

(1999) 08 CAL CK 0008
In the Calcutta High Court
Case No : C.R.R. No. 285 of 1998

State of West Bengal

APPELLANT

Vs

Arunesh Pathak and Others

RESPONDENT

Date of Decision : 24-08-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 17
Criminal Procedure Code, 1973 (CrPC) — Section 397, 401, 482
Evidence Act, 1872 — Section 136, 138, 154, 165
Penal Code, 1860 (IPC) — Section 201, 302, 34, 498A

Citation : (2000) CriLJ 1039 : (2000) 1 RCR(Civil) 508 : (2000) 1 RCR(Criminal) 336

Hon'ble Judges : Dibyendu Bhusan Dutta, J

Bench : Single Bench

Advocate : S. Mukherjee and R. Das, for the Appellant; Moharam Hossain, (for Nos. 1 and 2) and S.N. Pathak, (for No. 4), for the Respondent

Judgement

Dibyendu Bhusan Dutta, J.—Order No. 26 dated 20-11-97 passed by the Id. Seventh Additional Sessions Judge at Alipore holding the Sessions Trial being St. No. 1 (1) of 1997 arising out of G.R. Case No. 1451 of 1995 under Sections 302/34/201/498A of the IPC forms the subject-matter of challenge in the instant revisional application filed at the instance of the prosecution under Sections 397/401/482 of the Cr. P.C.

2. Dr. P.B. Das, the autopsy surgeon, was examined-in-chief as P.W. 2 by the prosecution on 22-5-97, 4-6-97, 7-7-97 and 8-7-97 and was cross-examined by the defence on 8-7-97, 22-7-97, 23-7-97, 23-9-97 and 24-9-97. After the cross-examination of the witness was over, the prosecution prayed before the Court below for time till 30-9-97 for filing a petition for recalling the witness for re-examination. The formal application was thereafter filed and the defence opposed the application by filing a written objection dated 7-11 -97. Upon hearing the prosecution and the defence and consideration of the deposition of the witness concerned, the trial Court was pleased to reject the prayer of the prosecution for

re-examination of the witness by the impugned order. On a perusal of the impugned order it appears that the trial Court was pleased to reject the prayer for re-examination on two grounds first, the questions required to be put to the witness concerned during the proposed re-examination have not been specifically mentioned in the application filed by the prosecution and secondly, no confusion appeared to have been raised during the cross-examination of the witness so as to necessitate re-examination.

3. The point for my consideration would be whether the Id. Trial Judge was justified in refusing to permit the prosecution to recall the autopsy surgeon for the re-examination.

4. In the revisional application it has been alleged on behalf of the prosecution that the examination of the autopsy surgeon revealed amongst others, the following lapses on the part of the witness while holding the post mortem examination.

(i) No step was taken by the doctor to find out "time since death" as suggested by Taylor and Lyons on Medical Jurisprudence.

(ii) "The cooling effects" which are required to be noted by a doctor holding post mortem examination have been ignored in the instant case as a result of which "time since death" could not be ascertained.

(iii) No step was taken by the doctor to find out the time of death in any other manner.

(iv) The temperature of the dead body was not recorded by the doctor at the time of holding the post mortem examination.

It is the further allegation of the prosecution that certain serious contradictions have cropped up in the evidence of the doctor during his examination-in-chief as well as cross-examination. Following are some examples cited in the revisional application.

(i) The witness deposed in his examination-in-chief to the effect that subdural haemorrhage is fatal but in cross-examination he deposed that sub-dural haemorrhage may or may not be fatal.

(ii) In examination-in-chief the doctor stated that there were extensive burn injuries on the dead body but in cross-examination, he specified the quantum of burn injuries as "cent percent burn injuries".

(iii) The doctor stated in the examination in chief that the apparels of the dead body were seized by him suggesting that there could not be "cent percent burn injuries.

(iv) In his examination-in-chief the doctor said that the burn injuries were of second degree with are skin-deep and not fatal but in cross-examination he contradicted himself and affirmed that the death might have been caused by

burn injuries.

(v) During cross-examination he also agreed to the suggestion that the death might have been caused by an accidental fall which according to the prosecution could not be possible in the circumstances in which the dead body was found.

