-45 on 10.09.2024 and did not bother to complete the deposition of PW-8.

[2.2] It is urged that, the prosecution filed evidence closure memo at Exh.306 on 02.12.2024 and the matter was taken for recording for further statement under Section-313 of the Cr.P.C. despite one of the accused under trial prisoner, further statement of the accused was recorded only on 17.02.2026 and the matter was taken up for hearing of final arguments and thereafter, on 17.03.2026 these applications at Exh.327 & Exh.329 were preferred. It is argued that taking into consideration the fact that three opportunities were granted to the prosecution to examine the PW-8 at the relevant point of time and despite defence having moved and application at Exh.233, no efforts were made by the prosecution to complete the deposition of PW-8 and at the fag end of trial when the matter is taken up for final arguments, the prosecution is attempting to fill up lacuna in its case by preferring these applications; and therefore, the applications are required to be dismissed with cost.

[3] In reply to the submissions of learned advocate for the defence, the learned Public Prosecutor submits that all efforts were made by the prosecution to examine PW-8 at the point of time, however, on account of non co-operation of PW-8 and on account of bonafide oversight, the

deposition of PW-8 could not be completed on the issue of delay in trial. It is submitted that during the trial proceedings, the accused No.2 who is under trial jumped bail and misused the short term bail granted to him and absconding and contributed factor of delay in trial and that at the during trial also adjournments were sought by the defense time and again; therefore solely on the ground of delay in disposal of the case, these applications may not be dismissed and it submitted that the prosecution undertakes to expedite the examination of PW-8 and co-operate in speedy disposal of the case.

- [4] In view of the above submissions and upon perusal of the record, it is evidence that as per the prosecution case, PW-8 is the eye-witness to the incident and PW-8 was examined in part on 22.07.2022. The PW-8 claimed ignorance about the deceased and also stated that he does not know anything about the incident, however, he identified his signature on his statement recorded by the learned Judicial Magistrate under Section-164 of the Cr.P.C. and accordingly, the said statement was taken on record at Exh.65. Perusal of the said statement reveals that the PW-8 narrated about having witnessed the incident in his statement recorded by the learned Judicial Magistrate, but in his examination-in-chief before the Court, he denied about having witnessed any such incident. Thereafter, the prosecution attempted to be shown the CDs containing CCTV footage relating to the incident, but objection was taken by learned advocate for the defence and the learned advocate for the defence also sought time to furnish case-

law on which the defence placed reliance; and accordingly, the matter was adjourned to 25.07.2022 and after hearing the either side as well as considering the ratio laid down in the decisions relied upon by the learned advocate for the defence, the Court was pleased to overrule the objection of defence and the prosecution was permitted to play the CD/DVD containing CCTV footage (seized in terms of panchanama at Exh.154) vide order passed on 26.07.2022.

[4.1] It also needs to be noted that on 25.07.2022 *de facto* complainant filed an application seeking permission to produce certain documentary evidence and photographs with a contention that PW-8 has good relation with the accused and he knows the accused very well despite of that the PW-8 has wrongly submitted before the Court that he does not know the accused and hence, the photographs annexed at list Exh.68 as well as the affidavit of *de facto* complainant was sought to be filed. The defence had filed its reply at Exh.69 on 26.07.2022 and learned advocate for the defence also filed an application at Exh.70 with a prayer to initiate proceedings under Sections-12 & 14 of the Contempt of Court against the complainant as the complainant had tried to pressurize the witness PW-8 and to pressurize the Court in deciding the issue of whether the witness PW-8 should be shown the CD or not.

[4.2] The matter was thereafter fixed on 02.08.2022 for hearing the application at Exh.68 & Exh.70, however, on 02.08.2022 the witness PW-8 filed an application at Exh.71 that he apprehends danger to his life along with the

other prosecution witnesses and therefore, an application is preferred before the Superintendent of Police, Porbandar on 26.07.2022 seeking police protection and it was also prayed before the Court that he may be given police protection for a period of one year and it was also conveyed that he desires to depose before the Court only after he is given police protection. Pursuant to such application of the witness PW-8, the Court was pleased to call upon report from the Office of the Superintendent of Police, Porbandar and the application Exh.71 was fixed for hearing. The matter was thereafter fixed on 03.08.2022 and on that day, P.S.I., Kamlabag Police Station submitted a report indicating that arrangement for bringing the witness PW-8 to the Court and taking him back has already been made and process for continuous protection of the witness is under consideration.

