IN THE SUPREME COURT OF BANGLADESH

HIGH COURT DIVISION

(CRIMINAL REVISIONAL JURISDICTION)

Criminal Revision No.787 of 2016

IN THE MATTER OF:

An application under 10(1A) the Criminal Law Amendment Act,1958.

IN THE MATTER OF:

Begum Khaleda Zia

---------- Petitioner

-Versus-

The State and another

---- Opposite parties

With

Criminal Revision No.788 of 2016

Begum Khaleda Zia

---------- Petitioner

-Versus-

The State and another

-------- Opposite parties

Mr. Jamiruddin Sircar, Advocate with

Mr. Khandokar Mahbub Hossain, Advocate,

Mr. A. J. Mohammad Ali, Advocate,

Mr. Md. Zainul Abedin, Advocate,

Mr. A.M. Mahbub Uddin, Advocate,

Mr. Raghib Rouf Chowdhury, Advocate,

Mr. Md. Nawshad Jamir, Advocate,

Mr. Md. Zakir Hossain Bhuiya,
Advocate

------ For the Petitioner

Mr. Mahbubey Alam, Attorney General
with

Mr. Murad Reza, Additional Attorney
General,

Mr. Sheikh A.K.M Moniruzzaman, D.A.G

Mr. Md. Shahidul Islam Khan, A.A.G
and

Mr. Mia Shirajul Islam, A.A.G

------ For the State

Mr. Md. Khurshid Alam Khan,
Advocate

---For the Anti-Corruption Commission

Present:

Mr. Justice M. Enayetur Rahim

And

Mr. Justice Amir Hossain

Heard on:04.05.2016, 05.05.2016, 08.05.2016, 10.05.2016 and Order on: 15.05.2016.

Both the Revisional applications have arisen out of same order and they have been heard together and those are disposed of by this common order.

The present accused petitioner by filing two separate applications under section 10(1A) of the Criminal Law Amendment Act,1958 vide Criminal Revision No.787 of 2016 and Criminal Revision No.788 of 2016 has challenged the order

dated 17.04.2016 passed by the learned Special Judge, Court No.03, Dhaka in Special Case No.05 of 2013 arising out of ACC G.R. Case No.84 of 2011 rejecting two applications, one was under section 172(2) and another was under section 540 of the Code of Criminal Procedure.

The present accused petitioner, along with 03(three) others, is facing trial on the charge under section 5(2) of the Prevention of Corruption Act, 1947 read with section 109 of the Penal Code, before the Court of Special Judge, Court No.03, Dhaka in Special Case No.05 of 2003.

After closing the evidence of the prosecution witnesses the learned Special Judge fixed 07.04.2016 for examination of the accused persons under section 342 of the Code of Criminal Procedure. Two of the accused persons were examined on that day under section 342 of the Code of Criminal Procedure but the examination of the present accused petitioner was adjourned on her prayer and eventually, date was fixed on 17.04.2016 for examination of the present accused petitioner under section 342 of the Code of Criminal Procedure and also fixed for argument.

On 17.04.2010 on behalf of the accused petitioner two applications were filed, one was under section 172(2) of the Code of Criminal Procedure for inspection of the case diary and another was under section 540 of the Code of Criminal Procedure for recalling PW-32, the investigating officer, for further cross-examination to ascertain the following issues:

১। ট্রাষ্ট এ্যাক্ট এর ২৩ ধারা মোতাবেক ট্রাষ্টী বোর্ড এর কোন সম্পত্তি অপব্যবহার হইলে বোর্ড অব ট্রাষ্টী দায়ী কিনা;

২। হলফকারী হিসাবে আপনি হলফ করে কি বলেছেন;

৩। অন্যান্য প্রশ্ন শুনানীর সময় বলা হবে;

৪। আপনাকে ২০০৫ সালে দুদক থেকে প্রত্যাহার করা হয়েছে? তারপর থেকে আপনি কিভাবে কার্যক্রম চালিয়ে যাচ্ছেন?

The learned Special Judge after hearing both the applications by the impugned order dated 17.04.2016 rejected the same.

Thus, these two applications.

Mr. A.J. Mohammad Ali the learned advocate has appeared with a good number of other learned Advocates for the accused petitioner.

