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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 687 OF 2016

Mansing @ Janu s/o Prabhu Rathod,
Age: 34 years, Occu: Agril.,
R/o Radi Tanda, Tq. Ambejogai,
Dist. Beed

..PETITIONER

VERSUS

State of Maharashtra,
Through Police Station,
Ambajogai, Dist. Beed

..RESPONDENT

Mr G. K. Thigle, Advocate to for petitioner;
Mr K. D. Munde, Addl. Public Prosecutor for respondent

CORAM : N.W. SAMBRE, J.

DATE : 24th August, 2016

ORAL ORDER :

This petition raises an issue as regards the stage at which, pursuant to the provisions of section 154 of the Evidence Act, a prosecution witness can be ordered to be cross-examined by the same side.

2. In Sessions Case No. 5 of 2015, P.W.7 Dayanand was examined and cross-examined at Exh.49 on 23rd February, 2016. It is not in dispute that Dayanand stood by the statement given to police in his examination-in-chief, however, during cross-examination, he gave certain admissions in favour of the defence. Thereafter, P.W.8 Dnyaneshwar came to be examined on 13th April 2016.

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3. On 25th April, 2016, an application (Exh.72) came to be moved by prosecution, purporting to be under section 311 of the Code of Criminal Procedure (for short "CrPC") for recalling witness P.W.7 and to make him subject to section 154 of the Evidence Act i.e. cross-examination. The said application came to be allowed by learned Additional Sessions Judge, Ambajogai by the order dated 9th May, 2016. As such, present petition.

4. Mr Thigle, learned Counsel appearing on behalf of the petitioner would submit that the approach on the part of the learned Additional Sessions Judge is contrary to the established procedure prescribed under the provisions of section 311 of the CrPC read with section 154 of the Indian Evidence Act. According to him, the application at Exh.72, at the most, could have been moved at the end of examination of witness P.W.7 Dayanand who is examined at Exh. 49. According to him, after the examination and cross-examination of the said witness, P.W.8 Dnyaneshwar was examined and it is at that moment, application at Exh.72 for cross-examination of P.W.7 Dayanand came to be moved. He would then urge that the very approach on the part of the prosecution in moving the said application is contrary to the object underlying section 311 of CrPC and section 154 of the Evidence Act, as the said P.W.7 has stood by his statement recorded under section 161 of the Code of Criminal Procedure, however, it is only in cross-examination by defence, he has given certain admissions in favour of the defence. According to him, on both these counts, i.e. no reason to invoke the provisions of section 311 and the stage at which an application to invoke the said provisions has

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been made out, hence this Court is required to exercise extra-ordinary jurisdiction. He tried to substantiate his contention by relying upon the judgment of the Apex Court in the matter of **State of Bihar Vs. Laloo Prasad Alias Laloo Prasad Yadav & anr.** reported in **(2002) 9 Supreme Court Cases 626.**

5. Learned Additional Public Prosecutor submits that this Court had an occasion to consider the issue as regards hostility of P.W.7 Dayanand while deciding Criminal Writ Petition No. 410 of 2016 on 6th April, 2016, wherein it is observed that the prosecution first should seek permission of the Court to declare the said witness hostile and only upon such permission being granted, is entitled to cross-examine him. According to him, the plea as is sought to be raised is already covered by the said order and it is not open for the petitioner to canvass or re-open pandora's box. He would then submit that it is only after the order of this Court passed on 6th April, 2016, application Exh. 72 came to be moved seeking relief under section 311 of CrPC on 25th April, 2016. He would urge that the stage at which the application was moved, was just and proper. As such, according to him, petition is liable to be rejected.

6. At the outset, it is required to be noted that the issue before this Court in Criminal Writ Petition 410 of 2016 was, whether the prosecution could have called its witness for cross-examination under section 311 of the CrPC without declaring him as hostile. Since a procedural lapse was noticed, this Court by order dated 6th April, 2016 had given liberty to the

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prosecution to apply for the status of said witness as hostile. The issue as regards subjecting him to cross-examination by prosecution would be available thereafter. It is required to be noted that the issue as regards entitlement of the prosecution to cross-examine the said witness was not gone into, but what was observed was first to declare the said witness as hostile.

7. It is to be noted that after the order dated 6th April, 2016, another witness, namely, P.W.8 Dnyaneshwar was examined in-chief and cross-examined on 13th April, 2016 and 25th April, 2016. It is on 25th April, 2016, perhaps after cross-examination of P.W.8 Dnyaneshwar was over, the application under section 311 of the CrPC came to be moved by the prosecution. Whether the said stage was a proper stage for moving such an application is an issue to be addressed by this Court.

