

(2010) 01 GUJ CK 0008
In the Gujarat High Court

Case No : Criminal Revision Application No. 268 of 2009

State of Gujarat

APPELLANT

Vs

Rajendrakumar Gokaldas Vaja

RESPONDENT

Date of Decision : 20-01-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 154, 161, 173(8), 311, 397
Evidence Act, 1872 — Section 154, 155, 165

Citation : (2010) 1 GLH 779

Hon'ble Judges : Harsha Devani, J

Bench : Single Bench

Advocate : Umesh A. Trivedi, APP 1, for the Appellant; P.J. Kanabar and Ms. Aditi P. Kanabar for Respondent 1, for the Respondent

Judgement

H.N. Devani, J.—This is a unique case where during the course of his examination-in-chief, the respondent who was a prosecution witness did not support the prosecution case, however, upon a request being made by the Public Prosecutor to declare him hostile, he moved an application supported by documentary evidence, raising objections against his being declared hostile. The trial Court considered the application on merits and after carrying out a detailed Inquiry stretching over a period of almost eight months and permitting production of additional documentary evidence and calling for reports from the police Authorities, has allowed the application and turned down the request made by the Public Prosecutor, leading to the present application. The facts leading to the filing of the present application are that acting on a tip off, to the effect that one Paresh Naran Chudasama-Vala and Ashok Devayat Aahir of villages Manavadar and Mandva, Taluka Kutiyana, respectively, have kept in their possession counterfeit currency notes of the denomination of Rs. 100/- and are trying to put them in circulation, Mr. M.R. Godhaniya, P.S.I. Manavadar Police Station, arranged a raid. A yadi had been sent to the Manager of the State Bank of Saurashtra (SBS) to join the police to verify the genuineness of the currency

notes which may be found from the possession of the aforesaid persons. Two panchas were summoned and a preliminary panchnama Exh.14 was drawn, wherein it was recorded that the respondent Shri Rajubhai Vaja, Senior Head Cashier, SBS Manavadar, was present with a Scanning Machine for the purpose of verifying the genuineness of the currency notes. The Panchnama records the presence of the respondent right from the inception of the raid. During the course of the raid the above-named two persons were apprehended and currency notes were found in their possession. The respondent examined the said currency notes through his scanner and found the same to be fake currency notes.

2. It appears that during the trial the panch-witnesses to the said panchnama did not support the prosecution case and were declared hostile. Since, in the panchnama, the presence of the respondent was shown throughout the raid, necessity arose to examine the respondent as a witness in support of the prosecution case. The respondent during the course of his examination-in-chief did not support the prosecution case, hence, the learned Additional Public Prosecutor requested the trial Court to declare the witness as hostile. At this stage the respondent took out a written two page application Exh.20, along with a list of 5 documents and produced the same before the trial Court objecting to his being declared hostile to the prosecution.

3. In substance the contents of the application Exh.20 are as follows:-

On 8.11.07 he was present on duty at the Bank when at 12:00 the Manager told him on intercom and gave him in writing to go to the Manavadar Police Station with their Ultra violet machine, whereupon he went to the Police Station at 12:15 and examined the genuineness of the currency notes and gave his opinion to the police. At about 12:45 the task was over and he had returned to the Bank and resumed duties. At about 1:30 the police came to the Bank and asked him to give reasons for arriving at the conclusion regarding genuineness of the currency notes. He had orally informed the police who had taken it down in writing. This task came to be completed at about 2:00 p.m. Except for this he has not gone with the police for any other purpose.

He came to know that he was shown to be present during the course of the Panchnama through acquaintances who had read it in the newspaper, but his Manager being on leave he waited till 16.11.07 till the Manager came back and informed him about it, who in turn informed the PSI Manavadar in writing on the same day, i.e., 16.11.07 that he was not present during the drawing of the panchnama.

He, thereafter, obtained a copy of the FIR and found that his presence had been shown by the police in the Panchnama, hence his Manager informed their legal advisor and as per his advice by letter dated 22.12.07, he informed the higher police officers, the Sessions judge as well as the Judicial Magistrate, Manavadar.

Since he was actually not present during the course of seizure of the currency

notes as recorded in the Panchnama the question of his telling lies did not arise.

Since he was not with the police during the course of the search he has objection if he is declared as hostile.

