

(2015) 04 GUJ CK 0048

In the Gujarat High Court

Case No : Special Criminal Application (Quashing) No. 1875 of 2015

Dhaval Gopalbhai Dobariya and Others

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 17-04-2015

Acts Referred:

Constitution of India, 1950 — Article 21, 227

Evidence Act, 1872 — Section 137, 138, 139, 140, 141

Penal Code, 1860 (IPC) — Section 114, 323, 376(1)(2)D, 504, 506(2)

Citation : (2015) 4 CCR 225 : (2015) CriLJ 3807

Hon'ble Judges : J.B. Pardiwala, J.

Bench : Single Bench

Advocate : N.J. Shah, APP, Advocates for the Respondent

Final Decision : Dismissed

Judgement

J.B. Pardiwala, J.—By this application under Article 227 of the Constitution of India, the applicants-original accused call in question the legality and validity of the order dated 18th March, 2015 passed by the Additional Sessions Judge, Jetpur below exhibit-79 in the Sessions Case No. 22 of 2014 by which the learned Sessions Judge allowed the application exhibit-79 filed by the public prosecutor appearing for the State seeking permission to put a leading question to a doctor as an expert witness in his examination in chief.

2. The facts giving rise to this application are as under:

2.1 The applicants are facing trial in the court of the learned Sessions Judge, Jetpur for the offence punishable under sections 376(1)(2)D, 323, 504, 506(2) read with 114 of the Indian Penal Code. In the course of the trial, Dr. Kirtan Manojbhai Vyas, a Gynecologist entered the witness box as the Prosecution Witness No. 6. His evidence was recorded at exhibit-78. In the course of his examination in chief, the public prosecutor preferred an application exhibit-79 before the trial court and sought permission to put a leading question to the doctor under section 142 of the Evidence Act in the form of an opinion.

2.2 The public prosecutor sought permission of the trial court to put a question to the doctor seeking his expert opinion which reads as under:

"If the victim is in menstruation and if there is a flow of blood, then due to such flow of blood semen may not be found and no evidence in that regard may be available." 2.3 The defense counsel raised an objection to such a question being put to the doctor as an expert witness as according to the defense, such question was in the form of a leading question which is otherwise not permissible in law.

2.4 The trial court adjudicated the objection raised by the defense on this count and ultimately passed an order that the public prosecutor may put such a question to the doctor and the reply to the same may also be obtained. The evidentiary value of such reply would be considered at the final stage of the trial.

2.5 Being dissatisfied with such order passed by the trial court, the applicants-original accused have come up with this application.

3. Mr. K.S. Chandrani, the learned advocate appearing for the applicants vehemently submitted that the trial court committed a serious error in passing the impugned order. He submitted that the impugned order is contrary to the provisions of sections 137, 141 and 142 of the Evidence Act. He submitted that the public prosecutor can put such a leading question to his own witness only after the witness is declared as hostile. He submitted that the question put by the public prosecutor to the doctor is in such a form that the reply could be either in "yes" or "no". Mr. Chandrani placed strong reliance on a decision of the Supreme Court in the case of Varkey Joseph Vs. State of Kerala, rep. By the Circle Inspector of Police, . In such circumstances referred to above, Mr. Chandrani prays that there being merit in this application, the same be considered and the impugned order be quashed.

4. On the other hand, this application is vehemently opposed by Mr. N.J. Shah, the learned APP appearing for the State. Mr. Shah submits that no error not to speak of any error of law could be said to have been committed by the trial court in passing the impugned order. Mr. Shah submits that the question asked by the public prosecutor was with a view to seek the opinion of the doctor as an expert witness. He submits that by no stretch of imagination, the question could be termed as "leading". Mr. Shah lastly submitted that such objection can be taken care of by the trial court while finally appreciating the evidence on record and the trial should not get delayed on account of such objection by the defense. He prays that there being no merit in this application, the same be rejected.

5. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for my consideration is whether the court below committed any error in passing the impugned order.

6. A leading question is a "suggestive?", i.e., a question which suggests the answer which the interrogator wishes or except to receive, or which embodying a material fact admits of a conclusive answer by a simple negative or affirmative. A

question is "leading" where the question assumes any fact which is in controversy, so that the answer may really or apparently admit that fact, for example e.g. question. A question admitting of being answered by a simple "yes" or "no" is regarded as generally a leading and improper question. The rule is not, however, rigid inasmuch as such question depends in its suggestion more than in the tone of voice than in the form of words. Whether a question in a particular form is leading or not depends upon whether it does or does not suggest any particular answer. The question will be leading, if it rehearses lengthy details which the witness might not otherwise have mentioned.

7. I may quote the relevant provisions of the Evidence Act, 1872 which reads thus:

"SECTION 137 : Examination-in-chief

The examination of a witness by the party who calls him shall be called his examination-in-chief.

Cross-examination. - The examination of a witness by the adverse party shall be called his cross-examination.

Re-examination. - The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

SECTION 138 : Order of examinations

Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination. - The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

SECTION 139 : Cross-examination of person called to produce a document

A person summoned to produce a document does not become a witness by the mere fact that he produces it, and cannot be cross-examined unless and until he is called as a witness.

SECTION 140 : Witnesses to character

Witnesses to character may be cross-examined and re-examined.

SECTION 141 : Leading questions

Any question suggesting the answer which the person putting it wishes or expects to receive, is called a leading question.

SECTION 142 : When they must not be asked

Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court. The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

SECTION 143 : When they may be asked

Leading questions may be asked in cross- examination."

8. Section 137, Evidence Act, enacts that the examination of a witness by the adverse party shall be called his cross-examination. Section 141 states that a leading question is one which suggests the answer which the person putting it wishes or expects to receive, while Section 142 lays it down that leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief or in a re-examination except with the permission of the Court but, under Section 143, they may be asked in cross-examination. A very brief consideration of these provisions, than which to an advocate nothing could be more elementary, will assist in an appreciation of the reply to the questions to which we have to furnish an answer. It is assumed that a party will call as witnesses only persons who can prove his case and in practice, as an almost invariable rule, what such witnesses may be expected to say is known beforehand. Hence the rule against leading questions by the party on whose behalf a witness is called. To the adverse party such witnesses are presumably hostile, a not altogether felicitous expression in so far as it implies personal animosity, but one which means that their evidence is not to be expected to be favourable to the side -against which they are called to depose. "To test their veracity, the truth of the story to which they have been called to testify, or to learn if and how far "they will support the case of the adverse party, the latter is allowed to put leading questions in cross-examination, as it is not to be expected that such witnesses would give answers favourable to the adverse party unless the answers were suggested to them.

9. The Supreme Court in the case of Varke Joseph v. State of Kerala (supra) has explained in detail regarding a leading question. I quote the observations made in paragraph-11.

"Leading question to be one which indicates to the witnesses the real or supposed fact which the prosecutor (plaintiff) expects and desires to have confirmed by the answer. Leading question may be used to prepare him to give the answers to the questions about to be put to him for the purpose of identification or to lead him to the main evidence or fact in dispute. The attention of the witness cannot be directed in chief examination to the subject of the enquiry/trial. The Court may permit leading question to draw the attention of the witness which cannot otherwise be called to the matter under enquiry, trial or investigation. The discretion of the court must only be controlled towards that

