CALCUTTA HIGH COURT

Profulla Kumar Sarkar

Vs

Emperor

(Rankin ,J.)

03.03.1931

JUDGMENT

Rankin, C.J.

1. By Section 154, Evidence Act, it is provided that: the Court may in its discretion permit the parson who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

2. The Division Bench has referred to us two appeals by accused persons from their convictions and sentences by the Court of Session. In each case the trial was held with a jury, and in both appeals it is contended for the accused that the Sessions Judge has misdirected the jury as to the consequence in law of the fact that the Court had permitted the Public Prosecutor to put to a prosecution "witness questions of the character described by Section 154.

3. In the appeal of Prafulla Kumar Sarkar (No. 327 of 1930) Mr. D. N. Bhattacharjee, who appears for the prosecution has contended before us that the direction given by the learned Sessions Judge has not the meaning and effect which the Division Bench took it to have. As both cases are exactly of the same character for the present purpose, I will confine myself, to begin with, to the other case, viz. to the appeal of Abdul Hatem (No. 463 of 1930).

4. Abdul Hatem, Arshed Ali and Arobali were charged' with the offence of rioting, and Arshed Ali was also charged with murder. The case was of a very common type, the allegation of the complainant being that the accused had been members of a party of 20 or 25 persons who went armed with lathis and spears to the complainant's plot of land and began to reap the paddy; that one Abdul Gani went on the land with his two brothers to protest, and, while Arobali was holding him, was pierced by Arshed Ali with a spear at the order of Hatem, and so forth. Upon the question of "common object" there was the usual dispute as to whether the occurrence took place on the plot alleged which was the complainant's plot, so that the accused persons were

aggressors, or took place on another plot belonging to the accused and the complainant's party were aggressors.

5. The prosecution called as a witness one Mainuddi (P. W. 11) described as a cultivator. He said in his examination-in-chief that on the morning in question he heard a golmal and saw a crowd of men near Hatem's hut which is in Hatem's bhita. That Hatem's bhita has a khal on three sides of it and on the west of it is the paddy field. That on seeing the crowd the witness came near the bhita and did not find anyone on it but found the hut broken. That he went to the south and found Abdul Gani lying wounded on the paddy field; that Abdul Gani said that' Arshed Ali had speared him and that he had been wounded on the field:

I did not ask anybody as to why there were men near the hut. I did not notice any stain of blood on the ground on the way from near the bridge. I did not notice any men on the field on which Abdul Gani was lying.

6. At this point the learned Judge records as follows:

(Declared hostile by Public Prosecutor and permitted to be cross-examined.)

7. Then follows:

I met Meher Munshi on the field when I went there. I had no talk with him. I saw Hatem Sikdar using the hut since Aswin. Before the occurrence there was no dispute between the parties over the hut. I cannot say who possessed the bhita last year and in previous years. I do not know if this bhita is claimed by anybody.

8. Then follows cross-examination by the defence. There was no re-examination. At the end of the case the deposition of this witness before the committing Magistrate was put in at the instance of the defence under Section 288, Criminal P. G. It was substantially in agreement with his evidence at the trial. Now the direction given to the jury by the learned Judge was this:

Mainuddin has deposed in favour of the defence story. This witness has been declared hostile and cross-examined by the prosecution. His evidence has therefore to be excluded from your consideration.

9. The Division Bench consider this to be a misdirection. Before us it has been challenged by the advocates for the accused and has not been supported by the advocate for the prosecution. The learned Sessions Judge was however only laying down the law in accordance with certain decisions of this Court, and the matter has been referred to a Full Bench for a ruling which will be binding upon all Courts in this province.

