

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL WRIT PETITION NO. 88 OF 2015

Shri Jeevan Gaonkar
Son of Pundalik Gaonkar
37 years of age, Indian
National, Deulwada,
Cudicherem, Bicholim-Goa .. Petitioner

Versus

State Bicholim Police Station
Bicholim Police Station
Bicholim-Goa
Through Public Prosecutor. .. Respondent

Mr. Dharmanand Vernekar, Advocate for the petitioner.

Mr. S. R. Rivankar, Public Prosecutor for the respondent.

CORAM :- C. V. BHADANG, J.

Date : 21st July, 2015.

ORAL JUDGMENT :

Rule. Rule made returnable forthwith.

2. Shri Rivankar, the learned Public Prosecutor waives service for the respondents.

3. Heard finally, with the consent of the parties.

4. By this petition, the petitioner/ accused seeks to

challenge the order dated 10/07/2015, passed by the Judicial Magistrate, First Class, Bicholim in Criminal Case No.91/S/2013, thereby permitting the Assistant Public Prosecutor (A.P.P.) to cross-examine PW5 Gunavanti Gaonkar.

5. Brief facts are that the petitioner is facing prosecution for having assaulted the husband of PW5 Gunavanti Gaonkar. It *prima facie* appears from the police statement of PW5 Gunavanti Gaonkar that she had actually witnessed the assault by knife by the petitioner on the victim. In her Examination-in-Chief, PW5 Gunavanti Gaonkar stated that on the date and time of the incident, she heard some shouts from outside and when she came out, she saw that her husband had a bleeding injury on his stomach. In view of the discrepancy vis-a-vis the Examination-in-Chief and the police statement, the learned A.P.P. had sought permission to cross-examine the witness on the ground that the witness has resiled from her earlier statement. On behalf of the petitioner, an objection was raised that unless the witness is declared as hostile, permission to cross-examine cannot be granted. The learned Magistrate, on hearing the parties, found that the prosecutor had only sought permission to cross-examine the witness and not to declare the witness as hostile. The learned Magistrate was of the opinion that hostility of the witness has to

be decided on merits, after her entire testimony is brought on record by the prosecution. In that view of the matter, the objection raised on behalf of the petitioner was overruled and the A.P.P. was permitted to cross-examine the witness. Feeling aggrieved, the petitioner is before this Court.

6. It is submitted by the learned Counsel for the petitioner that the permission to cross-examine the witness could not have been granted without the witness being declared as hostile. It is submitted that the impugned order, which holds that the witness can be allowed to be cross-examined without the witness being declared as hostile, is not correct. It is submitted that this is not a case in which the learned A.P.P. had sought permission to put some leading questions to the witness on account of the fact that the witness had strayed from what was stated in the police statement. He submitted that under Section 154 of the Evidence Act, the witness has to be declared as hostile and then only the cross-examination by the party, who brings the witness, can be allowed.

7. It is submitted by Shri Rivankar, the learned Public Prosecutor that the record would show that in effect, when the A.P.P. had sought permission to cross-examine, it was requested to

declare the witness as hostile. The learned Public Prosecutor specifically submitted that in view of the variance between the police statement and the Examination-in-chief on material aspect, (about the witness having actually seen the assault), the prosecution wants to declare the witness as hostile and in such circumstances, appropriate orders may be passed.

8. I have considered the rival circumstances and submissions made.

9. Section 154 which pertains to the question by a party to his own witness, reads thus :

“154. Question by party to his own witness.—
[(1)] The Court may, in its discretion, permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party.

[(2) Nothing in this section shall disentitle the person so permitted under sub-section (1), to rely on any part of the evidence of such witness.]”

10. Thus, there is a discretion in the Court to permit a party to cross-examine its own witness. Subsection (2) of Section 154 of the Evidence Act would show that this will not preclude

such party from placing reliance on any part of such evidence.

11. A perusal of the police statement vis-a-vis the Examination-in-chief of PW5 would reveal that the witness has deposed in variance to the police statement on the material aspect, as to having actually witnessed the incident of assault. The learned Magistrate has also found that the witness has resiled from her earlier police statement. In that view of the matter and particularly, in view of submission on behalf of the respondent that the prosecution wants the witness to be declared as hostile, in my considered view, the petition can be disposed of as under :

(i) The witness shall be treated to be declared as hostile and in such circumstances, the permission granted for cross-examination does not need any interference.

(ii) The petition is disposed of in the aforesaid terms.

(iii) Parties to act on the duly authenticated copy of the order.

C. V. BHADANG, J.

SMA