end but a question which suggest to the witness, the answer the prosecutor expects must not be allowed unless the witness, with the permission of the court, is declared hostile and cross-examination is directed thereafter in that behalf. Therefore, as soon as the witness has been conducted (sic) to the material portion of his examination, it is generally the duty of the prosecutor to ask the witness to state the facts or to give his own account of the matter making him to speak as to what he had seen. The prosecutor will not be allowed to frame his questions in such a manner that the witness by answering merely "yes" or "no" will give the evidence which the prosecutor wishes to elicit. The witness must account for what he himself had seen. Sections 145 and 154 of the Evidence Act are intended to provide for cases to contradict the previous statement of the witnesses called by the prosecution. Ss. 143 and 154 provides the right to cross-examination of the witnesses by the adverse party even by leading questions to contradict answers given by the witnesses or to test the veracity or to drag the truth of the statement made by him. Therein the adverse party is entitled to put leading questions but S. 142 does not give such power to the prosecutor to put leading questions on the material part of the evidence which the witnesses intend to speak against the accused and the prosecutor shall not be allowed to frame questions in such a manner which the witness by answering merely yes or no but he shall be directed to give evidence which he witnessed. The question shall not be put to enable the witness to give evidence which the prosecutor wishes to elicit from the witness nor the prosecutor shall put into witness's mouth the words which he hoped that the witness will utter nor in any other way suggest to him the answer which it is desired that the witness would give. The counsel must leave the witness to tell unvarnished tale of his own account. Sample leading questions extracted hereinbefore clearly show the fact that the prosecutor led the witnesses what he intended that they should say the material part of the prosecution case to prove against the appellant which is illegal and obviously unfair to the appellant offending his right to fair trial enshrined under Art. 21 of the Constitution. It is not a curable irregularity." 10. The following propositions are discernible from the aforesaid decision of the Supreme Court, on which strong reliance has been placed by the learned counsel appearing for the applicants.

(i) Leading question may be used to prepare witness to give the answers to the question about to be put to him for the purpose of identification or to lead him to the main evidence or fact in dispute.

(ii) The direction of the Court must only be controlled towards that end but a question which suggest to the witness, the answer the prosecutor expects must not be allowed unless witness, with the permission of the Court, is declared hostile and cross-examination is directed thereafter in that behalf.

(iii) As soon as the witness has been conducted (sic) to the material portion of his examination, it is generally the duty of the prosecution to ask the witness to state the facts or to give his own account of the matter making him to speak as

to what he had seen.

(iv) The prosecutor will not be allowed to frame his questions in such a manner that the witness by answering merely "yes" or "no" will give the evidence which the prosecutor wishes to elicit.

(v) The witness must account for what he himself had seen. Ss. 145 and 154 of the Evidence Act are intended to provide for cases to contradict the previous statement of the witnesses called by the prosecution. Ss. 143 and 154 provide the right to cross-examination of the witnesses by the adverse party even by leading questions to contradict answers given by the witnesses or to test the veracity or to drag the truth of the statement made by him. Therein the adverse party is entitled to put leading questions but S. 142 does not give such power to the prosecutor to put leading questions on the material part of the evidence which the witnesses intend to speak against the accused and the prosecutor shall not be allowed to frame questions in such a manner which the witnesses by answering merely "yes" or "no" but he shall be directed to give evidence which he witnessed.

(vi) The question shall not be put to enable the witness to give evidence which the prosecutor wishes to elicit from the witness nor the prosecutor shall put into witness's mouth the words which he hoped that the witness will utter nor in any other way suggest to him the answer which it is desired that the witness would give.

(vii) The Counsel must leave the witness to tell unvarnished tale of his own account.

The Sessions Court permitted even without objection by the defence to put leading questions in the chief-examination itself suggesting all the answers which the prosecutor intended to get from the witnesses to connect the appellant with the crime. For instance, see the evidence of PW-1 "Then I saw Jose (appellant) coming from the north and going towards south". Did you notice his dress then? Yes. He had worn a white dhoti..... Did you notice his dhoti? Yes. I had seen two or three drops of blood on his dhoti. Suddenly, I had a doubt". Similarly, PW-4 also at that time "Did you any one from Ramanattu house came for tea? Yes. Jose came. When did Jose come to have tea? I do not remember..... Did Jose came on the previous day. Yes. He came about 6 p.m. In the evening. Did he say anything? He brought a bag and said let it be here. I shall take this bag after some time.... What was the dress of the accused when he came to the shop? He was wearing white dhoti and tied a cloth on his hand. Have you noticed anything particular on the dhoti? No". Similar leading questions were put to other witnesses also to elicit on material part of the prosecution case in the chief-examination itself without treating any of the witness hostile.