10. Of previous decisions in this Court, the earliest to which it is necessary to refer is Surendra Krishna v. Rani Dassi A.I.R. 1921 Cal. 677 which was a probate case. In that case two witnesses had been examined on commission, and before the Commissioner leading questions had been put to the witnesses in examination-in-chief in a most irregular manner. By way of defence of the Commissioner's proceedings it was contended that as the propounder was obliged by law to call an attesting witness he could claim to cross-examine him as of right. Mookerjee, Ag. C. J., held that in India an attesting witness is in the same position for the present purpose as any other witness whom a party may cite of his own choice. He went on to observe:

But two important points must be borne in mind : first that a witness is considered adverse when in the opinion of the Judge he bears a hostile animus to the party calling him and not merely when his testimony contradicts his proof; in other words as Wilde, J., remarked in Coles v. Coles [1866] 1 P. & D. 70 a hostile witness is one who, from the manner in which he gives his evidence shows that he is not desirous of telling the truth; and secondly as Lord Campbell, C.J. observed in Faulkner v. Brine [1858] 1 P.& F. 254, when a witness is treated as hostile and -cross-examined by the party calling him, this must be done to discredit the witness altogether and not merely to get rid of part of his testimony. These principles have all been disregarded in the examination-in-chief and cross-examination of the panda and the debtor. The Commissioner could not exercise the discretion vested in the Court under Section 154, Evidence Act, and the mischief due to improper cross-examination could not be remedied in the trial Court. Consequently very little reliance can be placed upon the assertion of the panda and the doctor and this was the view adopted by Chaudhuri, J.

11. Now I will consider later whether it is a sound proposition in law to say that a witness can only be "cross-examined" under Section 154 for the purpose of discrediting him altogether and that permission should only be given under Section 154 when the proposed "cross-examination" has this purpose, i.e., is done with the aim of persuading the Court that the witness is worthy of no credit whatsoever. But it is a far cry from this to some of the propositions which we meet within the later rulings of this Court.

12. The next case appears to be Emperor v. Satyendrakumar A.I.R. 1923 Ca1. 463 which was a reference under Section 307, Criminal P. C, made by a Sessions Judge disagreeing with a jury's verdict of acquittal in a murder case. The prosecution case at its highest was that a number of guests were sitting in a courtyard on the occasion of a sradh ceremony when suddenly the accused entered with a spear and thrust it into the side of one of them. Some of the witnesses had made statements to the police to this effect but in the Magistrate's Court and at the trial some were saying that the assault had immediately been preceded by a violent quarrel. Two witnesses were dealt with at the trial under Section 154, one Padma Lochan had made a statement differing

from his statement before the police and Walmsley, J., after quoting Lord Campbell's words in Faulkner v. Brine and referring to Surendra's case said:

That is the principle to be applied to the evidence of a witness who has been cross-examined by the party which called him. The result is that Padma Lochan's evidence must be -excluded altogether. The other witness was Amar Kinkar. Walmsley, J. dealt with his evidence by saying that the Public Prosecutor's cross-examination had not shaken the credit of the witness.

13. His case is very different therefore from Padma Lochan's; different too from the circumstances in Faulkner v. Brine. My conclusion is that the principle laid down in the last mentioned authority has no application here and that we may accept Amar Kinkar's evidence for what it is worth. As to its value I regard it as the evidence of a man who is doing his best to give a faithful account of what happened in distressing circumstances:

The Court convicted the accused relying upon the evidence of this witness among others. It is to be observed that under Section 307, Criminal P. P.C., the High Court was arriving at its own find-rings of fact, but the case is a distinct authority against the doctrine which has been imputed to sit, viz., that by the mere fact of cross-examining a prosecution witness the prosecutor debars the Court from relying upon the evidence of that witness as against the accused.

14. In Khijiruddin v. Emperor A.I.R. 1926 Cal. 139 a prosecution witness having been examined-in-chief was not cross-examined at all on behalf of the accused but the foreman of the jury asked him certain questions, and then the prosecution asked him some more questions which the High Court held to be in the nature of cross-examination. These it would seem had reference to previous statements made by the witness. Certain documents containing the previous statements were also put in. The Court held that the documents were inadmissible as they did not tend to corroborate the evidence of the witness. As regards the questions asked by the prosecution it did not appear that permission had been asked for or given under Section 154. On this the reasoning of the judgment is that the accused were prejudiced because if the witness, had been properly dealt with under Section 154 the result [according to Faulkner v. Brine and the Indian cases] would have been "to deprive the accused of the benefit which might accrue to them from any statement which the witness might have made in favour of the accused and which the defence could have availed of if the witness had not been allowed to be cross-examined by the prosecution."