4. On the said application, the learned Additional Public Prosecutor made an endorsement to the effect that as per the panchnama the said witness had taken part in the raid and had examined the currency notes at the residence of the accused No. 1 and upon comparing the same with genuine currency notes had found them to be fake and the said fake currency notes were seized in his presence and the accused were apprehended. Thereafter on 19.11.2007. the witness s statement came to be recorded, whereas now during the course of his examination he was denying his presence at the time of the raid and thereby giving false evidence. It is interalia stated that as the witness belongs to the same community as one of the accused, with a view to save him, he has subsequently concocted the documents produced by him. It is further stated that during the course of examination-in-chief such documents cannot be produced. If such course of action is permitted no criminal trial can be conducted. It is also stated that at the time when his statement had been recorded, the respondent had not produced any document and now for the first time five documents are sought to be produced along with the list of documents, which cannot be produced and cannot be exhibited and admitted in evidence.

5. Vide order dated 28.7.2008. the learned Presiding Officer, Fast Track Court, Junagadh. (hereinafter referred to as the trial Court") fixed the application for hearing. On 8.9.08, after hearing the learned Additional Public Prosecutor and the learned Advocates for the accused, the trial Court passed an order wherein it was observed that in none of the judicial precedents on which reliance had been placed upon by the learned Additional Public Prosecutor, the witness had given an application requesting that he should not be declared hostile. The trial Court further observed that in the present case the witness was discharging duties as a Cashier and wanted to state facts to the extent of the proceedings to which he was party and more particularly if the presence of the witness in the proceedings has wrongly been shown by the police and if the witness was not party to the said proceedings and he is declared hostile in connection with the said facts, there were possibilities of his being suspended from his service. Hence, as a vigilant employee and a vigilant witness, he had made the application Exh.20. The trial Court also considered the documents produced by the respondent and observed that the Bank Manager had addressed a letter dated 22.12.2007 to the then Superintendent of Police, Junagadh, however, during the course of hearing the learned Additional Public Prosecutor has not made any submissions as regards what had transpired pursuant to the said letter. The trial Court was of the view that appropriate decision on the application Exh.20 could be taken only after ascertaining as to whether the letter Mark 21/3 was received by the Superintendent of Police, Junagadh. and if he has received the same what action he has taken thereon. The trial Court, accordingly ordered that it be ascertained

as to whether the letter dated 22.12.07, addressed by Mr. M.H. Vora, Manager of the SBS, Manavadar branch, to the District Superintendent of Police, had been received by him or not, and if received, a report be submitted by 30.9.2008 as to what action has been taken thereon.

6. On 31st January, 2009, after hearing the learned Advocates for the parties the trial Court passed yet another order inter alia directing to examine as to whether the handwriting and signature on the document dated 18.2.09 (sic 8.11.07), Mark 21/1 was actually that of Mr. Malay Hariprasad Vora, the Bank Manager. The Court also issued notice qua the Bank Manager to remain present with the original register of the Bank of 8.11.07, pertaining to removal of cash amount from the safe custody.

7. Vide the impugned order dated 16th March, 2009, the trial Court turned down the request of the learned Additional Public Prosecutor to declare the respondent hostile. While declining the request, the trial Court took into consideration the affidavit filed by the P.S.I., Manavadar, pursuant to an order passed by the Court, the affidavit of the Circle Police Inspector, Manavadar, the documents produced by Malay Hariprasad Vora, the Bank Manager, the Vault Register as well as the Key Register maintained by the bank, the Bank's Attendance Register, the affidavit of the respondent,, as well as the other documents produced on record pursuant to the aforesaid orders passed by the Court, the authorities cited at the bar and the submissions advanced by the learned Advocates for the parties. The trial Court came to the conclusion that the witness R.G. Vaja had not gone to the scene of the raid, but in the discharge of his duties had examined the currency notes and had given his opinion in writing as regards the genuineness of the said notes, which had been done between 12:15 to 12:45 in the afternoon of 8.11.07. The trial Court was of the view that the witness was not supporting the prosecution to the extent the witness was shown to have gone with the police to the site of the raid, but he was certainly stating that the currency notes are fake currency notes. Hence, the witness was not trying to protect the accused. The trial Court was further of the view that the witness as a vigilant and wise employee had submitted the application Exh.20 and that in the opinion of the Court the witness had a right to put forth his case before the Court, because if the Court declares him hostile, it would be a blot on his service and that the witness had a right to move the application Exh.20.