Under S. 142 leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.

11. In the facts of that case, the court held that the criminal trial was unfair to the appellant and the procedure adopted in the trial was illegal and unconstitutional.

12. The decision of the Supreme Court in the case of Varke Joseph (supra) has been considered in the case of Sidhartha Vashisht @ Manu Sharma Vs. State (NCT of Delhi), , wherein the Supreme Court in paragraph-97 observes thus:

"Mr. Ram Jethmalani, learned senior counsel next contended that the Public Prosecutor in the present case had put a leading question to Malini Ramani regarding identification of the accused Manu Sharma. We verified the said question. The question put by the Public Prosecutor, was at best clarificatory, and by no stretch of imagination can be termed as a leading question favouring/ eliciting an answer favouring the prosecution. The evidence of Ms. Malini Ramani two paragraphs prior to the leading question and two paragraphs thereafter, if read in conjunction with each other clarifies the whole scene and sequence of events. Learned senior counsel has relied upon the judgment in Varkey Joseph Vs. State of Kerala, rep. By the Circle Inspector of Police, to support his contention. The; said judgment is clearly distinguishable. On the facts in that case, this Court found that the Prosecutor had put leading questions, without objections by the defence, to several material and key witnesses regarding the culpability of the accused. The extent of the leading questions put, were on the facts of that case found to violate the constitutional right of a fair trial of the accused. The facts of the present appeal are wholly different. The petitioner had adequate and competent legal representation before the trial Court and leading questions, if any, put by the prosecutor were objected to by the defence and several questions were disallowed by the trial court. Furthermore, the finding of guilt of the appellant herein by the High Court has not been on account of any of the answers elicited to any such questions. It is not as if every single leading question would invalidate the trial. The impact of the leading questions, if any, has to be assessed on the facts of each case." 13. Thus what is discernible from the aforesaid decision of the Supreme Court is that every single leading question would not invalidate the trial. The impact of the leading question, if any, should be assessed considering the facts of each case.

14. In my view, the court below committed no error in permitting such a question to be put to a medical officer who entered the box as an expert witness. An expert witness is examined by the prosecution because of his specialized knowledge on certain subjects. The judge may not be fully equipped with such knowledge of medical science. An expert is not a witness of fact. His evidence is of an advisory character. The credibility of such witness depends on reasons stated in support of his conclusions and data and material furnished, which form basis of his conclusions. Let me assume for the moment that the question with which I am concerned is a leading question. Let me assume for the moment that the reply of the expert could be "yes" or "no". If it is in the affirmative, the defense can always prove him wrong by cross-examining him on the subject. The

case on hand is not one wherein an eye witness to an incident of murder has been put a leading question much to the prejudice of the defense. In the case of an eye witness, he supposed to account for what he himself had seen. In the present case, at the cost of repetition, I may state that the question put by the public prosecutor was more in the nature of seeking an opinion of an expert witness. Section 142 allows leading question to be put in the examination in chief, even if, objected too with the permission of the court. In the case of a witness like a doctor who gives his expert opinion, even according to the applicants, is not biased in any manner, there is no question of his being led into an answer against his will. He may, in normal circumstances, be expected to give his opinion and should he state anything which discloses an undue favour towards the prosecution, the manner and content of his answer would be appreciated and looked into by the trial court at the final stage of the proceedings.

15. For the foregoing reasons, I do not see any good ground to interfere with the impugned order. This application, therefore, fails and is hereby rejected.