15. The argument would seem to have been that this result would follow from the permission of the Court to cross-examine and that the result had in fact been brought about without taking the Court's permission, and that thus the accused were prejudiced. I see more than one difficulty in this reasoning, but the case does seem to assume that permission given to the prosecution to

cross-examine a prosecution witness prevents even the defence from relying upon his evidence at all. I am not clear that this was intended, but as the judgment has been taken in this sense, I would point out that the proposition can hardly be correct. The cross-examination must have some useful purpose, and if neither side can rely upon the witness whatever answers he may give, it would be more convenient and less humiliating for all concerned that he should be allowed to go home. Besides it can hardly be that the wide discretion given to the Court by Section 154 is a discretion to deprive the accused of any valuable right; still less that the Court and the prosecutor between them can destroy in advance testimony which may be vital to the defence. In the case of Mokbul Khan v. Emperor , Cuming, J., who was a party to the decision of Khijiruddin's case points out that the defence in such a case must be entitled to rely on so much of the evidence of the witness as supports the defence case.

16. In the case of Panchanan Gogoi v. Emperor the accused was charged with having abducted a girl. The girl had before the committing Magistrate and on two other occasions made statements supporting the prosecution case; but at the trial she told a different story altogether and leave was given to the prosecution to cross-examine her. Her deposition before the Magistrate had been put in under Section 288, Criminal P. C, and was clearly evidence in the case for all purposes on the face of that section as amended in 1923 : of Abdul Gani v. Emperor A.I.R. 1926 Cal. 235. The Sessions Judge had told the jury:

The girl has spoken in four voices. It is for you to decide in what voice she spoke the truth. The determining teat should be what version has been corroborated by the independent evidence.

17. It was laid down in the High Court that a hostile witness was one who was not desirous of telling the truth, that the evidence of a witness cross-examined under Section 154 could not be relied upon in part and that the evidence of such a witness should be rejected and left out of account in the minds of the jury. This was supported by a reference to Alexander v. Gibson [1811] 2 Camp 555, a case before Lord Ellenborough at nisi prius, and it was said that this case has been followed ever since 1811 and only in one case Bradley v. Ricardo [1831] 8 Bing. 57 it was not followed.

18. Bradley v. Ricardo was a decision of the whole Court of common pleas. Neither of these cases had any special reference to cross-examining a hostile witness.

19. Finally in Bikram Ali v. Emperor a prosecution witness stated that S. one of the accused had come to him on the night-of the dacoity and said that the names of the three accused had been given to the police as the culprits. The Public Prosecutor with the leave of the Court asked the witness whether S had stated that the three accused had committed-the dacoity and the answer was : "Yes,. he said so." Cuming, J., said:

He was not cross-examining his own witness but with the permission of the Court was asking him leading questions. That is not. necessarily to cross-examine. This is clear from. Section 154 itself, which does not say that a person, who calls a witness may cross-examine him in certain circumstances but that he might put questions to him which might be put in cross-examination by the adverse party. That is not. the same as cross-examining him. If it were the Code would have said so.

20. Lort-Williams, J. said:

Sections 143 and 154, Evidence Act, read together do not give power to the prosecution to-put leading questions to their own witnesses even with the assent of the Judge. The meaning of Section 154 is that they may with the permission of the Court, treat a witness as hostile and. cross-examine him.

21. Upon this I would make two observations. First, the reason why Section 154 does not say that with the permission of the Court a party may cross-examine his own. witness is simply that this would in strictness be a contradiction in terms. Cross-examination means examination by the adverse party as distinct from the party who calls the witness (Section 137). This is I think the whole explanation of the use of the phrase:

put any questions to him which might be put in cross-examination by the adverse party.