8. Section 311 of the CrPC provides power to summon witness, or examine person present. It gives power to the Court, at any stage of any enquiry, trial or other proceeding under the Code to summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined and also Court can summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The power to recall witness who is already examined vests in the Court and could be exercised, provided a case for recall of witness is made out. Whether such recall, for the purpose of declaring a witness

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hostile, could be exercised at any stage of the trial, particularly after the cross-examination of such witness was over and the other witnesses were already examined subsequent to the evidence of such witness, is required to be looked into.

9. The Apex Court, while dealing with the similar issue, in the matter of State of Bihar Vs. Laloo Prasad (supra) has observed in categorical terms in paragraphs 6 and 7 as under :

“6. Nonetheless, a discretion has been vested with the court whether to grant the permission or not. Normally, when the public prosecutor request for permission to put cross-questions to a witness called by him, the court used to grant it. Here, if the public prosecutor had sought permission at the end of the chief examination itself, the trial court would have no good reason for declining the permission sought for. But the public prosecutor did not do so at that stage. That is precisely the reason why the trial judge declined to exercise his discretion when the permission was sought for after the cross-examination was over. The witness has said only the details in cross-examination regarding the matter which he said in the chief examination itself. It would have been a different position if the witness stuck to his version, he was expected to say by the party who called the witness, in the examination in chief, but he showed propensity to favour the adverse party only in cross-examination. In such case, the party who called him has a legitimate right to put cross-question to the witness. But if he resiled from his expected stand even in chief examination, the permission to put cross-questions should have been sought then.

7. In the above situation, we are unable to hold that the trial judge has gone wholly wrong in declining to exercise the discretion envisaged under [Section 154](#) of the Evidence Act in favour of the appellant. Be that as it may, if the public prosecutor is not prepared to own the testimony of the witness examined by him, he can give expression of it in different forms. One of such forms is the one envisaged in [Section 154](#) of the Evidence Act. The very fact that he sought permission of the court soon after the end of the cross examination, was enough to indicate his resolve, not to own all what the witness said in his evidence. It is again open to the public prosecutor to tell the court during final consideration that he is not inclined to own the evidence of any particular witness inspite of the fact the said witness was examined on his side. When such options are available to a public prosecutor, it is not a useful exercise for this Court to consider whether the witness shall again be called back for the purpose of putting cross-questions to him.”

10. In paragraph 6 of the aforesaid judgment, the Apex Court has noted in the factual matrix of the said case that the Trial Court had declined to permit recalling of the witness for cross-examination under section 154 of the Evidence Act, whereas in the case in hand, it is the Trial Judge, who has permitted the recalling of such witness under section 311 of the CrPC for cross-examination by the prosecution. It is not in dispute that such recalling is sought after it is noted that said witness has stood by the case of the prosecution in examination-in-chief, but had given certain admissions favourable to the defence, during his cross-examination.

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11. It is to be noted that the stage at which such initiative was taken by the prosecution is required to be looked into. It is after the evidence of P.W.7 Dayanand in examination-in-chief as well as in cross-examination was over, P.W.8 Dnyaneshwar came to be examined and cross-examined and after that the application for cross-examination of P.W.7 Dayanand came to be moved by the prosecution. Once the evidence of P.W.7 Dayanand was over and thereafter recording of evidence of another witness was also over, in my opinion, such a stage would not be a proper stage, having regard to intent of the scheme under section 311 of the CrPC, in the background of section 154 of the Evidence Act, to recall a witness as the testimony of said witness is already over and the trial has proceeded further by recording evidence of subsequent witness.

12. However, the prosecution is not left remedy-less in such an eventuality. Paragraph 7 of the judgment of the Apex Court (cited supra) takes care of such an eventuality which provides that if the learned Public Prosecutor was not prepared to own the testimony of the witness, who was examined by him, it is always open for the Public Prosecutor to disown such witness or can give expression of it in different forms.

13. In the above background, in my opinion, the order impugned is not sustainable. I, therefore, pass following order :

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The order dated 9th May, 2016, passed by learned Additional Sessions Judge, Ambajogai, below Exh. 72 in Sessions Case No. 5 of 2015, is hereby quashed and set aside and application Exh. 72 stands rejected.

Criminal Writ Petition stands allowed in above terms.

(N.W. SAMBRE, J.)

amj