8. Being aggrieved by the aforesaid order, the applicant. State of Gujarat has filed the present revision application.

9. Mr. U.A. Trivedi, learned Additional Public Prosecutor submitted that the respondent who is a prosecution witness had resiled from the statement made before the police u/s 161 of the Code during the course of investigation, and as such, he was required to be declared hostile to the prosecution case. It was further submitted that the production of a written application by the respondent praying that he should not be declared hostile was a clever way of resiling from his earlier statement and avoiding any action that may be taken against him by

the Bank for being declared hostile. It was pointed out that the witness came all prepared along with the application Exh.20 along with documents in support thereof. It was submitted that the documents produced by the respondent in support of his case appear to be concocted documents which have been subsequently created. Attention was invited to the Yadi dated 8.11.07 which had been sent to the Manager of the Bank informing him to come immediately to the Manavadar Police Station with the equipment for examining the genuineness of currency notes as on the basis of confidential information some individuals were carrying on suspicious activities and keeping in their possession counterfeit currency notes and were distributing them. It was submitted that if at all the endorsement made on the yadi as regards the time of receipt of the same is true and correct; on the first available opportunity the witness has not raised any objection. Attention was invited to the report dated 8.11.07 addressed by the respondent to the Manager on the reverse side of the Yadi, to submit that there was no occasion for the respondent to make such a report to the Manager, and more particularly to clarify in the said report that except for verifying the genuineness of the currency notes, he had not taken part in any other proceeding undertaken by the police. It was urged that the said report appears to have been prepared subsequently. Referring to the letter dated 16.11.07, it was pointed out that the same appears to be in the hand-writing of the respondent and has only been signed by Manager. It was further pointed out that in the said letter there is no reference to the yadi and as to when it was received, as endorsed on the yadi. It was further submitted that when the statement of the witness was recorded on 19.11.07, he had not stated anything as regards the yadi, the endorsement made thereon or even his case.

10. The learned Additional Public Prosecutor had further contended that all the record produced before the Court, was in the custody of the Bank and appears to have been created subsequently. The contents of the said documents are nothing but an after thought and all documents appear to have been created subsequently on legal advice to come out of the rigour of being declared hostile. Subsequently the attendance register was also produced to show the presence of the witness, but all these documents were within their control.

11. Next it was submitted that the presence of the respondent-witness with typed application shows his preparation even " before entering the witness box, coupled with the fact that the time of receipt of yadi and going to the Police Station is nothing but a subsequent creation which is apparent from his own notings and letter dated 16.11.07. It was further submitted that the date on which the respondent read the newspaper has not been mentioned in the application and neither has he mentioned as to when he had obtained a copy of the FIR, which assumes significance because newspaper report shows that he was present through out. It was urged that the ground that the respondent came to know about it only after he obtained a copy of the FIR, is not genuine. In conclusion, it was submitted that the respondent-prosecution witness having resiled from his previous statement made during the course of investigation was

required to be declared hostile and the impugned order declining the request of the learned Additional Public Prosecutor deserves to be quashed and set aside and the prosecution should be permitted to put questions to the respondent which can be put in cross-examination by the adverse party.

12. The revision application was vehemently opposed by Mr. P.J. Kanabar, learned Advocate for the respondent. At the outset a preliminary contention was raised regarding the maintainability of the revision application. It was submitted that the impugned order is an interlocutory order and as such in view of the provisions of Section 397 of the Code the revision is not maintainable. In support of his submission, the learned Advocate placed reliance upon a decision of the Supreme Court in *Sethuraman Vs. Rajamanickam*, .

13. Next it was submitted that the preliminary panchnama began at 9:30 a.m., whereas the Bank timings are 10:30 a.m. to 5:00 p.m. and the respondent is shown to be present at 10:45 a.m., hence he could not possibly have been present at 9:30 with the police. Drawing the attention of the Court to the fact that the respondent is alleged to have resiled from his previous statement recorded on 19.11.2007, it was submitted that when he had registered objection on 16.11.07, it was not possible that he would give a contrary statement on 19.11.07. It was submitted that in any case, whether or not to declare a witness hostile is solely within the discretion of the Court. The impugned order passed by the trial Court is a discretionary order which has been passed after considering the evidence on record and as such does not call for any intervention by this Court. In support of his submissions, the learned Advocate placed reliance on the decision of the Supreme Court in *Sat Paul Vs. Delhi Administration*, , for the proposition that the discretion conferred by Section 154 on the Court is unqualified and untrammelled and is apart from any question of 797 hostility. Reliance was also placed upon the decision of the Supreme Court in *Gura Singh v. State of Rajasthan*, AIR 2001 SC 330, for the proposition that when the witness has fully supported the case of prosecution in all material particulars, merely because he does not concur with the suggestion made by the Public Prosecutor on a single point is not sufficient to permit the witness to be cross-examined by the prosecution. It was, accordingly, submitted that as rightly noted by the trial Court, the respondent-witness has supported the prosecution case insofar as the genuineness or otherwise of the currency notes is concerned. Merely because he does not support the prosecution case as regards his presence at the time of the raid, is no reason to declare him hostile.