22. The second observation is that while the mere putting of a question in a leading form is not necessarily tantamount to cross-examination there is no doubt as to the power of the Judge to give leave to put a leading question to one's own witness. This is plain from Section 142 the second part of which goes further than English law and requires the Judge to give permission in certain cases. As to the power in England : of Best on Evidence, Edn. 11, Vol. 11, p. 957.

23. It will be seen from this review of the recent cases in this Court that the Division Bench has rendered a distinct service to the law in making this reference to the Full Bench. Before the Indian, legislature passed the Evidence Act the greatest pains were taken to examine-the English law of evidence and to codify it. Certain alterations were made which were taken either to be improvements in themselves or calculated to work better under Indian conditions. But when we are invited to hark back to dicta delivered by English Judges, however eminent, in the first half of the nineteenth century it is necessary to be careful lest principles be introduced which the Indian Legislature did not see fit to enact. Broadly speaking it was well established in England at the end of the first quarter of the century that a party could not call evidence to attack the general credit of his own witness, but that if out of several witnesses called by him one made a statement as to a particular fact, this did not prevent the others from giving contrary evidence as to that

particular fact even if the collateral effect of their evidence was in the circumstances to destroy the general credit of the first. This is really what Lord Ellenborough laid down in Alexander v. Gibson; but he coupled it, according to the report by Campbell with certain dicta which suggested that in all cases in which one witness is contradicted in this manner, the party calling him must be taken in law to repudiate him entirely. This suggestion however was most convincingly negatived in Bradley v. Ricardo when the Court of Common Pleas gave a considered decision upon this exact point in a case which forcibly illustrates the unreasonableness of the suggestion. The suit was against a Sheriff for making a (false return of nulla bona to a writ of fi-a.

24. The plaintiffs had to prove that the warrant had been delivered to the Sheriff, and for this purpose called the Sheriff's officer, i.e., a witness out of the enemy's camp. This witness proved delivery of the writ but in cross-examination said that no goods of the judgment-debtors could be found. It was agreed that the plaintiff was quite at liberty to prove by other witnesses that some goods could be found, but as he had no other evidence to call as to the delivery of the writ, the Judge non suited him, holding that the plaintiff could not in law rely on the evidence of the Sheriff's officer as to delivery of the writ; and saying that the whole evidence of the witness would have to be struck out. This was a complete reductio ad absurdum of the doctrine of Lord Ellenborough. Assuming that conclusive evidence had been given by the plaintiff to show that goods of the judgment-debtor could be found and were found, would any jury have said to themselves: "We cannot therefore rely on the Sheriff's officer's admission that the writ was delivered ?" Even if we assume that on one point the man was lying to shield himself or his master, was he likely to tell a lie on the other point against his own or his master's interest ? The doctrine that you cannot contradict your own witness on a particular fact without repudiating his evidence altogether was treated by the Common Pleas as a novel and ill-considered doctrine, and it was held that it is for the jury to say whether his evidence is to be entirely repudiated or not.

25. Now a witness who with the permission of the Court is cross-examined by the party calling him is in some of the Indian cases, e.g., Surendra' case and Panohanan Gogois case regarded as one whom the Judge has declared to be "not desirous of telling the truth" and it is this view, coupled with the idea that "cross-examination" is necessarily directed to the credit of the witness, that has led to the doctrine that the witness must not be relied on. Now it is true that in Coles v. Coles, and it may be in other cases, a hostile witness has been described as a witness who from the manner in which he gives his evidence shows that he is not desirous of telling the truth to the Court. This is not a very good definition of a hostile witness and the Evidence Act is most careful in Section 154 not to restrict the right of "cross-examination" even by committing itself to the word "hostile." But so far as English law is concerned I believe there is no English case which has ever held or suggested that permission given by the Judge to the party calling a witness to