According to the prosecution, the doctor has directly and indirectly supported the defence suggestion in every stage and that his evidence is full of confusions and contradictory statements and it is for the reason of getting at the truth that the prosecution was compelled to ask for his recall for re-examination.

5. Mr. Mukherjee, the Id. senior Counsel appearing on behalf of the prosecution, placed his strong reliance upon what has been stated on the scope and object of "re-examination" u/s 138 of the Evidence Act in a treatise named the Law of Evidence, 18th Edition by Hon"ble Mr. Justice Hidayatullah and others. Following are the passages at page 387 on which the reliance was placed.

Re-examination.-- The object of re-examination is to afford the party calling a witness an opportunity of filling in the lacuna or explaining the inconsistencies which the cross-examination has discovered in the examination-in-chief of the witness Sections It is accordingly limited to the explanation of matters referred to in cross-examination (S. 138)....

The party who calls a witness has the right to re-examine him on all matters arising out of the cross-examination for the purpose of reconciling any discrepancies that may exist between the evidence on the examination-in-chief and that which has been given in cross-examination; or for the purpose of removing or diminishing any suspicion that the cross-examination may have cast on the evidence-in-chief; or to enable the witness to state the whole truth as to matters which have only been partially dealt with in cross-examination.

In re-examination the party has a right to ask all questions which may be proper to draw forth an explanation of the meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful and also of the motive, or provocation, which induced the witness to those expressions; but he has not right to go further, and to introduce matter new in itself and not suited to explain either the expressions or the motives of the witnesses. If the counsel chooses to cross-examine the witness as to facts which were not admissible in evidence, the other party has a right to re-examine him as to the evidence so given. If a question has been omitted in the examination-in-chief, and cannot, in strictness, be asked on re-examination as not arising out of the cross-examination, it is usual for counsel to request the Judge to make inquiry and such a request is generally granted. If the cross-examination is ineffective, no re-examination is, as a rule, made.

6. Mr. Mukherjee did also refer to the observations appearing at page 131 of Taylor's Principles and Practice of Medical Jurisprudence under the caption "cooling of the body". Mr. Mukherjee has also referred to paragraph 35 of the

Supreme Court decision reported in *Tanviben Pankaj Kumar Divetia Vs. State of Gujarat*, He further submitted that there is nothing in the Evidence Act which makes it obligatory upon a party seeking re-examination of a witness to specify the particular questions which it desires to put to the witness during the re-examination before the Court and that the Id. Sessions Judge was not justified in taking an exception to the omission on the part of the prosecution in specifying the questions to be put to the witness, in the application that was filed by it for re-examination of the witnesses. Mr. Mukherjee urged that Section 138 of the Evidence Act gives the party calling a witness the right to re-examine the witness after his cross-examination is over and the Id. trial Judge was not justified in refusing to allow the prosecution to exercise such right in relation to the autopsy surgeon for the purpose of filling in the lacuna or explaining the inconsistencies that have been brought out in his evidence during the cross-examination by the defence.

7. On a plain reading of Section 138 of the Evidence Act, it becomes clear that it does give a right to the party calling a witness to re-examine him after his cross-examination if it so desires. But such right is circumscribed by the limits prescribed in the third paragraph of the section. The said paragraph provides that 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. The third paragraph specified the object and scope of re-examination and it is clear that the object is to give an opportunity to reconcile the discrepancies, if any, between the statements in examination-in-chief or to explain any statement inadvertently made in cross-examination or to remove any ambiguity in the deposition or suspicion cast on the evidence by cross-examination. It goes without saying that if there is no ambiguity or where there is nothing to explain, questions put in re-examination with the sole object of giving a chance to the witness to undo the effect of previous statements can never be allowed. The right to re-examine appears to be absolute so far as it is directed to the explanation of matters referred to in the cross-examination. The question of taking the permission of the Court would arise only if new matter is introduced in re-examination and if the occasion so arises for seeking such permission and if new matter is, by the permission of the Court, introduced during re-examination, then the adverse party gets a right to further cross-examine the witness upon the matter which is introduced at the stage of re-examination. The occasion for seeking permission of the Court during re-examination may also arise if the witness turns out to be hostile or adverse to the party calling him for the purpose of putting questions in the nature of cross-examination which is not otherwise permissible during the examination-in-chief or re-examination and Section 154 of the Evidence Act vests the Court with the discretion to grant such permission only when the Court is satisfied that the witness is one who from the manner in which he gives his evidence shows that he is not desirous of telling the truth to the Court. Section 154 is wide in its scope and the discretion can be exercised