14. In rejoinder Mr. U.A. Trivedi learned Additional Public Prosecutor submitted that in small Taluka places it is not uncommon to call a person from his residence. The Yadi must have been sent to the residence of Manager, who in turn asked the respondent to go for the panchnama. In the circumstances, nothing much turns on the timing in the Panchnama. As regards the maintainability of the revision application, it was submitted that an order declaring or not declaring a witness hostile, is a final order and not an

interlocutory one. The proceeding insofar as whether or not to declare the witness hostile stands terminated by the said order. It was submitted that even if revision is held to be not maintainable the Court has ample powers u/s 482 of the Code to interfere with the impugned order to secure the ends of justice. It was further submitted that insofar as exercise of powers u/s 401 of the Code is concerned, there is no bar against challenge to an interlocutory order.

15. After hearing the matter at length, the judgment- was reserved. However, while examining the matter, this Court was of the view that the questions as to whether the trial Court could have entertained the application Exh.20 filed by the respondent objecting to his being declared hostile; whether the witness who according to the party which had called him had resiled from his previous statement can be heard on the question as to whether the party who has "called him should put questions to him which can be put to a witness in cross-examination by the adverse party; and also whether it was permissible for the trial Court to adopt the procedure adopted by it while considering the application; need to be addressed. Accordingly the matter was again notified for hearing and after apprising the learned Advocates for the parties as regards the said issues, the matter was fixed for hearing on 11th January, 2010 on the aforesaid limited aspect.

16. Mr. Kanabar, learned Advocate for the respondent submitted that the respondent being a Government employee would have to face adverse consequences in the event he is declared hostile, inasmuch as he would be exposed to disciplinary proceedings. It was submitted that a witness is a party to the extent that he has to save his skin from being declared hostile and to that extent he is certainly an interested party. It was submitted that the trial Court has exercised powers u/s 154 of the Evidence Act which are in the nature of discretionary powers in the manner that it deemed fit. In the circumstances this is not a case where interference is called for. Reliance was placed upon the decision of the Apex Court in *Shri Rabindra Kumar Dey Vs. State of Orissa*, and more particularly to the contents or paragraphs 10 and 11 thereof, for the proposition that it may be 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 u/s 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. The attention of the Court was invited to the following observations made in *Dahyabhai Chhaganbhai Thakker Vs. State of Gujarat*, , which have been reproduced in the said decision: Section 154 does not in terms, or by necessary implication confine the exercise of the power of 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." Reliance was also placed upon a decision of the Madras High Court in *S. Murugesan and 2 others Vs. S. Pethaperumal and 2 others*, , for the proposition that Section 154 confers a discretion upon the Court to permit cross-examination

of a witness and it does not contain any conditions or guidelines which may govern exercise of such discretion. It was, accordingly, submitted that it was permissible for the trial Court to exercise discretion in the manner it thought best and that if the trial Court thought it fit to make an Inquiry into the matter by permitting production of documents in support of the say of the witness as well as calling for reports from the investigating agency, it was only a manner of exercising discretion, hence no fault can be found in the procedure followed by the Court for deciding whether or not to allow the party concerned to cross-examine its own witness. It was submitted that exercise of discretion would include permitting the witness to produce the documents which he is relying upon. Inviting attention to the provisions of Section 311 of the Code, it was submitted that if it is found necessary by the Court at any point of time during the course of the trial, the witness can be recalled, hence no intervention is warranted at the hands of this Court. Reliance was placed upon the decision of the Apex Court in *Zahira Habibulla H. Sheikh v. State of Gujarat*, AIR 2004 SC 3114, for the proposition that if a criminal Court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine, by becoming a participant in the trial evincing intelligence, active interest and eliciting all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. It was submitted that if for the purpose of arriving at the truth it was necessary to conduct the Inquiry made by the trial Court, the trial Court was perfectly justified in doing so. Reliance was placed upon the decision of the Apex Court in *Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others*, for the proposition that the power u/s 482 of the Code being an extraordinary one it has to be exercised sparingly. Likewise, the decision of the Apex Court in *Laxmi Bai Patel Vs. Shyam Kumar Patel*, , was cited for the proposition that power u/s 482 of the Code can be exercised by the High Court in rare cases and in exceptional circumstances where the Court finds that permitting the impugned order to remain undisturbed will amount to abuse of process of the Court and will result in failure of justice.