"cross-examine" him amounts to a declaration binding upon the Court or the jury that the evidence which be has given or is about to give is unworthy of any credit. Such a doctrine is wholly contrary to fundamental principle that credibility of witnesses is matter for the opinion of the jury, to the principle that it is to be judged of finally at the end of the case and to the principle which was firmly held in the first half of the nineteenth century in England, that a party could never be allowed to impeach the general credit of a witness whom he himself has called. The utility of cross-examination was supposed to be that it was a means whereby the Court could more readily get the truth out of the witness. In the case of witnesses like attesting witnesses to a will or witnesses whose interest was obviously contrary to that of the party who called them, liberty to cross-examine was somewhat freely given without any intention of declaring in advance against the reputation of the witness. The ordinary rule that leading questions must not on material points to be put by a party to his own witness has its basis in the circumstance that as the party chooses what witnesses he will call, a witness is very often anxious to assist the party on whose behalf he is called. The rule is to guard against the bias of the witness in favour of the side in support of which his evidence is sought. Where no such bias need be apprehended the rule loses much of its utility. The hostile witness is ex hypothesi one who cannot be led. The rule is not relaxed because the witness has already forfeited all right to credit but because his evidence will be more fully given and his credit more adequately tested by questions put in a more pointed and searching way.

26. This may I think be clearly illustrated by two cases before the Privy Council in each of which the trial Judge had refused permission to a party to cross-examine his own witness, and the refusal was disapproved by their Lordships. In the first case Radha Jiban v. Taramonee [1861] 12 M.I.A. 380 at p. 393 the plaintiff called the defendant to prove that the plaintiff had sustained certain damage from the defendant's failure to carry on certain religious ceremonies. The defendant denied generally that the claim was well founded and the observations of their Lordships show that they considered that the plaintiff should have been allowed to cross-examine in order to prove thereby his claim to damages. In the second case Kalagurhla v. Yarlagadda [1906] 6 C.W.N. 513 (P.C.), at p. 524, a witness called by Yarlagadda gave evidence against him and their Lordships' reason for regret that permission to cross-examine was refused was that in the absence of cross-examination it was unfair that the other party should be allowed to rely upon the witnesses evidence. It seems clear therefore that either side may rely upon the evidence:-, of a witness who is cross-examined by; the party calling him.

27. Now in each of the two cases referred; to this Full Bench the prosecution witness was simply cross-examined upon the particular facts of the case. Neither was cross-examined upon any matter-directly impeaching his general credit. No previous statement contradicting. his present evidence was put to either witness in the course of the, cross-examination by the Public

Prosecutor. In such cases as these it seems-plainly wrong to say that the credit of the witness is impeached merely because he is cross-examined at all, and so far as these cases are concerned it is not, strictly necessary to consider the law off evidence any further.

28. As it appears however that Lord Campbell's observations in Faulkner v.. Brine (3), have very seriously disturbed recent practice in Bengal it is perhaps-right that they should be examined... Under Section 154, Evidence Act, as under English practice a party who is given leave to cross-examine his own witness may cross-examine to credit. This is sometimes necessary in order to contradict or get rid of a particular statement already sworn to by the witness and in such cases the witness is sometimes cross-examined to show that he has previously made a statement inconsistment with his present evidence-It is here that the old English principle that a party cannot be allowed to impugn the general credit of his own. witness and the principle that he maybe allowed to cross-examine a 'hostile witness called by himself may be thought to come into conflict. By 1850 at latest it had been established in England, Melhuish v. Collier [1851] 15 Q. B. 878, that the hostile witness might be asked whether he had not previously made statements differing from his present evidence. As Patterson, J., stated:

There is a distinction between asking questions of a witness in the box as to statements he may have formerly made and calling other witnesses to say in contradiction to him that he made such statements.

29. On the latter question there had been much difference of opinion and it was only settled by the Common Law Procedure Act of 1854, which permitted such evidence to be given even by the party calling the witness if the Judge gave permission, though it forbade the party to impeach the credit of the witness by general evidence of bad character. This matter is governed by Section 105, Evidence Act.