Mr. Mohammad Ali has submitted that the learned Special Judge in rejecting the application under section 172(2) of the Code of

Criminal Procedure failed to consider that under the facts and circumstances of the instant case the provisions of section 145 and 161 of the Evidence Act would apply and the accused petitioner or her agent is entitiled to see such entries in the case diary to cross-examine the investigation officer since the investigation officer who made the case diary was allowed to refresh his memory and as such the learned Special Judge committed serious illegality in rejecting the said application.

To substantiate the above submissions Mr. Ali has referred to the cases of Queen-Empress Vs. Mannu, reported in the Indian Law Report, page-390 and Sheru Shan and others Vs. The Queen-Empress, reported in ILR, 20 Cal, page-643.

Mr. Mohammad Ali having placed a memo being no.দুদক/প্রকা/১০১/১০০৫/১৩৬২ dated 02.10.2005 has further submitted that PW-32 Harunur Rashid, the investigating officer of the case, had no authority to investigate the case as the Anti-Corruption Commission **(hereinafter referred as Commission)** decided to withdraw him from the Commission and requested to the Government to withdraw him, despite the said decision of the

Commission PW-32 has been continuing in the service of the Commission illegally.

Mr. Ali has also submitted that the High Court Division in a number of writ petitions was pleased to discharge the Rule issued earlier declaring that the impugned process of withdrawing the incompetent officer i.e. including PW-32, the investigation officer Mr. Harunur Rashid, was in accordance with law and subsequently, the Civil Petition for leave to appeal being No.905 of 2007 filed before the Appellate Division was dismissed on the ground of withdrawing the same and therefore, the investigation officer Mr. Harunur Rashid cannot continue his job violating the judgment dated 13.12.2006. The learned Special Judge ignored the vital facts that the legality of the functioning of the PW-32 as investigation officer should be determined for ends of justice which would lead to question the legality of the whole investigation process done by the alleged illegally functioned investigation officer. The learned Special Judge in rejecting the application under section 540 of the Code of Criminal Procedure for recalling and re-examining the prosecution witness No.32 failed to consider that the proposed question and suggestion intended to be put to PW-32 by

recalling him are essential to the just decision of the case and had the accused petitioner not been given such opportunity it may cause miscarriage of justice.

However, Mr. Md. Khurshid Alam Khan, the learned Advocate appearing for the opposite party-Anti-Corruption Commission has submitted that both the applications filed by the accused petitioner are misconceived. The learned Special Judge in rejecting the said applications has assigned cogent reasons as such there is no illegality and infirmity in the impugned order and the applications are liable to be rejected summarily.

Mr. Murad Reza, the learned Additional Attorney General, appearing for the State has adopted the submissions of Mr. Khan.

Heard the learned Advocates for the respective parties, perused the applications and the impugned order and the annexures to the applications.

The learned Special Judge in rejecting the application under section 172(2) of the Code of Criminal Procedure has observed that:

"মামলাটির তদন্তকারী কর্মকর্তা পিডব্লিউ-৩২ কে অভিযুক্ত আসামীদের পক্ষ হতে জেরা করার পর্যায়ে বিজ্ঞ আইনজীবীগণ কেস ডায়েরী (সিডি) এর কোন সুনির্দিষ্ট বিষয়ে উক্ত সাক্ষীর দৃষ্টি আকর্ষণ করে কিংবা তার Memory refresh করার জন্য সংশ্লিষ্ট অংশ তাকে অবলোকন করতে বলেছেন এবং বিজ্ঞ আইনজীবীগণও ঐ সংশ্লিষ্ট অংশ অবলোকন করে contradiction এর বিষয়টি নিশ্চিত করেছেন। ফলে দীর্ঘ প্রায় ১ বছর কাল যাবত এই মামলায় ৩২ জন সাক্ষীর সাক্ষ্য গ্রহণ করায় এবং ঐ সকল সাক্ষীকে আসামীদের পক্ষ হতে দীর্ঘ সময় ধরে জেরা করার পর আসামী পক্ষকে পুনঃ পুনঃ জিজ্ঞাসা করেই রাষ্ট্র/দুদক পক্ষের সাক্ষ্য গ্রহণ সমাপ্ত করা হয়েছে এবং ফৌজদারী কার্যবিধির ৩৪২ ধারার বিধান অনুসারে আসামীগণকে পরীক্ষা করা এবং মামলাটির যুক্তিতর্ক শুনানীর জন্য দিন ধার্য করা হয়েছে। ফৌজদারী কার্যবিধির ৩৪২ ধারার বিধান অনুসারে গত ০৭-০৪-২০১৬ইং তারিখে আসামীগণকে পরীক্ষা করার জন্য দিন ধার্য থাকলেও আসামী বেগম খালেদা জিয়া অসুস্থ্যতার কারণ উল্লেখে ঐ তারিখে আদালতে গড়হাজির থেকে সময়ের আবেদন করায় ন্যায় বিচারের স্বার্থে উক্ত সময়ের আবেদন মঞ্জুরক্রমে অদ্য ১৭-০৪-২০১৬ইং তারিখে তাঁকে ফৌজদারী কার্যবিধির ৩৪২ ধারার বিধান অনুসারে পরীক্ষা করার জন্য দিন ধার্য করা হয়েছে। আসামী বেগম খালেদা জিয়া অদ্য আদালতে হাজির হলেও তাঁর পক্ষে বিজ্ঞ আইনজীবীগণ যে দরখাস্তটি দাখিল করেছেন উক্তরূপ দরখাস্ত মামলার বিচারের এই পর্যায়ে দাখিল করার আইনগত কোন সুযোগ এবং কারণ না থাকায় দরখাস্তটি ন্যায় বিচারের স্বার্থে নামঞ্জুর করা হলো।"

