

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRR No. 152 of 2021

- Sandeep Jain S/o Late Shri Rawalmal Jain, Aged About 42 Years, R/o Ganjpara, in front of Alokchand Trilokchand Jewelers, Durg, Police Station and District Durg Chhattisgarh., District : Durg, Chhattisgarh

---- Applicant

Versus

- State Of Chhattisgarh, through the Police Station Durg, District - Durg Chhattisgarh., District : Durg, Chhattisgarh

----Non-applicant

For Applicant – Shri Tarendra Kumar Jha, Advocate.

For Non-applicant – Shri Adil Minhaj, Govt. Advocate.

Hon'ble Shri Justice Rajendra Chandra Singh Samant

Order on Board

19-03-2021

Heard.

1. This criminal revision is directed against the order dated 16-02-2021 passed in Sessions Trial No.56/2018 by the Court of Additional Sessions Judge Durg, District Durg, Chhattisgarh dismissing the objection raised by the applicant.

2. The applicant is accused in the Sessions Trial No.56/2018. One witness Saurabh Golchha was examined on 24-10-2018 and the recording of evidence was closed on that date. The respondent then moved application praying for re-examination of witness Saurabh Golchha for purpose of explaining some of the statements he has made in the cross-examination, the same was rejected by the trial Court. The respondent then filed CRR No.1275 of 2019 before this Court. This Court by order dated 02-11-2020 allowed the same and opportunity of re-examination of the witness was given to the respondent. Witness Saurabh Golchha was then re-examined on 28-01-2021. His re-examination could not be completed on that date, the re-examination was continued on 02-02-2021 which was again incomplete and again taken up on 08-02-2021. The

Special Public Prosecutor sought permission of the Court to declare the witness hostile and to put leading questions to him. The counsel for the applicant objected and written objection was also presented in the Court on 11-02-2021. Learned trial Court has by the impugned order dismissed the objection and has granted permission to the respondent to cross-examine the witness.

3. It is submitted by learned counsel for the applicant that the impugned order is erroneous and illegal. The witness Saurabh Golchha (PW-8) was examined at length and at that stage there was no request by the respondent-State to declare that witness hostile. Only for the reason that the witness has made some admissions in cross-examination and the witness has remained intact on the statement in re-examination, it cannot be said that a ground is made out to declare the witness hostile. Section 154 of the Evidence Act grants discretion to the Court to permit a person calling a witness to put any question to such witness which might be put in cross-examination by the adverse party, but the discretion should be exercised judiciously. The respondent-State cannot declare the witness hostile for the statement that he has made in his cross-examination. Reliance has been placed on the judgment of **Rabindra Kumar Dey Vs. State of Orrissa**, 1976 4 SCC 233, in which it has been held that the discretion should be exercised judiciously and properly only in the interest of justice. It is submitted that in the case of **Gura Singh Vs. State of Rajsathan**, AIR 2001 2 SCC 330, wherein it was held by Hon'ble the Supreme Court that the terms "hostile", "adverse" or "unfavourable" witnesses are alien to the Indian Evidence Act. The courts are under legal obligation to exercise the discretion vested in them in a judicious manner by proper application of mind and keeping in view the attending circumstances. Permission to cross-examine in terms of Section 154 cannot be and should not be granted at mere asking of the party calling the witness. In the case of **Pushpendra Singh @**

Paresh Vaghela Vs. State of Gujarat in Special Criminal Application No.3082 of 2012 decided on 08-02-2013, the Gujarat High Court has held that the contingency of cross-examining the witness by the party calling him is an extraordinary phenomenon and permission under Section 154 of the Evidence Act should be granted judiciously.

Reliance has also been placed on the judgment of Andhra Pradesh High Court in the matter of **Mattam Ravi Vs. Mattam Raja Yellaiah** in Civil Revision Petition No.348 of 2017 decided on 23-06-2017. It is submitted that the order granting permission to the respondent to declare witness Saurabh Golchha hostile is unsustainable. Hence, this revision petition be allowed and the impugned order be set aside.

4. Learned counsel for the State appearing for the respondent opposes the submission and submits that the witness Saurabh Golchha (PW-8) has made contradictory statement in his cross-examination. The witness was re-examined with the permission of this Court, but that re-examination had been not without any hindrance, because the applicant side has raised objection to re-examination every now and then. It was a fit case in which the questions can be put to the witness in the manner put in cross-examination, therefore, learned trial Court has not committed any error in dismissing the objection made by the applicant side.

