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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPLICATION NO.349 OF 2016

Jayant Rangnath Kulkarni	...Applicant
Versus	
Shirish Damodar Aranake and Anr.	...Respondents

Mr.K.U.Nikam, for the Applicant
Mr.Siddhesh Pilankar i/b Mr.Uday Warunjikar, for the Respondent No.1.
Ms. Veera Shinde, A.P.P for the Respondent-State

CORAM : REVATI MOHITE DERE, J.

DATE : 16th APRIL, 2016

P.C. :

1. By this application, the applicant has impugned the order dated 30th January, 2016, passed by the learned Judicial Magistrate First Class, Satara, below Exhibit – 284 in Summary Criminal Case No.686 of 2008, by which his application seeking re-examination/cross-examination of Defence Witness No.3 came to be rejected.

2. The respondent no.1 is the original complainant, who has filed a complaint under Section 138 of the Negotiable Instruments Act, as against the applicant herein, pursuant to which process came to be issued

against the applicant. Thereafter, proceedings commenced; respondent no.1 led evidence in support of his case; and the applicant was examined under Section 313 of the Code of Criminal Procedure. The applicant thereafter, proceeded to examine his witnesses as defence witnesses. The applicant examined Mr.S.N.Khanwalkar, Advocate and Notary as Defence Witness No.3. After a detailed examination-in-chief of the said DW.3 – S.N.Khanwalkar, the respondent no.1 proceeded to cross-examine the said witness. As DW.3 in the midst of his cross-examination changed his deposition and took a 'U' turn, the applicant immediately preferred an application, below Exhibit – 284 before the learned Judicial Magistrate First Class, Satara, praying therein, for permission to re-examine/cross-examine the said DW.3, as he had partly turned hostile. The said application was opposed by the respondent no.1. After hearing the parties, the said application being Exhibit – 284 came to be rejected. The said order is impugned in this application.

3. Learned Counsel for the applicant submitted that the learned Judge ought to have perused the examination-in-chief and cross-examination of DW.3 and as such ought to have permitted the applicant to

re-examine/cross-examine DW.3. He further submitted that the learned Judge had misinterpreted the Judgment of this Court in the case of **Suresh s/o Vithal Ballal v/s State of Maharashtra**¹. He submitted that Section 154 of the Evidence Act does not discriminate between prosecution witness and defence witness and as such grants discretion to the Court, to allow either party to the proceedings to cross-examine/re-examine its own witness, more particularly, when his witness turns hostile. He submitted that DW.3 had taken a complete 'U' turn in his cross-examination with regard to the execution of the document. He submitted that in the interest of justice, the applicant be given an opportunity to re-examine/cross-examine DW.3. He relied on the Judgment of the Delhi High Court in the case of **Shiv Kumar Yadav v/s State, decided on 4th March, 2015**.

4. Learned Counsel for the respondent no.1 opposed the application. He submitted that there is no infirmity in the impugned order. He relied on the Judgment of the Apex Court in the case of **Rabindra Kumar Dey v/s State of Orissa**,² in particular paragraphs 10, 11 and 16 of the said Judgment.

1 2004 ALL MR (Cri) 664

2 1976 SCC (Cri) 566

5. Perused the papers and the impugned order. In his examination-in-chief, DW.3 has categorically mentioned that the accused was reluctant to sign the document, whereas, in his cross-examination he has taken a complete 'U' turn. The learned Magistrate/Judge has rejected the said application on the ground that there was nothing to show that the said witness had become hostile. In ***Rabindra Kumar Dey (Supra)***, the Judgment relied upon by the learned counsel for the respondent no.1, the Apex Court in paras 10 and 11 has observed thus :-

“10. Before proceeding further we might like to state the law on the subject at this stage. Section 154 of the Evidence Act is the only provision under which a party calling its own witnesses may claim permission of the court to cross-examine them. The section runs thus:

“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.”

The section confers a judicial discretion on the court to permit cross-examination and does not contain any conditions or principles which may govern the exercise of such discretion. It is, however, well-settled that the discretion must be judiciously and properly exercised in the interests of justice. The law on the subject is well-settled that a party will not normally be allowed to cross-examine its own witness and declare the same hostile,

unless the court is satisfied that the statement of the witness exhibits an element of hostility or that he has resiled from a material statement which he made before an earlier authority or where the court is satisfied that the witness is not speaking the truth and it may be necessary to cross-examine him to get out the truth. One of the glaring instances, in which this Court sustained the order of the court in allowing cross-examination was where the witness resiles from a very material statement regarding the manner in which the accused committed the offence. In *Dahyabhai Chhaganbhai Thakker v. State of Gujarat* this Court made the following observations:

Section 154 does not in terms, or by necessary implication confine the exercise of the power by the court before the examination-in-chief is concluded or to any particular stage of the examination of the witness. It is wide in scope and the discretion is entirely left to the court to exercise the power when the circumstances demand. To confine this power to the stage of examination-in-chief is to make it ineffective in practice. A clever witness in his examination-in-chief faithfully conforms to what he stated earlier to the police or in the committing Court, but in the cross-examination introduces statements in a subtle way contradicting in effect what he stated in the examination-in-chief. If his design is obvious, we do not see why the court cannot, during the course of his cross-examination, permit the person calling him as a witness to put questions to him which might be put in cross-examination by the adverse party.

Broadly stated, the position in the present case is that the witnesses in their statements before the police attributed a clear intention to the accused to commit murder, but before the court they stated that the

accused was insane and, therefore, he committed the murder.”

A perusal of the above observations will clearly indicate that the permission to cross-examine was upheld by this Court because the witnesses had categorically stated before the police that the accused had committed the murder but resiled from that statement and made out a new case in evidence before the court that the accused was insane. Thus it is clear that before a witness can be declared hostile and the party examining the witness is allowed to cross-examine him, there must be some material to show that the witness is not speaking the truth or has exhibited an element of hostility to the party for whom he is deposing. Merely because a witness in an unguarded moment speaks the truth which may not suit the prosecution or which may be favourable to the accused, the discretion to allow the party concerned to cross-examine its own witnesses cannot be allowed. In other words a witness should be regarded as adverse and liable to be cross-examined by the party calling him only when the court is satisfied that the witness bears hostile animus against the party for whom he is deposing or that he does not appear to be willing to tell the truth. In order to ascertain the intention of the witness or his conduct, the Judge concerned may look into the statements made by the witness before the Investigating Officer or the previous authorities to find out as to whether or not there is any indication of the witness making a statement inconsistent on a most material point with the one which he gave before the previous authorities. The court must,

however, distinguish between a statement made by the witness by way of an unfriendly act and one which lets out the truth without any hostile intention.

11. It may be rather difficult to lay down a rule of universal application as to when and in what circumstances the court will be entitled to exercise its discretion under Section 154 of the Evidence Act and the matter will largely depend on the facts and circumstances of each case and on the satisfaction of the court on the basis of those circumstances. Broadly, however, this much is clear that the contingency of cross-examining the witness by the party calling him is an extraordinary phenomenon and permission should be given only in special cases. It seems to us that before a court exercises discretion in declaring a witness hostile, there must be some material to show that the witness has gone back on his earlier statement or is not speaking the truth or has exhibited an element of hostility or has changed sides and transferred his loyalty to the adversary. Furthermore, it is not merely on the basis of a small or insignificant omission that the witness may have made before the earlier authorities that the party calling the witness can ask the court to exercise its discretion. The court, before permitting the party calling the witness to cross-examine him, must scan and weigh the circumstances properly and should not exercise its discretion in a casual or routine manner.”

6. Thus, what emerges from the said Judgment is that the Court, before permitting the party calling the witness to cross-examine him, must scan and weigh the circumstances properly and should not exercise its discretion in a casual or routine manner. It is not in dispute, that an accused has a right not only to a speedy trial, but also a right to a fair trial. It is also not disputed that if the defence is called to adduce evidence in support of his case, it is his valuable right and denial of the same would amount to denial of a fair trial. Fair trial is the main object of a criminal trial, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Under no circumstances can a person's right to a fair trial be jeopardized. Adducing evidence in support of his defence is a valuable right of the accused and denial of such a right would amount to denial of a fair trial. It is no doubt true, and well settled, that a party will not normally be allowed to cross-examine its own witness and declare him hostile, unless the Court is satisfied that the statement of the witness exhibits an element of hostility or that he has resiled from a material statement which he made before an earlier authority or where the Court is satisfied that the witness is not speaking the truth and it may be necessary to cross-examine him to get to the truth. In the facts of the present case,

from the examination-in-chief and cross-examination of DW.3, it is evident that the witness has made an inconsistent statement on the most material point and hence it would be necessary to give the applicant permission to re-examine/cross-examine DW.3 to the extent of the inconsistent statements.

7. Learned Counsel for the Applicant makes a statement that he will not seek any adjournment and ensure that the witness, is present on 20th April, 2016, for the same.

8. The Application is allowed in the aforesaid terms and is accordingly disposed of.

9. All concerned to act on the authenticated copy of this order.

REVATI MOHITE DERE, J.