



CROSS EXAMINATION AND THE INDIAN JUDICIARY

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Witness as Bentham said are the eyes and ears of justice. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer constitutes a fair trial.

The order by which a witness would be examined by both the parties to the lis is prescribed under Section 137 of Indian Evidence Act. As per the same a witness who has been produced by a party to prove his case will be examined by such party in the chief examination which would be followed by a cross examination by the adverse party for challenging the veracity of the evidence adduced by such witness during the chief examination. Thereafter the party who is producing the witness can conduct a re-examination for clarifying the ambiguities arising out of the evidence of such witness during the cross-examination.

Ordinarily a party who produces a witness expects the witness to give evidence in the party's favour. But there are instances where the witness who was called by a party gives his/her evidence in contrary to the interest of such party. He can turn against the party during his/her chief examination itself or can resile from his stand made during his chief examination, while he/she is cross examined. In such a case, the party calling such a witness will have to get rid of the adverse evidence which was adduced by his witness. If not, such adverse evidence can be binding and can in turn be detrimental to the interest of such party to the lis who produces the

witness. The solace to such party is provided under section 154 of the Indian Evidence Act. A plain reading of section 154 of the Indian Evidence Act would show that, the party when allowed permission is allowed to put questions to his/her witness which can only be asked in the cross examination by the adverse party. This means that the party who has called the witness is allowed to ask him/her leading questions¹, questions meant to contradict his/her present statement from a previous statement made in writing relevant to the matter in issue², questions to test the veracity of his/her deposition³ and also questions put forth to impeach the credibility of the witness⁴.

It can be squarely held from the wordings of the section that, whether or not to give permission to a party to cross examine the witness according to this provision is **completely the discretion of the courts.**

Are there any conditions or principles which may govern the permission being provided for cross examination under S.154 of the Indian Evidence Act?

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. However it is a well settled dicta that this discretion must be judiciously and properly exercised in the interests of justice.

To confine the operation of section 154 to a particular stage in the examination of a witness is to read the words in the section which are not here. The three judge bench of the Hon'ble Supreme court made in **Dhayabhai Chhanganbhai Thakkar v State of Gujarat**⁵ is required to be noticed in regard to the same:



“S.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 perusal of the court’s position in the above mentioned case would show that the witnesses had categorically stated before the police and the chief examination that the accused had committed the murder, but in the cross examination they resiled from that statement and made out a new case before the Court wherein accused was insane. Thus it is made clear that before a party is given permission to cross examine his witness, 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. Therefore the Court must 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.⁶

Arriving at the truth is the essential function of the court, because the truth of the matter maybe unravelled at any stage of the case, such a function cannot be curtailed to any stage or period. The discretion conferred by section 154 on the court is unqualified and

untrammelled and is apart from the question of hostility. It is to be liberally exercised whenever the court from the witness’s **demeanour, attitude, bearing, or the 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.⁷

It can be clearly inferred from the above mentioned extracts that though it is difficult to lay down a universal application as to when and in what circumstance the court will be entitled to exercise the discretion vested in them. The courts are under a legal obligation to exercise this discretion in a judicious manner by proper application of mind and in keeping view of the circumstances.

Whether in Indian courts the grant of permission to cross exam one’s own witness by a party is conditional on the witness being declared “adverse” or “hostile”?

Mere permission to cross-examine is not equivalent to a conclusion that the witness is a hostile one. In determining the element of hostility in a witness the courts would have to be very cautious and should enquire into the inner psyche or idiosyncrasies of a witness. The court ought to discern this element of hostility from:

1. His/her temper, demeanour, bearing etc. in the witness box which shows an indication of aversion to the party calling him/her.
2. He/she is adverse and hostile when he/she is making statements contrary to his/her oath, knowledge, earlier deposition in front of a court or any authority etc.



3. The cues and signs that the witness is not desirous of giving evidence and trying to suppress the truth in order to help the other party.

The position of the Indian law with respect to declaring a witness as “hostile” or “adverse” which is different from the English law has been rightly held by the Hon’ble Supreme Court of India in **Gura Singh vs The State of Rajasthan**⁸, where it states that under the English Act of 1865, a party calling the witness can cross examine and contradict a witness in respect of his previous inconsistent statements with the leave of the court, only when the court considers the witness to be 'adverse'. As already noticed, no such condition has been laid down in S.154 of the Indian Act and the grant of such leave has been left completely to the discretion of the court, the exercise of which is **not fettered by or dependent upon the 'hostility' or 'adverseness' of the witness.**

The fallacy underlying the view pertaining to declaring of witness as hostile or adverse prior to the permission granted under S.154 of the Indian Evidence Act come from the supposition that the only purpose of a cross examination is to discredit a witness. This supposition ignores the hard truth that another equally important objective of cross examination is to elicit admissions of facts which would help build the case of the cross examiner. That is when a party with the leave of the court confronts his witness with his previous inconsistent statement, he/she does so in the hope that the witness might revert to what he/she had stated previously because the act of resiling from his/her previous statement may not be deliberate but due to faulty memory or a like cause. If that is the case, there is every possibility of the witness veering round to his/her prior statement.