30. Now Faulkner v. Brine, came before Lord Campbell sitting with a jury in 1853. The action was for damages for injuries caused by the negligent driving of the defendant's carman. The defendant called a witness to prove that the plaintiff had stated that the accident was due to the plaintiff's own fault. The witness did not say so but gave a different account of the conversation. In re-examination defendant's counsel proposed to ask the witness whether he had not stated to the defendant's attorney that the plaintiff had admitted that the accident was due to the plaintiff's fault, and referred to the recent Act. It was at once objected that the witness had in no way shown himself to be hostile. Defendant's counsel contended that the hostility could only be seen if the question were allowed to be put. On this Lord Campbell is reported to have said:

The defendant's counsel stating that I will allow the question to be put, but it must be understood that it must be done to discredit the witness altogether and not merely to get rid of part of his

testimony. If that which is suggested shall be elicited it will show that he is not trustworthy at all.

31. Defendant's counsel however did not ask whether the witness had stated to the attorney that this plaintiff had admitted that the accident was due to his own fault, but put to him a very different statement which the witness at once admitted to have been made by him to the attorney-a statement which was quite consistent with his evidence. There is nothing in the report to suggest that Lord Campbell told the jury that because he had allowed the question to be put the defendant could not rely at all upon the evidence of the witness. He neither said nor meant that cross-examination of a hostile witness by permission of the Court must always be cross-examination to destroy the general credit of the witness. He was prepared to allow a question which was an attack upon the honesty of the witness although the witness had not shown himself to be hostile, but he pointed out that if the plaintiff's cross-examination succeeded in its aim it would destroy the witness's credit altogether. The observation was, I think, a common-sense observation for the benefit of the jury and as a warning to counsel of the risk he ran.

32. Even so however the difficulty is to see that Lord Campbell's ruling was at all consistent with the English Act and English Practice. The rule that leave should be given only when the witness appears hostile is consistent with the idea that it can be given in order to see whether the witness is hostile or not. Lord Campbell probably thought that the statement of defendant's counsel in the hearing of the jury made it desirable to clear the matter up, and his observations may have been made as terms which he imposed as a condition of giving leave to put the question at all. In any event the doctrine which has been founded upon them is not accepted in English practice. The proper direction to the jury in a case in which a '"hostile" prosecution witness admits having made a previous statement inconsistent with his evidence can be seen from such cases as John Williams [1913] 8 Cr.App.Rep. 133 and Alfred White [1922] 17 Cr. App. Rep. 60 to which we have been referred. In India however the position will be altered by 3, 288, Criminal P. C, if that section comes into play.

33. In my opinion the fact that a witness is dealt with under Section 154, 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. There is moreover no rule of law that if a jury thinks that a witness has been discredited on one point they may not give credit to him on another. The rule of law is that it is for the jury to say.

34. Of the seven questions stated by the Division Bench I propose that we should answer four, viz.:

(3) Whether the evidence of a witness treated as "hostile" must be rejected in whole or in part.

(4) Whether it must be rejected so far as it is in favour of the party calling the witness.

(5) Whether it must be rejected so far as it is in favour of the opposite party.

These three questions I would answer in the negative.

(6) Whether the whole of the evidence, so far as it affects both parties favourably or unfavourably, must go to the jury for what it is worth.

35. To this question I would be content to answer "yes" save that if we add nothing to this answer it is only too likely to be misapplied in cases where a prosecution witness goes back upon his previous statements. In saying that the whole of the evidence must go to the jury I do not mean to approve the sort of direction which in Panchanan Gogol's case was given by the Sessions Judge, where he said in effect:

The witness has spoken in four voices.... It is for the jury to say in which voice she spoke the truth.