Section 172(2) of the Code of Criminal Procedure runs as follows:

"172(2) Any Criminal Court may send for the police diaries of a case under inquiry or trial in such Court and may use such diaries, not as evidence in the case, but to aid it in such inquiry

> or trial. Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but if they are used by the police officer who made them, to refresh his memory, or if the Court uses them for the purpose of contradicting such police officer, the provisions of the Evidence Act, 1872, section 161 or section 145, as the case may be shall apply." [Underlines supplied]

On plain reading of the above provision of law, particularly, the last portion as well as and the decisions referred to by the learned Advocate for the accused petitioner it is crystal clear that the provision of section 172(2) is only applicable at the time of examination of the investigating officer to arrive at the truth in the interest of justice. The provisions of sections 145 and 161 of the Evidence Act have no manner of application after closing the evidence of the investigating officer. It has to be applied at the time of cross-examination of the investigation officer

who used the case diary to refresh his memory. As such, the application under section 172(2) of the Code of Criminal procedure filed by the accused petitioner after closing the examination of the investigating officer and at the stage of examination of the accused petitioner under section 342 of the Code of Criminal procedure is absolutely misconceived one and not tenable in the eye of law and the learned Special Judge rightly rejected the same.

It is always to be born in mind that the discreation has to be exercised judiciously not in a fanciful manner.

In rejecting the application under section 540 of the Code of Criminal Procedure for recalling the PW-32, the investigating officer, the learned Special Judge has observed as under:

> আসামী বেগম খালেদা জিয়া এঁর পক্ষে মামলাটির তদন্তকারী কর্মকর্তা পিডব্লিউ-৩২ কে রিকল করার প্রার্থনায় দাখিলকৃত দরখাস্তটি পর্যালোচনা করে দেখা যায় যে, উহাতে উল্লিখিত ১নং প্রশ্নটি আইনের উপর প্রশ্ন বিধায় ঐ প্রশ্ন পিডব্লিউ-৩২ কে করার আইনগত সুযোগ নেই। ২নং প্রশ্নে উল্লেখ করা হয়েছে যে, এই পিডব্লিউ-৩২ হলফকারী হিসেবে হলফ করে কি বলেছেন। এই ২নং প্রশ্নটি প্রকৃত পক্ষে কোন প্রশ্ন নয় এবং সাক্ষ্য আইনের বিধান অনুযায়ী কোন সাক্ষীকে এইরূপ অস্পষ্ট প্রশ্ন করার আইনগত সুযোগ নেই। ৩নং প্রশ্নে উল্লেখ করা হয়েছে যে, অন্যান্য প্রশ্ন শুনানীর সময় বলা হবে। কোন সাক্ষীকে রিকল করে জেরা করতে হলে তাকে কি প্রশ্ন করা হবে

