

**IN THE HIGH COURT OF SINDH, KARACHI**

Criminal Rev. Application No. 97 of 2019.

Applicant Yasir Sajjad through Mr. Aftab Ahmed, advocate.  
Respondent No. 1 Mst. Rani Nasir through Sardar Sher Afzal,  
advocate.  
Syed Zahoor Hussain Shah, DPG.

Date of hearing : 04.07.2019  
Date of Judgment : \_\_\_\_\_

**J U D G M E N T**

**FAHIM AHMED SIDDIQUI, J** :- This revision application is directed against the order dated 14-05-2019 passed by the learned Additional Sessions Judge-III, Karachi South in Sessions Case No. 1405/2017 allowing two applications filed on behalf of the complainant in the case. Through the impugned order, the learned trial judge not only allowed to call in-charge 15 Helpline CPO Karachi as Court witness but also gave permission to the counsel for the complainant to conduct cross-examination upon a prosecution witness after declaring him as hostile.

2. The learned counsel for the applicant has argued the entire case in the backdrop of Section 493 CrPC and submits that a private advocate cannot move an application for declaring a witness hostile and even he cannot cross-examine any witness. According to him, he has to assist the learned Prosecutor only, and beyond that he cannot do anything. In support of his contentions, he relies upon *Jahanzeb v. Malik Mehboob* (2009 YLR 691).

3. The learned counsel for the respondent submits that under the law there is no bar on private counsel to request for declaring a prosecution witness hostile. He submits that the accused persons are influential and

they are trying to sabotage the case of the complainant since the beginning. He submits that the instant revision application is not maintainable as after declaring the witness hostile, the cross has yet not been conducted. He frankly admits that the learned trial Court has permitted him to conduct the cross-examination. According to him, it will make no difference if the cross is conducted by a private counsel instead of the DDPP.

4. Mr. Zahoor Shah, learned DPG submits that although the trial Court has allowed such application but the fact is that the said application was required to be moved through the Prosecutor conducting trial on behalf of the State. According to him, being in-charge of the prosecution, only the Public Prosecutor can conduct cross and a private counsel has to assist him only.

5. I have heard the arguments advanced and have gone through the available record. It is pertinent to point out that in the arguments the learned counsel for the applicant has not said anything about recalling of an official of 15 Helpline. Meaning that at least up to that extent of the impugned order, he had no grievance. Now there remains only the permission of conducting cross-examination to an important prosecution witness by the counsel for the complainant, after declaring him hostile. In view of the objection filed in the instant application, it appears that the investigation officer has deposed in a changed tone, which was considered by the complainant counsel as harmful and he sought permission to conduct cross-examination upon him. Whatever the case may be, the entire controversy between the parties rests on this vital question; i.e. whether a private counsel can request to the trial Court to declare a witness hostile and to seek permission to cross-examination to such witness? For resolving this controversy, we have to go through the phraseology of Section 493 of

the Code of Criminal Procedure, 1898 (hereinafter referred as 'CrPC'), which reads as under:

***"493. Public Prosecutor may plead in all Courts in cases under his charge Pleaders privately instructed to be under his direction. The Public Prosecutor may appear and plead without any written authority before any Court in which any case of which he has charge is under inquiry, trial or appeal, and if any private person instructs a pleader to prosecute in any Court any person in any such case, the Public Prosecutor shall conduct the prosecution, and the pleader so instructed shall act therein, under his directions."***

6. In the above language of law, the word 'act' should not be considered in a limited or technical sense. I consider that it is entirely distinct and altogether different from the word 'plead', which is an essential function of an advocate. I am of the view that an 'act' by an advocate in a case should not be used in distinction from the words 'appear and plead' coming in the initial part of Section 493 CrPC for the Prosecutor. I am of the view that the word 'act' does not mean something other than examining and cross-examining witnesses or addressing the Court but at the end of the statute, a delicate embargo is placed i.e. 'under the direction of the Public Prosecutor'. It is evident from the referred catchphrase that in a criminal trial, the Public Prosecutor is the main figure and a private counsel should act under his control and direction. Nevertheless, I am of the view that when Section 493 CrPC authorizes a privately engaged advocate to act in the case under the direction of the Public Prosecutor, he may do everything in the case provided that the same should be done under the control and direction of the Public Prosecutor.

7. I am of the view that it is not the scheme of law that a privately engaged advocate by the complainant is required to sit aloof during trial and only provide assistance to the Public Prosecutor by doing some legal research etcetera. A complainant engages private advocate by considering that being a member of the bar and trained in the art of advocacy, the said advocate will provide comprehensive assistance to punish a felonious, who has done wrong

with him. Whatever the reasons may be, engaging a private counsel indicates that the complainant wants to fortify the prosecution, as such he should not be harnessed unreasonably while providing assistance to the Prosecutor of the case. He may seek to declare a witness hostile and even to seek permission to cross-examine a hostile witness as it has happened in the present case. Since the privately engaged counsel and the Public Prosecutor are not antagonistic to each other but actually they are sailing in the same boat; therefore, it is supposed that all such requests either forwarded through the Public Prosecutor or with the consent of the Public Prosecutor. In the instant case, since the Public Prosecutor has not objected upon such request of the privately engaged counsel; therefore, the presumption is that the same is by the consent of the Public Prosecutor. Nevertheless, if a privately engaged advocate of complainant intends to move such an application, the same should be in writing and either through the Public Prosecutor or counter signed by him, as he is the controlling officer of the prosecution.

8. In any trial, the credibility of a witness may be judged under three stages which are 'bolstering' or supporting the case, 'impeachment' of the witness and 'rehabilitation' of the damage caused during examination. Usually but not necessary, the process of rehabilitation is done by re-examining or cross-examining a witness after declaring him hostile. Whenever, a witness is produced by a party for recording examination-in-chief during trial; it is supposed that the witness will support the prosecution case. On the other hand, the opponent party try to impeach the witness by conducting a cross-examination so that his credibility may be shaken before the Court. If at the time of recording evidence, the credibility of a witness is shaken up to that extent that he is causing damage to the case of the party, who produced him or her, then such witness may be declared hostile. However, the aim of cross-examination to such witness after declaring him 'hostile' is not to impeach him totally but to restore the damage which has already been caused by him. This

restoration process of a witness is known as 'rehabilitation of witness' in the jurisprudence of evidence. Hence, a witness, who is cross-examined by the party for whom he appears after declaring him hostile, is not an opponent witness as such he will not be impeached totally by such cross-examination and he will remain the witness of the same party but under a proper and successful cross-examination, such witness may rehabilitate the damage caused to the party for whom he appears as witness. Hence, after declaring a witness hostile and permission to cross-examine him, the evidence of such witness remains intact and he may cause more damage, after such cross-examination, to the party produced him if his deposition is not rehabilitating the case of the party for whom he appears. The cross-examination is an art and if the complainant has engaged a private lawyer, for whom the prosecution considers that he will do a better cross-examination to a hostile witness, then there will be no harm if the trial Court permits him to conduct such cross-examination. With these observations, the instant revision application is dismissed.

**J U D G E**