17. Mr. U.A. Trivedi, learned Additional Public Prosecutor submitted that it should be open for the applicant to challenge the impugned order either by way of revision u/s 397 or u/s 482 of the Code or Article 226 of the Constitution of India. The applicant cannot be rendered remediless if it desires to challenge the impugned order. Even in case, revision is not maintainable, the Court can always exercise jurisdiction either u/s 482 of the Code or under Article 226 of the Constitution, else the order would remain unchallenged causing grave prejudice to the prosecution case.

18. In the background of the facts and contentions noted above, in the opinion of this Court the moot question that arises for consideration is as to whether a witness has any say on the question as to whether or not he should be declared hostile. From the facts noted hereinabove, it is amply clear that during the course of his examination-in-chief the respondent did not support the

prosecution case, consequently the learned Additional Public Prosecutor requested the Court to declare the witness hostile to the prosecution case. At this stage the respondent produced a typed application, the contents of which have been noted hereinabove, raising objections against being declared as a hostile witness. On the said application the trial Court passed orders from time to time and then after considering the documentary evidence produced on record including affidavits made by the police officers, recorded findings on the veracity of the say of the witness as well as the prosecution case.

19. In this regard it may be germane to refer to the law laid down by the Supreme Court as regards the exercise of powers u/s 154 of the Evidence Act.

20. In *Shri Rabindra Kumar Dey Vs. State of Orissa*, , the Supreme Court held 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 u/s 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.

21. In *Sat Pal v. Delhi Administration* (supra), the Supreme Court held thus:

"37. xxxxxx The discretion conferred by Section 154 of the Court is unqualified and untrammelled, and is apart from any question of hostility". It is to be liberally exercised whenever the Court from the witnesses' demeanour, temper, attitude, bearing, or tenor and tendency of his answers, or from a perusal of his previous inconsistent statement, or otherwise, thinks that the grant of such permission is expedient to extract the truth and to do justice. The grant of permission does not amount to an adjudication by the Court as to the veracity of the witness. Therefore, in the order-granting such permission, it is preferable to avoid the use of such expressions, such as declared hostile", declared unfavourable", the significance of which is still not free from the historical cobwebs which, in their wake bring a misleading legacy of confusion, and conflict that had so long vexed the English Courts. "

42. The fallacy underlying this view stems from the assumption that the only purpose of cross-examination of a witness is to discredit him: it ignores the hard truth that another equally important object of cross-examination is to elicit admissions of facts which would help build the case of the cross-examiner. When a party with the leave of the Court, confronts his witness with his previous inconsistent statement, he does so in the hope that the witness might revert to what he had stated previously. If the departure from the prior statement is not deliberate but is due to faulty memory or a like cause, there is every possibility of the witness veering round to his former statement. Thus, showing faultiness of the memory in the case of such a witness would be another object of cross-examining and contradicting him by a party calling the witness. In short, the rule prohibiting a party to put questions in the manner of cross-examination or in a leading form to his own witness is relaxed not because the witness has already forfeited all right to credit but because from his antipathetic attitude or otherwise, the Court feels that for doing justice, his evidence will be more fully given, the truth more effectively extricated and his credit more adequately tested by questions put in a more pointed, penetrating and searching way."

22. The principles which can be culled out from the abovenoted judgments as regards exercise of powers u/s 154 of the Indian Evidence Act are:

(i) Section 154 of the Evidence Act confers a judicial discretion on the Court to permit cross-examination.

(ii) The discretion must be judiciously and properly exercised in the interests of justice. 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.

(iii) 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.

(iv) 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.

(v) The discretion conferred by Section 154 of the Court is unqualified and untrammelled, and is apart from any question of "hostility". It is to be liberally exercised whenever the Court from the witnesses demeanour, temper, attitude, bearing, or tenor and tendency of his answers, or from a perusal of his previous inconsistent statement, or otherwise, thinks that the grant of such permission is expedient to extract the truth and to do justice, vi. The grant of permission does not amount to an adjudication by the Court as to the veracity of the witness.

23. From the aforesaid principles it is apparent that while considering the request of a party to declare its witness hostile, what the Court may look into is 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 and may keep in view the following factors viz- the witness s demeanour, temper, attitude, bearing, or tenor and tendency of his answers, or from a perusal of his previous inconsistent statement, or otherwise, and exercise its discretion as to whether or not to allow the prosecution to put questions to the witness which could be put in cross-examination. Applying the aforesaid principles to the facts of the present case, it is apparent that the trial Court instead of restricting itself to the above referred parameters has not only entertained an application made by the witness raising objections against his being declared hostile, but has adopted a novel course and permitted the witness to lead evidence to establish the veracity of his say. In the opinion of this Court, the expression 800otherwise used along with the other factors, has to be considered in the light of the preceding words and cannot be stretched so far as to include a request of the witness to consider his objections against being treated as a hostile witness or detailed Inquiry to ascertain the veracity of the say of the witness.