তার সুস্পষ্ট বর্ণনা থাকতে হবে কিংবা কি বিষয়ের উপর প্রশ্ন করা হবে সেই বিষয়টি সুস্পষ্ট হতে হবে। ৩নং প্রশ্নে কোন প্রশ্ন কিংবা বিষয়ের উল্লেখ না করে বলা হয়েছে যে, অন্যান্য প্রশ্ন শুনানীর সময় বলা হবে। ফলে এই ৩নং প্রশ্নটিও আইনগতভাবে গ্রহণযোগ্য নয়। ৪নং প্রশ্ন সম্পর্কে ইতোমধ্যেই আলোচনা হয়েছে এবং দালিলিক প্রমাণের ভিত্তিতেই প্রতীয়মান হয় যে, জনাব হারুনুর রশীদ, দুর্নীতি দমন কমিশন, প্রধান কার্যালয়, ঢাকা এর সহকারী পরিচালক পদে কর্মরত থাকা অবস্থায় তিনিসহ মোট ৪৮ জন কর্মকর্তাকে দুর্নীতি দমন কমিশনে দাখিলকৃত অভিযোগের অনুসন্ধান এবং রুজুকৃত মামলাসমূহের তদন্তের ক্ষমতা অর্পন করে স্মারক নং-দুদক/৩১-২০০৬/মা.স/৭৪৭১, তারিখ-১০/০৫/২০০৯ইং মূলে প্রজ্ঞাপন জারী করা হয়েছে যা গেজেটে প্রকাশ করা হয়েছে। এছাড়াও জনাব হারুনুর রশীদ, সহকারী পরিচালক, দুর্নীতি দমন কমিশন, প্রধান কার্যালয়, ঢাকাকে এই মামলার এজাহার দায়ের করার অনুমোদন প্রদানপূর্বক প্রদত্ত দুর্নীতি দমন কমিশন, প্রধান কার্যালয়, ঢাকা এর স্মারক নং-দুদক/অনুঃ ও তদন্ত-৩/৭৪/২০০৯/১৬৩০০, তারিখ-০৮/০৮/২০০১ইং প্রদর্শনী-১ হিসেবে, তাকে তদন্তকারী কর্মকর্তা নিয়োগ সংক্রান্ত দুর্নীতি দমন কমিশন, প্রধান কার্যালয়, ঢাকা এর স্মারক নং-দুদক/বিঃ অনুঃ ও তদন্ত-১/সি-১১০/২০১১/২২৪৭, তারিখ-০৩/১১/২০১১ইং প্রদর্শনী-২৩ হিসেবে এবং তার মামলাটিতে অভিযোগপত্র দাখিলের অনুমোদন (Sanction)জ্ঞাপন সংক্রান্তে দুর্নীতি দমন কমিশন, প্রধান কার্যালয়, ঢাকা এর স্মারক নং-দুদক/বিঃ অনুঃ ও তদন্ত-১/সি-১১০/২০১১/১৫৩৬, তারিখ-১৬/০১/২০১২ইং প্রদর্শনী-২৫ হিসাবে ইতোমধ্যেই প্রমাণিত চিহ্নিত হয়েছে।

উপর্যুক্ত অবস্থায় এবং মামলাটির বিচারের বর্তমান পর্যায় বিবেচনাক্রমে মামলাটির তদন্তকারী কর্মকর্তা পিডব্লিউ-৩২ কে আসামী বেগম খালেদা জিয়া এঁর পক্ষ হতে রিকল করার প্রার্থনায় দাখিলকৃত দরখাস্তটি আইনসম্মত ও বিধিসম্মত না হওয়ায় উক্ত দরখাস্ত ন্যায় বিচারের স্বার্থে নামঞ্জুর করা হলো।”

[Underlines supplied]

Mr. Mohammad Ali has submitted that section 540 of the Code of Criminal Procedure has given widest power to a Court to recall and re-examine a witness for just cause in order to ensure fair trial but the learned Special Judge in an arbitrary manner without understanding the scope of the said provision of law rejected the application under section 540 of the Code of Criminal Procedure on the plea of the present stage of the case.

Mr. Ali has also referred to the cases of Hemayetuddin alias Auronga Vs. State, reported in 46 DLR (AD), page-186 and Kazi Ali Zahir alias Elin and others Vs. The State, reported in 9 MLR, 2004, page-187 in support of his submissions.