- [4.3] Thereafter, the matter was fixed on 08.08.2022 and on that day, the Superintendent of Police, Porbandar was directed to remain present along with necessary threat analysis report in terms of the Witness Protection Scheme, 2018. The Deputy Superintendent of Police, Porbandar submitted a report at Exh.75 on 08.08.2022 stating that as an interim measure, arrangement for protection of PW-8 has been made by the Police Agency. Thereafter, on 10.08.2022 it was stated by the Superintendent of Police, Porbandar that the PW-8 qualifies as A-Category witness under the Witness Protection Scheme, 2018 and till the pendency of trial, one armed personnel would be allotted to the said witness for his protection and the PCR Van shall conduct

patrolling for his office place, residential and business and that the concerned station house officer and other police officials shall co-ordinate with the said witness.

[4.4] Thereafter, the matter was fixed on 18.08.2022, however, the learned Public Prosecutor filed an application at Exh.78 declaring that the PW-8 is present before the Court and he wants some clarification about police protection and is not ready to depose today (18.08.2022) and since the accused is under trial prisoner, with a view to avoid delay in trial proceedings the prosecution may be permitted to examine other witnesses. Accordingly, the permission to examine other witnesses was granted and the matter was fixed on 01.09.2022 whereby witness summon was issued. It is evident from the record that the PW-9 was examined on 15.09.2022 and thereafter, the prosecution proceeded further with examining the other witnesses and in all 45 witnesses have been examined by the prosecution.

[4.5] It is also evident from the record that an application Exh.233 was moved by the defence with a contention that prior to examining the Investigating Officer, it is necessary to examine and complete deposition of PW-8 since the PW-8 is an important witness and that if the Investigating Officers are examined before the PW-8 is recalled for completing his deposition, it would cause prejudice to the defence and the contradiction and omission that may be found in the deposition of PW-8 would not be proved through the Investigating Officer. The said application was preferred on 02.12.2023. While the Investigating Officer

Mr. M. D. Chaudhari (Police Inspector) was present for deposition. The Court was pleased to reject the said application on the ground that the main Investigating Officer Mr. J. B. Karmur who filed the charge-sheet is yet to be examined and that the application Exh.233 is filed with a view to delay the trial proceedings as no prejudice to the defence by examining Mr. M. D. Chaudhari as witness of prosecution. It is evident that the deposition of PW-44 Mr. M. D. Chaudhari was concluded on 18.11.2024 and thereafter, Mr. J. B. Karmur who had filed the charge-sheet was examined as PW-45 on 10.09.2022.

[4.6] Thereafter, learned Public Prosecutor filed evidence closure memo at Exh.306 on 02.12.2024 and the matter was taken up for recording further statement of the accused. However, the further statement of the accused was recorded after lapse of more than one year on 17.02.2026 and the matter was taken up for final arguments. Thereafter, the applications Exh.327 & Exh.329 were preferred by the learned Public Prosecutor seeking to open the right of prosecution to furnish evidence and recall PW-8.

[4.7] Having regard to the submissions of learned Public Prosecutor as well as the contention of defence in the application Exh.233, it is evident that the PW-8 is an important witness and the statement of PW-8 produced at Exh.65 is indicative of PW-8 having witnessed the incident.

[5] The applications Exh.327 & Exh.329 are opposed by the defence broadly on two grounds: (1) that it is an attempt to fill up the lacuna in the prosecution case and (2) that it would result in delay of trial proceedings.

[5.1] With regards to the contention that these applications are an attempt to fill up the lacuna in the prosecution case, it must be noted that the prosecution is not attempting to introduce some new evidence or material about which the accused were not aware; rather though the witness PW-8 in his initial statements of the examination-in-chief recorded so far does not support the case of prosecution, the prosecution seeks to examine him as witness and having regard to the events that unfolded after the matter was deferred for deciding the objection taken by the defence with regards to the recordings of CCTV footage, it appears that the witness apprehended harm and sought protection. It also needs to be appreciated that the belated prayer for recalling the witness PW-8 by the prosecution appears to be on account of an oversight in the management of the prosecution case and it can not be termed as irreparable lacuna.

[5.2] Moreover, having regard to the fact that the prayer for recalling PW-8 appears to be on account of bonafide oversight, it would not be appropriate to preclude the prosecution from correcting the error and rather it would be in the interest of justice to permit the prosecution to examine PW-8. In this regard, it would be apt to refer the decision of Hon'ble Supreme Court in the case titled

Rajendra Prasad Versus Narcotic Cell Through Its Officer reported in AIR 1999 Supreme Court 2292, wherein it was held as under.

“Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting, errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.”