whenever the circumstances demand it and also at the stage of re-examination, subject, however, to the condition that the adverse party must then be given further opportunity to cross-examine the witnesses. Under ordinary circumstances it is not necessary or permissible to allow a witness once examined and dismissed by a party to be recalled, for it is expected that the advocate will interrogate him on all material points touching his case, but unforeseen situation may however develop and there may also be inadvertent omissions. In such cases, the Court has a discretion to allow a witness to be recalled. Of course, no one can be allowed to fill up lacuna in evidence under the pretext of a recall. Circumstances may so arise when it may be necessary in order to come at the truth of the case to examine the witness as to new matters and after that, there may be a second cross-examination. Of course, the Court, at its discretion, may permit a witness to be examined by either party over and over again at any time during the trial, but it will have to take care to exercise the discretion so as not to suffer any advantage to be gained or trick or artifice. If a question has been omitted in examination-in-chief, as strictly speaking not arising out of the cross-examination, it is usual for the counsel to request the Judge to make an inquiry and such a request is generally granted. Under Order 18, Rule 17, C. P.C. the Court has always the power to recall a witness at any stage of the proceeding and u/s 165 of the Evidence Act it has also the power to put any question it pleases, in any form. There is nothing in Section 138 of the Evidence Act to indicate that a party entitled to recall his witness for re-examination is required to spell out in advance to the Court the particular questions which it would be putting to the witness during such re-examination. Indeed, Section 138 gives a statutory right to the party calling a witness to re-examine him after the cross-examination. Such right is however not unlimited. It is qualified to the extent that the re-examination is required to be confined only to the explanation of matters referred to in cross-examination and if new matter is however required to be introduced in re-examination, the party does not have the absolute right to do so. It has to seek the permission of the Court for introducing new matter and if it is allowed to be introduced by the Court, the adverse party has the right to further cross-examine that witness upon that matter. Section 136 of the Evidence Act empowers the Judge to allow only such evidence to be given as in his opinion, relevant and admissible and in order to ascertain the relevancy of the evidence which a party proposes to give, be it during the examination-in-chief or cross-examination or even re-examination, the Judge may ask the party proposing to give such evidence in what manner the alleged fact, if proved, would be relevant and it would then be the duty of the Judge to decide as to its admissibility. The question of asking the prosecution to satisfy the Court as to how the evidence which it proposes to give during re-examination of the witness concerned would be relevant or admissible would really arise only at the time when the evidence is offered to be given. The application that was filed on behalf of the prosecution for re-examination of PW-2 did contain materials sufficient to indicate the necessity for re-examination. The Id. Judge cannot be said to have been justified in refusing to allow the re-

examination which has been sought for by the prosecution only on the ground that the exact questions that would be put to the witness during such re-examination have not been precisely specified in the application. The prosecution will not be free to re-examine the witness in any manner it likes simply because it has the right to re-examine. The relevancy and the admissibility of the evidence that is sought to be offered during the re-examination will have to be determined by the Court before it admits the evidence and the prosecution will have to satisfy the Court at the stage it offers the evidence during the re-examination as to how such evidence would be relevant and admissible. But as the materials on record stand and particularly regard being had to the manner in which the witness concerned had deposed during his examination-in-chief as well as cross-examination, it would be too much to hold that actually no confusion has arisen in the evidence of the witness during his cross-examination, or for that matter, there is absolutely nothing to explain what has been elicited from the witness during the cross-examination. In this view of the matter, I must hold that the impugned order by which the Id. Court below did totally refuse to allow the prosecution to exercise its statutory right for re-examination u/s 138 of the Evidence Act is not sustainable in law. The impugned order is, therefore, set aside with a direction upon the Id. Sessions Judge to recall the PW-2 for re-examination by the prosecution, in accordance with law, in the light of the observations made above, and also to proceed with the trial and conclude the same as expeditiously as possible. The revisional application is thus disposed of on contest.