We have no disagreement with the submission of the learned Advocate for the accused petitioner as to the purport and scope of section 540 of the Code of Criminal Procedure that the section is expressed in the widest possible term and it cannot be said that the intention of the section is to limit its application and at any stage of the trial, even, before pronouncement of the judgment a witness

may be recalled and re-examined for the just cause.

But, we must also bear in mind the well settled proposition that fairness of trial has to be seen not only from the point of view of the accused, but also from point of the prosecution also. In the name of fair trial, the system cannot be held to ransom. Mere submission that recall was necessary "for ensuring fair trial" is not enough unless there are tangible reasons to show how the fair trial suffered without recall. Recall is not a matter of course and the discretion given to the court has to be exercised judiciously to prevent failure of justice and not arbitrarily.

Mr. Ali has tried to convince us that the PW-32, the investigating officer, has no legal right to continue in the service of the Anti-Corruption Commission in view of the decision dated 02.10.2005 of the Commission and he is an unauthorized person and intruder in the Commission, as such the investigation done by him has vitiated the whole investigation as well as the trial. To determine the said fact it is necessary to recall and re-examine the PW-32 and

it is the just cause in view of the above facts and circumstances.

It appears from the evidence of PW-32, the investigating officer Harunur Rashid (the certified copy of the same has supplied by both the parties), that at time of the deposition PW-32 the investigating officer categorically has testified that the Anti-Corruption Commission vide its office memo no. দুদুক/বিঃ অনুঃ ও তদন্ত-১/সি-১১০/২০১১/১৭১৭৪, তারিখ-০৩/১১/২০১১ইং appointed him as the investigating officer of the case and he took up the investigation of the case, exhibit-23 and exhibit-26.

It also appears from the First Information Report and charge sheet, annexures A and B respectively, that PW-32 lodged the FIR and submitted charge sheet as the Assistant Director of the Anti-Corruption Commission and he having entrusted with the investigation of the case by the Commission had investigated the case and submitted charge sheet in the case obtaining sanction from the Commission, exhibit-25. The learned Special Judge in the impugned order has also categorically discussed about the said facts.

Further, Mr. Kurshid Alam Khan, the learned Advocate for the Anti-Corruption Commission has informed us that the present accused petitioner earlier vide Criminal Miscellaneous case No.7681 of 2016 challenged the Gazette notification appointing PW-32 as the investigating officer of the case before a Division Bench this Court, but the said application was ultimately rejected as being not pressed.

It is pertinent to mention here that the Anti-Corruption Commission is an independent body created under a statue and the said Commission having taken decision by a Gazette notification appointed PW-32 Harunur Rashid, an officer of the Commission mentioning his position as Assistant Director, for investigation of the present case.

In view of the above facts and circumstances, we are of the view that at this stage of the case there is no scope to raise any question about the competency of the PW-32 as the investigating officer in any manner in the present proceeding of the case.

Moreover, the **de-facto doctrine** will be applicable, if any irregularity is found with regard to the appointment, absorption or

continuation of the PW-32 in the office of the Anti-Corruption Commission.

The **de facto doctrine** is by now has received judicial recognition in this sub-continent like in the United States of America and English jurisdiction also.

The **de facto doctrine** is now well established that the acts of the Officers de facto performed by them within the scope of their assumed official authority, in the interest of the public or third persons and not for their own benefit, are generally as valid and binding, as if they were the acts of officers de jure.

An officer, de facto is one who is not a mere intruder or usurper but one who holds office, under the colour of lawful authority, though his appointment is defective and may later be found to be defective.

In **State v. Gardner** (Cases on Constitutional Law by Mc, Gonvey and Howard Third Edition 102) **Bradbury. J.** observed:

> "We thing that principle of public policy, declared by the English Courts three centuries ago, which gave

> validity to the official acts of persons who intruded themselves into an office to which as they had not been legally appointed, is as applicable to the conditions now presented as they were to the conditions that they confronted the English Judiciary. We are not required to find a name by which officers are to be known, who have acted under a statute that has subsequently been declared unconstitutional, though we think such officers might aptly be called de facto officers."