Reliance on behalf of the respondent/State has been placed on the judgment of Hon'ble the Supreme Court in the matter of **Dahyabhai Chhaganbhai Thakkar Vs. State of Gujarat**, AIR 1964 SC 1563.

Reliance has also been placed on the judgment of Hon'ble the Supreme Court in the matter of **Rammi @ Rameshwar Vs. State of M.P.**, 1999 8 SCC 649, in which it has been held that in special case such permission can be granted to the prosecutor. Therefore, the impugned order is sustainable and the revision petition be dismissed.

5. Learned counsel for the applicant submits in reply that the witness Saurabh Golchha (PW-8) has made some admissions in cross-examination and which is needed to be appreciated by the Court. The prosecution is making all efforts to frustrate the defence. It is again submitted that as per the ratio laid down by the Andhra Pradesh High Court in **Mattam Ravi Vs. Mattam Raja Yellaiah** (supra) case and by Gujarat High Court in **Pushpendra Sinh @ Paresh Vaghela Vs. State of Gujarat** (supra) case such permission cannot be granted to the prosecution which has been granted by the impugned order. Hence, the revision petition deserves to be allowed.

6. Heard learned counsel for the parties and perused the documents.

7. Considered on these submissions. It is not disputed that witness Saurabh Golchha has supported the prosecution in his examination-in-chief and he has made some statement in his cross-examination which the prosecution considers to be explained and clarified. With the permission of this Court this witness was re-examined. However, the prosecution is still not satisfied, therefore, the permission was sought to put questions to the witness in the manner it is put in cross-examination which has been allowed by the impugned order.

8. In the case of **Rabindra Kumar Dey Vs. State of Orrissa** (supra) Hon'ble the Supreme Court has held in para No.11 which is as follows:-

“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 s. 154 of the Evidence Act and the matter will largely depend on the facts and circumstances of such 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.”

9. It was further held in this judgment that the trial Court was not at all justified in declaring the witness a hostile witness and permitting his cross-examination because the fate of this would be that the statement of such witness is not fully acceptable and not be of credence. It is true that the Court has to exercise powers under Section 154 of Evidence Act judiciously and reasonably, but what shall be the circumstances for exercise that has been elaborated in the case of **Dahyabhai Chhaganbhai Thakkar Vs. State of Gujarat** (supra) by Hon’ble the Supreme Court. Hon’ble the Supreme Court has held in paragraph 8 of that judgment which is as follows:-

8. Now we come to the merits of the case. Ordinarily this Court in exercise of its jurisdiction under Art. 136 of the Constitution accepts the findings of fact arrived at by the High Court. But, after having gone through the judgments of the learned Additional Sessions Judge and the High Court, we are satisfied that this is an exceptional case to depart from the said practice. The learned Additional Sessions Judge rejected the evidence of the prosecution witnesses on the ground that their version was a subsequent development designed to belly the accused. The learned Judges of the High Court accepted their evidence for two different reasons. Raju, J., held that a court can permit a party calling a witness to put questions under s. 154 of the Evidence Act only in the examination-in-chief of the witness; for this conclusion, he has given the following two reasons: (1) the wording of Ss. 137 and 154 of the Evidence Act indicates it, and (2) if he is permitted to put questions in the nature of cross-examination at the stage of re-examination by the party, the adverse party will have no chance of cross-examining the witness with reference to the answers given to the said questions. Neither of

the two reasons, in our view, is tenable. Section 137 of the Evidence Act gives only the three stages in the examination of a witness, namely examination-in-chief, cross-examination and re-examination. This is a routine sequence in the examination of a witness. This has no relevance to the question when a party calling a witness can be permitted to put to him questions under S. 154 of the Evidence Act: that is governed by the provisions of S. 154 of the said Act, which confers a discretionary power on the court to permit a person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party. 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 (sic-re-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. To confine the operation of S. 154 of the Evidence Act to a particular stage in the examination of a witness is to read words in the section which are not there. We cannot also agree with the High Court that if a party calling a witness is permitted to put such questions to the witness after he has been cross-examined by the adverse party, the adverse party will not have any opportunity to further cross-examine the witness on the answers elicited by putting such questions. In such an event the court certainly, in exercise of its discretion, will permit the adverse party to cross-examine the witness on the answers elicited by such questions. The court, therefore, can permit a person, who calls a witness, to put questions to him which might be put in the cross-examination at any stage of the examination of the witness, provided it takes care to give an opportunity to the accused to cross-examine him on the answers elicited which do not find place in the examination-in-chief. In the present case what happened was that some of the witnesses faithfully repeated what they had stated before the police in the examination-in-chief, but in the cross-examination they came out with