Thus, showing faultiness of the memory in the case of such a witness would be another objective of cross examining. 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 his credibility but because from his animus attitude or otherwise, the court feels that for doing justice, his evidence need further elucidation and in the process the truth more effectively extricated. Therefore his/her credit is more adequately tested by the questions put forth, in a more pointed, penetrating and searching way.⁹

Should the evidence given by a “hostile witness” be excluded altogether by the Indian courts?

The deposition of a witness who has turned hostile in the observations of the court is not to be excluded entirely or rendered unworthy of consideration. And whether the testimony of such a witness should be rejected in whole or accepted in part would entirely rest on the result of cross examination.

The Full bench of Calcutta High Court in **Prafulla Kumar Sarkar's case**¹⁰ was of the opinion, the fact that a witness is dealt with under S.154 of the Evidence Act, even when under that section he is 'cross-examined' to credit, in no way warrants a direction to the jury that they are bound in law to place no reliance on his evidence, or that the party who called and cross-examined him can take no advantage from any part of his evidence.

But however because the credit of the hostile witness is shaken, it is not safe to rely on it totally and requires closer scrutiny. Judicial interpretations of the Hon’ble Supreme Court



of India in this regard show that the following evidence can be safely relied on by the court:

1. If there are some other material on the basis of which the said witness can be corroborated.

2. The part of the deposition which supports the prosecution version of the incident.

In **Bhagwan Singh v. State of Haryana**¹¹, Bhagwati, J. speaking for this Court observed that the fact that the Court gave permission to the prosecutor to cross examine his own witness, thus characterising him as, what is described as a hostile witness, does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence.

The Hon'ble Supreme court in **Bhaju @ Karan Singh v. State of M. P**¹² states that S.154 of the Act enables the Court to exercise its discretion to 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 view that the evidence of the witness who has been called and cross - examined by the party with the leave of the court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law. The Courts may rely upon so much of the testimony which supports the case of the prosecution and is corroborated by other evidence. It is also now a settled cannon of criminal jurisprudence that the part which has been allowed to be cross - examined can also be relied upon by the prosecution. These principles have been encompassed in the many judgments of the Hon'ble Supreme Court ¹³.

From the above conspectus, it emerges clear that even in a criminal prosecution when a

witness is cross examined and contradicted with the leave of the court by the party calling him/her, his/her evidence cannot as a matter of law be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he/she may after reading and considering the evidence of the witness as a whole with due caution and care, accept in the light of the other evidence on the record that part of his/her testimony which he/she finds to be creditworthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned and in the process, the witness stands squarely and totally discredited, the Judge should as matter of prudence, discard his evidence in toto.

Conclusion:

Witnesses being the eyes and ears of the court when turned hostile becomes detrimental to a fair trial, this in fact affects the constitutional mandate of due process. It is inherent in the concept of due process of law that condemnation should be rendered only after the trial in which the hearing is a fair one, not mere farce or pretence. A fair trial is one that helps to extract the truth and prevent the miscarriage of justice. But when the witness himself/herself is incapacitated from acting as the eyes and ears of justice due to negligence, ignorance or some corrupt collusion, the trial would no longer produce the desired outcome. These instances if allowed to perpetuate further would undermine and destroy public confidence in the administration of law and subsequently pave way for anarchy and injustice, resulting



in the complete breakdown of the edifice of rule of law enshrined in the constitution of India. The fundamental principle behind cross examination is to assist the courts in handling such circumstances, it aids the court when faced with adversities and hindrances in extricating the truth and thereby upholding justice.

Works cited and consulted:

1. Indian Evidence Act, s.143
2. Indian Evidence Act, s.145
3. Indian Evidence Act, s.146
4. Indian Evidence Act, s.155
5. AIR 1964 SC 1563
6. Para. 10, 1977 SCR (1) 439
7. Para. 37, Air 1976 SC 294
8. AIR 2001 SC 330
9. Para 41, Air 1976 SC 294
10. AIR 1931Cal. 401
11. 1976 (1) SCC 389
12. 2012(4) SCC 327
13. 1999 (8) SCC 624, 2010 (8) SCC 536,
2010 (6) SCC 1, 2007 (13) SCC 525
14. Para. 51, Air 1976 SC 294