In Norton v. Shelby County, (1886) 118 US 425:30 L ed 178 Field, J., observed as follows:

> "The doctrine which gives validity to acts of officers de facto whatever defects there may be in the legality of their appointment or election is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the benefit of the public, and private parties are not

> permitted to inquire into the title of persons clothed with the evidence of such offices and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined. It is manifest that endless confusion would result, if in every proceeding before such officers their title could be called in question." [Underlines supplied]

In **Cooley's 'Constitutional Limitations'**, Eighth Edition, Volume II p. 1355, it is said:

> "An officer **de facto** is one who by some colour or right is in possession of an office and for the time being performs its duties with public acquiescence, though having no right in fact. His colour of right may come from an election or appointment made by some officer or body having colourable but no actual right to make it; or made in such disregard of legal requirements as to be ineffectual in law; or made to fill the place of an officer illegally

removed or made in favour of a party not having the legal qualifications; or it may come from public acquiescence in the qualifications; or it may come from public acquiescence in the officer holding without performing the precedent conditions, or holding over under claim of right after his legal right has been terminated; or possibly from public acquiescence alone when accompanied by such circumstances of official reputation as are calculated to induce people, without inquiry, to submit to or invoke official action on the supposition that person claiming the office is what he assumes to be. An intruder is one who attempts to perform the duties of an office without authority of law, and without the support of public acquiescence.

No one is under obligation to recognize or respect the acts of an intruder, and for all legal purposes they are absolutely void. But for the sake of order and regularity, and to prevent confusion in the conduct of public business and in security of private rights, the acts of officers de facto

> are not suffered to be questioned because of the want of legal authority except by some direct proceeding instituted for the purpose by the State or by someone claiming the office de jure, or except when the person himself attempts to build up some right, or claim some privilege or emolument, by reason of being the officer which he claims to be. In all other cases the acts of an officer de facto are as valid and effectual, while he is suffered to retain the office as though he were an officer by right, and the same legal consequences will flow from them for the protection of the public and of third parties. There is an important principle, which finds concise expression in the legal maxim that the acts of officers de facto cannot be questioned collaterally."
> [Underlines supplied]

In **Pulin Behari v. King Emperor, (1912-15 Cal LJ 517) Sir Asutosh Mukerjee, J.** after tracing the history of the doctrine in England observed as follows:

> "The substance of the matter is that the de facto doctrine was introduced

> into the law as a matter of policy and necessity, to protect the interest of the public and the individual where these interests were involved in the official acts of persons exercising the duties of an office without being lawful officers. The doctrine in fact is necessary to maintain the supremacy of the law and to preserve peace and order in the community at large. Indeed, if any individual or body of individuals were permitted, at his or their pleasure, to collaterally challenge the authority of and to refuse obedience to the Government of the State and the exercised its various powers on the ground of irregular existence or defective title, insubordination and disorder of the worst kind would be encouraged. <u>For the good order and peace of society, their authority must be upheld until in some regular mode their title is directly investigated and determined.</u>"
>
> [Underlines supplied]

In **P. S. Menon v. State of Kerala (AIR 1970 Ker 165 at p. 170) a Full Bench of the Kerala High Court** said about the de facto doctrine:

> "This doctrine was engrafted as a matter of policy and necessity to protect the interest of the public and individuals involved in the official acts of persons exercising the duty of an officer without actually being one in strict point of law. But although these officers are not officers de jure they are by virtue of the particular circumstances, officers, in fact, whose act, public policy requires should be considered valid." [Underlines supplied]
>
> **[Source of above citations: Gokaroju Rangaraju Vs. Sate A.P, reported in AIR 1981 (SC), page-1473]**

Further, in exercising the power under section 540 of the Code of Criminal Procedure the following principles has to be borne in mind:

I. The wide discretionary power should be exercised judiciously and not arbitrarily.

II. The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him

for further examination in order to arrive at a just decision of the case.

III. The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

IV. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

V. The power under Section 540 of the Code of Criminal Procedure must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection.

If we considered the submissions of the learned Advocate for the accused petitioner coupled with the recognized **de-facto doctrine** and the above propositions of law, we have no hesitation to hold that there is no just cause to recall PW-32, the investigating officer for ascerting his present status in the Anti-

Corruption Commission and there is no basis for holding that any prejudice will be caused to the accused petitioner unless the said witness is recalled.

Having discussed and considered as above, we find no merit in both the applications.

Thus, both the applications are rejected summarily.

However, the learned Special Judge is directed to be cautious in future in making any adverse comment against any officers of the Court. And we disapprove the observation made by the learned Special Judge against the Senior Lawyers for the accused petitioner.

Communicate the order at once.

I.Sarwar/B.O