24. Section 154 of the Evidence Act interalia lays down that the Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party. Section 155 of

the Evidence Act, inter alia provides that the credit of a witness with the consent of the Court may be impeached, by the party who calls him, by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted. In the present case, it is the case of the prosecution that the respondent witness has during the course of his examination-in-chief given testimony which is inconsistent with the former statement made by him. Accordingly, the prosecution has sought for permission to declare the witness hostile so as to enable the prosecution to put questions to him which might be put in cross-examination by the adverse party and bring out the inconsistencies in his testimony qua his previous statement. On the request made by the prosecution, it was for the trial Court to consider the same keeping in view the parameters laid down by the Supreme Court and thereupon exercise its discretion as to whether or not to declare the witness hostile or in other words whether or not to permit the prosecution to put questions to the said witness which could be put to him during the course of cross-examination by the adverse party. However, on the question as to whether or not the witness should be declared hostile, the concerned witness has no say. It is a matter between the party concerned and the Court, but the concerned witness cannot be heard on the question as to whether or not he should be declared hostile. Considering the issue from a wider perspective, it would open flood gates whereby any witness during the course of the trial may resile from his previous statement and then try to avoid being declared hostile by leading evidence in support of the veracity of his claim. The trial Court, then, as in the present case, instead of proceeding with the trial would embark upon an Inquiry as regards the veracity of the say of the witness, which would not only unduly delay the trial but is otherwise not contemplated either under the Evidence Act or under the Code of Criminal Procedure. Affording an opportunity of hearing to a witness prior to declaring him hostile de hors the provisions of law would tantamount to stretching the principles of natural justice too far. Declaring a witness hostile cannot be said to be an order against the witness, so as to afford an opportunity of hearing to the witness. The moment a witness does not adhere to his previous statement on a material aspect, the party that calls him has a statutory right to put questions which can be put in cross-examination to such witness with the permission of the Court. It is for the Court concerned to examine the material on record to ascertain whether the witness is not speaking the truth or has exhibited an element of hostility to the party for whom he is deposing and then exercise discretion whether or not to allow the party calling the witness to cross-examine him. In this entire exercise, the witness is not required to be heard. This is where the trial Court has fallen in error. The learned Advocate for the respondent is right in contending that the order passed by the trial Court is a discretionary order. But such discretion has to be exercised within the framework of law and not de hors it, as had been done in the present case.

25. As can be seen from the application Exh.2(), it does not mention the provision under which the same is made. Considering the nature of the

application the same cannot be traced to any of the provisions of the Code or the Evidence Act. Criminal trials are to be conducted in the manner laid down under the Code of Criminal Procedure, 1973 and the Evidence Act. Neither does the Code nor the Indian Evidence Act provide for a witness being heard prior to him being declared hostile. Once the witness does not support the case of the party calling, it is the prerogative of the party concerned to request the Court to permit it to put any questions to the said witness which can be put in cross-examination by the adverse party. The trial Court, on the basis of the previous statement of the said witness and attendant circumstances which have come on record is required to form an opinion as to whether or not to grant the said request. On the question of declaring a witness hostile, the concerned witness has no say. By permitting such course of action, the trial Court has clearly committed a jurisdictional error attracting the revisional powers of this Court.

26. In the circumstances, the trial Court ought not to have entertained the application made by the witness objecting to his being declared hostile. In fact the trial Court did not even rest at that but embarked upon a detailed time consuming Inquiry, permitting the witness to lead evidence in support of his say along with documentary evidence and even directed the police authorities to submit their report on the application made by the Manager. During the course of trial, the documents which are to be taken into consideration are the documents referred to in the charge-sheet, copies of which have been supplied to the accused. In case production of any document is necessary or desirable for the purpose of trial, the Court may issue summons to the person in whose possession or power such document is or is believed to be, requiring him to attend and produce it, or to produce it at the time and place stated in the summons or order. At best, even if it is assumed that the trial Court has invoked the powers u/s 91 of the Code, such power could have been exercised for production of existing documents in the possession of any person, namely the direction to the Bank for production of documents in its possession. However, the power u/s 91 could not have been invoked to call for reports from the police authorities and affidavits of police officers which were to be made subsequent to the passing of the order. Such direction to submit a detailed report on the action taken on the letter written by the Bank Manager, if necessary along with the affidavits would certainly not fall within the ambit of Section 91 of the Code. Also the witness could not have been permitted to place on record documents in support of his application, except in accordance with the provisions of law. In case any Inquiry in connection with the case is to be made, further investigation is permissible only under the provisions of Section 173(8) of the Code. Any Inquiry to be made by the police has to be under the said provision. The Inquiry which was directed to be made by the trial Court cannot be traced to any provision of the Code. In the circumstances, in the opinion of this Court, it was not permissible for the trial Court to adopt such course of action. Section 311 of the Code and Section 165 of the Evidence Act, between them confer jurisdiction on the trial Court to act in aid of justice. However, on the facts of the present

