

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

CRIMINAL REVISION APPLICATION NO. 193 OF 2022

Mohd. Rafi @ Rafik Wali Mohd. Choudhary

Age : about 27 Years. Occ : Service,

Indian Inhabitant, Residing at the time of

arrest : Rizwan Apartments,

Aksa Masjid Road, Bandiwali Hill,

Jogeshwari (W), Mumbai 400 102.

Permanent resident of Darhal,

District Rajouri, Jammu and Kashmir

Currently incarcerated at Arthur Road

Central Prison as an under-trial prisoner

...Applicant

Versus

State Of Maharashtra

...Respondent

....

Mr. Gaurav Bhawanani i/by Mr. Khan Abdul Wahab, Advocate for the Applicant.

Mr. A. R. Patil, APP for the Respondent – State.

CORAM : PRAKASH D. NAIK, J.

DATE : 17th JUNE, 2022.

PER COURT:

1. The applicant is prosecuted for offences punishable under Sections 302, 376 & 511 of Indian Penal Code (for short 'IPC') registered vide C.R. No.90 of 2016 with Oshiwara Police Station, Mumbai. The First Information Report (for short "FIR") was registered on 11th February, 2016. Applicant was arrested on 3rd

March, 2016. Charge-sheet was filed. The case is based on circumstantial evidence. The grandmother of first informant was found murdered in the house. The applicant was the watchman in the building where deceased resided. Trial had commenced. 19 witnesses were examined.

2. The evidence of PW-15 Asif Sunasra was recorded by the trial Court on 8th September, 2021. He is the Panch witness to seizure panchanama dated 20th June, 2016. His examination-in-chief and cross examination was completed on 8th September, 2021. The Court passed order of no re-examination. Subsequently, the prosecution preferred an application Exhibit – 147 for recall of said witness for conducting cross examination on 21st September, 2021. The ground for recall of witness urged by prosecution was that he has not supported prosecution case, which and hence he has to be cross examined which had inadvertently remained on the last date. The application was opposed by defence by filing reply. By order dated 27th November, 2021 the Sessions Court allowed the said application. PW-15 was cross examined at the instance of the prosecution. On perusal of the evidence of PW-15 brought on record through the cross examination of the said witness by the prosecution it is apparent that, it was a lengthy cross examination running into several pages. After the cross examination by

prosecution was completed, the defence made an application seeking permission to further cross-examination of the said witness. The application was opposed by prosecution. The learned Judge vide order dated 1st March, 2022 partly allowed the said application only to the extent of cross examination of PW-15 qua photographs at Exhibit – 175 to 185. The applicant is aggrieved by the order passed by the trial Court disallowing the cross examination on the other issues.

3. Learned Advocate for the applicant submitted that PW-15 was extensively cross examined by prosecutor. New materials including but not limited to the following was elicited.

- i. Details about the seizure panchanama for which PW-15 Mr. Sunasra was a panch witness;
- ii. The appointment and duties of the Applicant as a watchman in the building where the spot is situated;
- iii. The layout of the building and society complex;
- iv. The inter-connectivity of the wings of the buildings;
- v. The presence and locations of CCTV cameras;
- vi. The situation of the spot immediately after the incident prior to spot panchanama;
- vii. The learned Sessions Judge has erred in believing that, there is no right to cross-examine a hostile witness and that Indian Evidence Act, only permits examination in chief, cross examination and the Act does not contemplate cross examination

of a witness after he has been already cross examined.

viii. The learned Sessions Judge has committed an error in allowing cross examination only in respect to Exhibit- 175 to 185. In view of the lengthy cross examination conducted by the prosecution after the closure of the evidence of PW-15 several new facts were also brought on record and therefore the accused had right to cross examine the said witness.

4. Learned Advocate for the applicant relied upon the following decisions :-

- i. Pradhan s/o Murlidhar Potdar V/s. State of Maharashtra¹.
- ii. Dahyabhai Chhaganbhai Thakkar V/s. State of Gujrat².
- iii. Bhajju alias Karan Singh V/s. State of Madhya Pradesh³.

5. Learned APP submitted that there is no infirmity in the order passed by the learned Sessions Judge. The order spells out reasons for restricting cross examination on Exhibits 175 to 185. The law does not prescribe the cross examination by the defence after the witness is declared hostile and cross examined by the prosecution. In the present case, witness was hostile during cross examination by defense. After he was cross examined by prosecution, there is no provision to allow cross examination by accused. The

¹ [2005(2) – Mh.L.J. 226.