[5.3] It further needs to be appreciated that the object of Section-311 of the Cr.P.C. is to enable the Court to determine the truth and to render just decision after disclosing of relevant facts and obtain proper proof and to arrive to just decision of the case. Hence, since this Court is of the view that permission to prosecution to recall PW-8 would not amount to filling up the lacuna in the prosecution case, it would not be proper to curtail the right of prosecution by denying to recall PW-8 who is undisputedly an important witness to the case.

[5.4] On the aspect of delay in trial, it is unfortunate that after completion of examination of prosecution witness, the recording of further statement of the case consumed a considerable time. It is also true that the accused No.2 is under trial prisoner. However, perusal of the record would indicate that the delay in trial cannot be solely attributed to the prosecution. It has to be noted that the matter was sent

up for trial and registered as Sessions Case on 09.07.2021 during COVID times and the accused No.2 who is under trial prisoner was produced through video conferencing and thereafter, the charge was framed on 01.11.2021 and thereafter, total 45 witnesses are examined. It is also evident from the Rojnama that the accused No.2 was granted short term bail by the Hon'ble High Court, however, the accused No.2 breached the bail condition and went absconding and thereafter, non-bailable warrant was issued against him on 15.02.2024 and thereafter, the accused was arrested in furtherance of such non-bailable warrant and produced before the Court on 06.04.2024 and thereafter, the examination of witnesses were considered.

[5.5] Having regard to the time that has lapsed since commencement of the trial and the fact that the accused No.2 is under trial prisoner, with a view to ensure that the trial proceedings is not delayed any further, the prosecution can be directed to ensure completion of the examination of PW-8 in a time bound manner and solely on the ground of likelihood of delay in trial proceedings, request of prosecution of recalling the PW-8 can not be denied.

[5.6] Having regard to the facts and circumstances of the case pertaining to the prayer made in the applications at Exh.327 & Exh.329, it would be apt to refer the decision of Hon'ble High Court of Gujarat in the case titled **Anton Sadiya Ganava Versus State of Gujarat** decided on 16.11.2022 (R/Special Criminal Application No.8940 of

2018) wherein while dealing with the issue of recall of witness by prosecution, it was observed and held as under.

"10. The concerned Court while passing the impugned order below Ex.114 dated 29.9.2018 while allowing the application considered the following. Paragraph 5 and 6 read thus :-

"(5) Perusing the averments made by both the parties in the present case, it appears that the Prosecution has produced the documentary evidence as to receiving information at Mark-10/14 since beginning and the same is in knowledge of the accused. Further, considering the deposition of witness Pravinbhai Gandabhai at Exhibit-69, he has not stated any fact about the document produced at Mark-10/14. Further, in his deposition at Exhibit-69, he has not stated the important fact that he was present during the raid, as stated by him in his statement before the Investigating Officer. Under these circumstances, it is necessary for a true and just decision in the present case that the procedure done by this witness is brought on record. Further, Ld. A.P.P. for the Prosecution has produced the judgment of the Hon'ble Supreme Court, (2014 (13) SCC 59) Mannan S.K. and Ors. Vs. The State of Bengal (Hon'ble Supreme Court) Criminal Appeal No. 1307/ 2014. As per the principle, i.e. "Justice must not be allowed to suffer because of the oversight of the prosecution", established vide the judgment, the principle is completely applicable to the present case. In the present case too, the Prosecution has committed an omission and not brought on records the important facts during the deposition of Prosecution Witness Pravinsinh Gandabhai at Exhibit-69. Under these circumstances, with a view to bring the truth on record and appropriate decision in the present case, recalling of this witness is necessary. Considering these facts, the above stated judicial principle is absolutely helpful to the Prosecution.

(6) Under these circumstances, as per the principle of the stated judgment and the premises of the present case, the application for recalling witness, produced at Exhibit-114, cannot be rejected only because it was an omission of Prosecution that certain facts could not be brought on record. For bringing the true facts on records and deciding the case in appropriate and just manner, granting the application at Exhibit-114 appears to be just, reasonable and necessary. Further, when the witness is recalled and whatever further evidence he produces, the defense can cross examine him thereabout. The defense has complete right to cross examine the witness and defend the accused. Further, the defense has produced following judgments in the present case.

(1) Judgment of Hon'ble Supreme Court in SLP Criminal No.

2400 of 2011, dated 04/07/2013 in a case of *Rajaram Prasad Yadav Vs. State of Gujarat*.