case, the powers exercised by the trial Court do not fall within the ambit of either of the two provisions. Moreover, as held by the Apex Court in the decisions cited hereinabove the grant of permission to declare a witness hostile does not amount to an adjudication by the Court as to the veracity of the witness, whereas in the facts of the present case prior to passing the impugned order refusing the request of the Additional Public Prosecutor to declare the witness hostile, the trial Court instead of relying on the usual factors which are to be taken into consideration has embarked upon a detailed enquiry as regards the veracity of the claim of the witness, which is alien to the provisions of the Code. The trial Court, was, therefore, not justified in entertaining and allowing the application Exh.20.

27. True it is that it is the discretion of the trial Court whether or not to declare a witness hostile. However, in the instant case when the trial has already been delayed for almost a year, this Court does not deem it fit to remand the matter to the trial Court on the question as to whether or not the respondent-witness should be declared hostile. A perusal of the deposition of the respondent-witness indicates that he has not supported the prosecution case and has resiled from his previous statement recorded by the police. According to the trial Court, the said witness has not totally resiled from his previous statement, inasmuch as he has stated that he had examined the currency notes and found them to be fake. However, no such statement is found in the deposition of the said witness. It is in the application Exhibit 20 that the witness has stated that pursuant to the requisition sent to the bank, he had gone to the Police Station with the ultra-violet machine and had examined the currency notes at the Police Station. Insofar as the deposition is concerned, it is apparent that he has totally resiled from his previous statement. The application Exh.20 certainly could not have been treated as part of the testimony of the witness to hold that the witness has to a certain extent supported the prosecution case. While exercising discretion u/s 154 of the Evidence Act the Court is required to consider whether or not there is any indication of the witness making a statement inconsistent on a material point with his previous statement. In the present case on the face of it, it is apparent that entire deposition of the witness is inconsistent with his previous statement, hence permission u/s 154 could not have been refused. In the circumstances the trial Court was not justified in declining the request to declare the respondent to be a hostile witness. The decision of the Supreme Court in *Gura Singh v. State of Rajasthan* (supra) would also not come to the aid of the respondent as in the facts of the said case, the witness had fully supported the prosecution case and it was only on a single point that he did not concur with the suggestion made by the Public Prosecutor, which according to the Court was not sufficient to permit the witness to be cross-examined by the prosecution, whereas in the facts of the present case the witness has not supported the prosecution case on material aspects. The decision of the Apex Court in *Dahyabhai Chhaganbhai Thakkar v. State of Gujarat*, (supra) also does not support the case of the respondent as in the said case the Apex Court was

concerned with the stage at which Court can exercise powers u/s 154 of the Evidence Act.

28. Insofar as the documents on which reliance has been placed by the respondent in support of his case, this Court does not deem it fit to comment on the same. However, the endorsement on the reverse side of the yadi, allegedly made on 8.11.2007 certainly does not inspire confidence as on that day the respondent had no reason to make any such endorsement, more particularly stating that he had not taken part in any proceeding except that stated in the endorsement. The letter dated 16th November, 2007 on which strong reliance has been placed by the trial Court, though signed by the Manager, when compared with the endorsement of the aforesaid yadi, appears to be in the handwriting of the respondent. Besides, in the affidavit dated 6.10.08 filed by the P.S.I., Manavadar based on Inquiry made by him, it has been categorically stated that the respondent-witness was present during the course of the raid and had examined the currency notes at the site of the raid. Thus, it is word against word. Hence, till the entire evidence has been recorded, the trial Court could not have adjudicated on the veracity of the claim of the witness.