² AIR 1964 SC 1563.

³ (2012) 4 SCC 327.

examination-in-chief, cross examination and re-examination is provided under Section 138 of Evidence Act. Section 154 of Code of the Evidence Act, provides Courts discretion to permit the person who calls a witness to put any questions to him which might be put in cross examination by the adverse party.

6. The applicant is facing serious charge under Section 302 & 376 of IPC. From the record it is apparent that PW-15 was examined by the prosecution. His examination-in-chief was recorded. He was cross examined by defense. The Court proceeded to pass order of no re-examination. After the evidence of PW-15 was ordered, the prosecution had preferred application for recalling PW-15 for cross examination on the ground that he was hostile during cross examination by defense. The application did not specify on what point witness was hostile. On perusal of the cross examination conducted by the prosecution it is apparent that cross in conducted in detail which it is running into 14 pages. The witness has been cross examined on several aspects even beyond the cross examination conducted by the defence.

7. In the case of *Pradhan s/o Murlidhar Potdar V/s. State of Maharashtra* (supra) the similar issue came up for consideration. The factual matrix of the said decision indicate that, the accused was prosecuted for offences under Prevention of Corruption Act.

The prosecution examined complainant. He was cross examined by defense. At a stage the public prosecutor declared him hostile and requested the Court to grant permission cross examine him. The Court granted the request. Thereafter, the public prosecutor cross examined the complainant and concluded the same. The accused filed application seeking permission to cross examine the complainant on the ground that, the witness while in cross examination of the public prosecutor, gave certain statements against the accused. The trial Court rejected the request made by the accused. The said order was challenged before High Court. This Court referred to decision of **Dahyabhai Chhaganbhai Thakkar V/s. State of Gujrat** (Supra); **Gura Singh V/s. State of Rajasthan**⁴; **Rammi V/s. State of Madhya Pradesh**⁵. The application of accused was allowed on the ground that, after declaring the witness hostile, in the cross examination of prosecutor the witness made certain statements which may go contrary to the statement made while the witness was examined by the State. It was submitted on behalf of Petitioner that he had not completed his cross examination and therefore, it would be in tune with legal position to allow cross examination to a limited extent. In the case of ***Dahyabhai Chhaganbhai Thakkar V/s. State of Gujrat*** (supra) it is observed

4 (2001) 2 SCC 205

5 1999 Cr.L.J. 4561

that, Section 137 of the Evidence Act, gives only 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 Section 154 of the Evidence Act. That is governed by the provisions of Section 154 of the Evidence 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 the operation of Section 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. It cannot be accepted 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 event, the

Court, in exercise of its discretion, will permit the adverse party to cross-examine the witness on the answers elicited by such questions. The Court thereafter 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 case of *Bhajju alias Karan Singh V/s. State of Madhya Pradesh* (supra) in Paragraph-35 it is observed that normally, when a witness deposes contrary to the stand of the prosecution and his own statement recorded under Section 161 Cr.PC. the prosecutor, with the permission of the court, can pray to the court for declaring that witness hostile and for granting leave to cross-examine the said witness. If such a permission is granted by the court then the witness is subjected to cross examination by the prosecutor as well as an opportunity is provided to the defence to cross-examine such witnesses, if he so desires.

8. In the light of the principles of law as enumerated herein above and applying the same to the factual matrix of this case, the defence should have been permitted to cross examine the witness on the issues referred to herein above. It is pertinent to note that the learned trial court has not rejected the application on the

ground that it is not permissible to do so under the law. The application was partly allowed. In the light of lengthy cross examination conducted by the prosecution and the facts brought on record, the applicant was entitled to cross examine PW-15 in relation to issues referred in ground 'd' this application and qua Exhibits 175 to 185. Ground 'd' refers to following issues :

- “ i. details about the seizure panchanama for which PW-15 Mr. Sunasra was a panch witness;
- ii. the appointment and duties of the Applicant as a watchman in the building where the spot is situated;
- iii. the layout of the building and society complex;
- iv. the inter-connectivity of the wings of the buildings;
- v. the presence and locations of CCTV cameras;
- vi. the situation of the spot immediately after the incident prior to spot panchanama;”

9. In view of the above, I pass the following order :-

ORDER

- i.** Criminal Revision Application No.193 of 2022 is allowed and disposed of;
- ii.** The Advocate for the applicant is permitted to cross examine PW-15 in relation to the issues referred to in ground 'd' of this application as well as qua Exhibits 172 to 185.

(PRAKASH D. NAIK, J.)