the story of insanity of the accused. The court, at the request of the Advocate for the prosecution, permitted him to cross-examine the said witnesses. It is not suggested that the Advocate appearing for the accused asked for a further opportunity to cross-examine the witnesses and was denied of it by the court. The procedure followed by the learned Judge does not conflict with the express provisions of S. 154 of the Evidence Act. Mehta, J., accepted the evidence of the witnesses on the ground that the earlier statements made by them before the police did not contradict their evidence in the court, as the non-mention of the mental state of the accused in the earlier statements was only an omission. This reason given by the learned Judge is also not sound. This Court in *Tahsildar Singh v. The State of U.P.*, (1959) Supp (2) SCR 875 at p. 908: (AIR 1959 SC 1012 at p. 1026) laid down the following test, for ascertaining under what circumstances an alleged omission can be relied upon to contradict the positive evidence in court:

"..... (3) though a particular statement is not expressly recorded, a statement that can be deemed to be part of that expressly recorded can be used for contradiction, not because it is an omission strictly so-called but because it is deemed to form part of the recorded statement; (4) such a fiction is permissible by construction only in the following three cases: (i) when a recital is necessarily implied from the recital or recitals found in the statement ; (ii) a negative aspect of a positive when the statement.....; and (iii) when the statement before the police and that before the Court cannot stand together.....".

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. In the circumstances it was necessarily implied in the previous statements of the witnesses before the police that the accused was not insane at the time he committed the murder. In this view the previous statements of the witnesses before the police can be used to contradict their version in the court. The judgment of the High Court, therefore, in relying upon some of the important prosecution witnesses was vitiated by the said errors of law. We would, therefore, proceed to consider the entire evidence for ourselves."

10. The ratio laid down by Hon'ble the Supreme Court in **Dahyabhai Chhaganbhai Thakkar Vs. State of Gujarat** case (supra) has been discussed in the case of **Pushpendra Sinh @ Paresh Vaghela Vs. State of Gujarat** (supra) by the Gujarat High Court. In judgment of case of **Rammi @ Rameshwar Vs. State of M.P.** (supra) para No.17 and 18 are as follows:-

17. There is an erroneous impression that re-examination should be confined to clarification of ambiguities which have been brought down in cross-examination. No doubt, ambiguities can be resolved through re-examination. But that is not the only function of the re-examiner. If the party who called the witness feels that explanation is required for any matter referred to in cross-examination he has the liberty to put any question in re-examination to get the explanation. The Public Prosecutor should formulate his questions for that purpose. Explanation may be required either when ambiguity remains regarding any answer elicited during cross-examination or even otherwise. If the Public Prosecutor feels that certain answers require more elucidation from the witness he has the freedom and the right to put such questions as he deems necessary for that purpose, subject of course to the control of the court in accordance with the other provisions. But the court cannot direct him to confine his questions to ambiguities alone which arose in cross-examination.

18. Even if the Public Prosecutor feels that new matters should be elicited from the witness he can do so, in which case the only requirement is that he must secure permission of the court. If the Court thinks that such new matters are necessary for proving any material fact, courts must be liberal in granting permission to put necessary questions.”

11. The Andhra Pradesh High Court in case of **Mattam Ravi Vs. Mattam Raja Yellaiah** (supra) has held that permission under Section 154 of the Evidence Act can be sought before the evidence of witness concluded and the Court has wide discretion under Section 154 either to grant or refuse permission.

12. On going through the case laws cited, it is clearly made out that there is rule of caution in every such case where the prosecutor seeks permission to cross-examine a witness called by it. Judicious exercise of such discretion is always called for. Learned trial Court has after detailed consideration on the submission made by both the sides felt it necessary that the prosecution shall be permitted to cross-examine witness Saurabh Golchha (PW-8). This Court does not find any fault with the order passed in view of the circumstances that are present and also in view of the guidelines that have been laid down in the

case laws mentioned hereinabove. Therefore, I do not find any substance in this revision petition, which is dismissed.

Sd/-

(Rajendra Chandra Singh Samant)
Judge