29. As regards the maintainability of the revision application. Section 397 of the Code provides for the exercise of powers of revision by the Court to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed and, as to the regularity of any proceedings of an inferior Court. In the present case it is the regularity of the proceeding of the trial Court which is in question before this Court, inasmuch as the point for determination before this Court is whether the application Exh.2() which has been considered while passing the impugned order could have been taken into consideration by the trial Court and as to whether it was permissible for the trial Court to adopt the procedure which it had adopted while considering the said application. The Supreme Court in Sethuraman Vs. Rajamanickam, , on which reliance has been placed by the learned Advocate for the respondent, has held thus: Hie orders passed by the trial Court refusing to call the documents and rejecting the application u/s 311 CrPC, were interlocutory orders and as such, the revision against those orders was clearly barred u/s 397(2) CrPC. The trial Court, in its common order, had clearly mentioned that the cheque was admittedly signed by the respondent-accused and the only-defence that was raised, was that his signed cheques were lost and that the appellant complainant had falsely used one such cheque. The trial Conn also recorded a finding that the documents were not necessary. This order did not. in any manner, decide anything finally. Therefore, both the orders i.e. one on the application u/s 91 CrPC for production of documents and other on the application u/s 311 CrPC for recalling the witness, were the orders of interlocutory nature, in which case, u/s 397(2), revision was clearly not maintainable. Under such circumstances, the learned" Judge could not have interfered in his revisional jurisdiction. The impugned judgment is clearly incorrect in law and would have to be set aside. "

30. In the said decision, the orders which were subject matter of challenge were under the provisions of Section 311 and 91 of the Code which were in the nature of interlocutory orders and there was no jurisdictional error in entertaining such applications. In the present case, the impugned order finally decides the veracity of the version of the witness, viz. he was not present at the time of making of the panchnama, which seriously prejudices the prosecution case. Besides, as already discussed hereinabove, by entertaining the application Exh.20 as well as allowing the witness to lead evidence in support of his say, the trial Court has clearly committed a jurisdictional error which would clearly attract the revisional jurisdiction of this Court. The above referred decision would therefore not carry the case of the respondent any further. The contention that the revision application is not maintainable, therefore, does not merit acceptance. Besides, even in case revision were not maintainable, as held by the Apex Court in *Laxmi Bai Patel v. Shyam Kumar Patel* (supra) when on examination of the record the High Court finds that there is grave miscarriage of justice or abuse of the process of the Courts or the required statutory procedure has not been complied with or there is failure of justice or order passed or sentence imposed by the trial Court requires correction, it is but the duty of the High Court in exercise of its inherent power u/s 482 of the Code to correct it at the inception lest grave miscarriage of justice would ensue.

31. Before concluding it may be apt to refer to the following observations made by this Court in *State of Gujarat Vs. Pirubhai Jivabhai Mistry*, wherein the Court was dealing with an order passed by the trial Court dismissing the application made by the prosecution seeking to reexamine a prosecution witness in order to put leading questions in the nature of cross-examination to him: 805 Whilst passing the interim order of nature like the one in the instant case, in the midst of trial, the trial Judge is required to be quite careful and circumspect enough so as not to deny fair trial to the prosecution as such orders when challenged, unnecessarily delays the trial to the greatest detriment and prejudice once again to the prosecution which with little care on the part of the learned trial Judge could have been easily avoided."

32. For the foregoing reasons, the application succeeds and is accordingly allowed. The impugned order dated 16th March, 2009 allowing the application Exh.20 and declining the request of the learned Additional Public Prosecutor to declare the respondent-witness hostile is hereby quashed and set aside. Permission is granted u/s 154 of the Evidence Act to put questions to the respondent-witness which might have been put to him in cross-examination by the adverse party. The trial Court which has already wasted considerable time in deciding the question as to whether or not the witness should be declared hostile shall now proceed with the case as expeditiously as possible. Rule is made absolute accordingly. It is clarified that this Court has not expressed any opinion on the merits of the case, or the veracity of the say of the respondent-witness. The trial Court shall proceed with the trial without in any manner being prejudiced by any observation made in this judgment. It is further clarified that

insofar as the evidence of the respondent is concerned, while deciding the case the trial Court shall rely only upon the evidence which is brought on record during the course of examination-in-chief and cross-examination of the respondent and shall not place reliance on any additional material which was brought on record while hearing the application Exh.20. However, these observations shall not come in the way of the trial Court in exercising powers u/s 91 and 311 of the Code or Section 165 of the Evidence Act if it so deems fit during the course of trial for bringing on record any document or thing which is necessary or desirable for the purpose of the trial or to summon any person as a witness if the evidence of such person appears to the trial Court to be essential to the just decision of the case.