- (2) Oral Judgment delivered by Hon'ble Gujarat High Court, in Sp. Criminal Appl. no. 643/2013, dated 11-11-2016, in a case of *Menashi Rajabhai Kathad Vs. State of Gujarat*. (3) Judgment delivered by Hon'ble Madhya Pradesh High Court, in Misc. Criminal Case no. 11021/2016 in a case of *Kamlesh Diwakar Vs. State of M.P.* (4) Judgment of Hon'ble Supreme Court in Criminal Appeal Nos. 805 - 806 of 2016 in (@ SLP (Cri.) Nos. 3278 - 3279 of 2016) , in a case of *State of Haryana Vs. Ram Mehar & Ors. etc.* Perusing these judgments, the facts and premises of their cases are different that the present case. Considering the same, the judgments cited by the defense are not helpful to the accused and the averment in this regard is not admissible. Under these circumstances and considering the above noted facts and premises of the present case, the application at Exhibit-114 seems to be admissible. Therefore, the following order is passed.

ORDER

The application at Exhibit-114 given by the Ld. Addl. A.P.P. for the prosecution is granted. The order is issued that the Prosecution evidence be opened and the witness Pravinsinh Gandabhai be recalled.

Pronounced today on Day 01 of Month of October of Year 2018 in open court."

10.1 The concerned Court while allowing the impugned order below Ex.114 dated 29.9.2018 considered the following :-

- (1) Citation relied upon by the applicant (2014) 13 SCC 59 *Mannan S.K. and others vs State of Bengal* : The principle i.e. "Justice must not be allowed to suffer because of the oversight of the prosecution" is completely applicable to the present case.
- (2) Documentary evidence as to receiving information at mark 10/14 is on record since beginning and the same is in knowledge of the accused.
- (3) The deposition of witness Pravinbhai Gandabhai at exhibit 69, wherein he has not stated any fact about the document produced at mark 10/14. He has not stated the important fact that he was present during the raid as stated by R/SCR.A/8940/2018 JUDGMENT DATED: 16/11/2022 him in his statement before the investigating officer.
- (4) Procedure undertaken by the witness in question is produced on record.
- (5) The prosecution has committed an omission and not brought on records the important facts during the deposition of prosecution witness Pravinsinh Gandabhai at exhibit 69 and, therefore, recalling of witness is necessary.
- (6) The application for recalling witness cannot be rejected only because of an omission of certain facts by the

prosecution and the same could not be brought on record.

(7) Granting the application at exhibit 114 appears to be just, reasonable and necessary.

(8) When the witness is recalled and whatever further evidence he produces, the defense can cross-examine the witness.

(9) The defense has right to cross examine the witness and defend the accused.

(10) The judgements cited by the defense are not helpful to the accused and the averment in this regard is not admissible.

11. Considering the facts of the present case, it is undisputed that the prosecution had examined P.W. No.10 below Ex.69 and evidence of other witnesses.

12. The documentary evidence as to Mark 10/14 was known to the accused right from the beginning and was in the knowledge of the accused. In the deposition of witness - Pravinbhai Gandabhai at Ex.69, the deponent did not state any fact with regard to the documents produced at Mark 10/14. The said document in view of the prosecution and the concerned Court is an important document and germane for adjudication which has not been brought on record. In such circumstances, it was important according to the prosecution to bring the fact omitted by the prosecution to be brought on record. In view of above, the concerned Court thought it fit to allow the application below Ex.114 for recalling of the witness".

[10] In the case at hand also the defense was well aware about the case of prosecution and the PW8 has been cited as witness in the charge-sheet and his statement in terms of section 164 was also recorded and therefore, permitting the prosecution to complete the deposition of PW8 would not in any manner amount to filling up the lacuna of prosecution case. Also the settled legal principle that "Justice must not be allowed to suffer because of the oversight of the prosecution" is squarely applicable to the present case. Hence, in light of the above, following order is passed.

-// ORDER \\\-

- (a) The present applications Exh.327 & Exh.329 are allowed with a condition to complete recording of deposition of PW8 in time bound manner.
- (b) The stage of prosecution to furnish evidence is re-opened solely for completing the deposition of PW8 and the Prosecution shall ensure that the witness PW-8 appears before the Court on the next date and the S.H.O. of the concerned Police Station shall ensure necessary police protection to the witness, if required.
- (c) The exercise of completing the deposition of PW-8 to be completed within 15 days and thereafter, it would be open for the either side desires to re-call the Investigating Officer who recorded the statement of PW-8 would be recalled, if found necessary, within further 15 days.

Signed and pronounced in the open Court today
on this **13th DAY OF APRIL, 2026 at PORBANDAR.**

Date:- 13.04.2026

Place:- Porbandar

(**M. A. BHATTI**)

Principal District & Sessions Judge,

P O R B A N D A R

Code No. **GJ01506**