36. If the previous statement is the deposition before the committing Magistrate, and if it is put in under Section 288, Criminal P.C., so as to become evidence for all purposes, the jury may in effect be directed to choose between the two statements because both statements are evidence of the facts stated therein. But, in other cases, the jury cannot be so directed because prima facie the previous statement of the witness is not evidence at all against the accused of the truth of the facts stated therein. The proper direction to the jury is that before relying on the evidence given by the witness at the trial the jury should take into consideration the fact that he made the previous statement, but that they must not treat the previous statement as being any evidence at all against the prisoner of the facts therein alleged. This has always been insisted upon in the English cases from the earliest times down to the most recent: Wright v. Beckett [1834] 1 M. & Rob. 414, Ewer v. Ambrose [1825] 3 B.& C. 746, Debbie's case [1808] 1 Cr. App. Rep. 155, John Williams (15) and Alfred White (16).

37. It is equally good law under the Evidence Act whether the previous statement be admitted by the witness or proved in spite of his denial under Section 155: Emperor v. Cherath [1903] 26 Mad. 191. No doubt in a civil case, if the witness be himself a party, his previous statement, though unsworn and said by the witness at the trial to be false, would be evidence of the facts stated therein as being an admission. In a criminal case however the previous unsworn statement of a witness for the prosecution is not evidence against the accused of the truth of the facts stated therein save in very special circumstances, e.g. as corroboration under Section 157 of his testimony in the witness box on the conditions therein laid down. If the case be put of the previous statement having been made in the presence and hearing of the accused this fact might

under Section 8 alter the position; but the true view, even then, is not that the statement is evidence of the truth of what it contains, but that if the jury think that the conduct, silence or answer of the prisoner at the time amounted to an acceptance of the statement or some part of it, the jury may consider that acceptance as an admission, Rex v. Norton [1910] 2 K.B. 496 and Percy William v. Adams [1923] 17 Cr.App.Rep. 77. But apart from such special cases, which attract special principles, the unsworn statement, so far as the maker in his evidence does not confirm and repeat it, cannot be used at all against the accused as proof of the truth of what it asserts. This means not merely that it is in itself insufficient proof, but that it cannot be so used at all. It cannot be coupled with probabilities which suggest that the witness was more likely to tell the truth on the former occasion than in the witness box so as to go to the jury as part of the proof that what was then stated is true. With this explanation I would answer question (6) in the affirmative. The cases before us should be remanded to the Division Bench for disposal.

C.C. Ghose, J.

38. I desire to say that on further and fuller consideration I agree with the Chief Justice in the answers he proposes to give to the questions referred to the Full Bench.

Buckland, J.

39. It is unnecessary that I should repeat the facts of these cases and the circumstances in which this reference has been made. I have had the advantage of reading the judgment which has just been delivered by the learned Chief Justice, and, while I am in full agreement with the views which be has expressed as to the authorities cited, I think the questions propounded can also be solved by reference exclusively to certain sections of the Evidence Act and the Code of Criminal Procedure, an examination of which may prove of service. As the learned Judges who have made the reference have pointed out, confusion has arisen between the right of a party with the permission of the Judge to treat the party's own witness as hostile and cross-examine him, and the right, which is limited, to contradict one's own witness by other evidence, and therefore incidentally, and to this extent, to discredit him.

40. Section 137, Evidence Act, enacts that the examination of a witness by the adverse party shall be called his cross-examination. Section 141 states that a leading question is one which suggests the answer which the person putting it wishes or expects to receive, while Section 142 lays it down that leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief or in a re-examination except with the permission of the Court but, under Section 143, they may be asked in cross-examination. A very brief consideration of these provisions, than which to an advocate nothing could be more elementary, will assist in an appreciation of the reply to the questions to which we have to furnish an answer. It is assumed

that a party will call as witnesses only persons who can prove his case and in practice, as an almost invariable rule, what such witnesses may be expected to say is known beforehand. Hence the rule against leading questions by the party on whose behalf a witness is called. To the adverse party such witnesses are presumably hostile, a not altogether felicitous expression in so far as it implies personal animosity, but one which means that their evidence is not to be expected to be favourable to the side -against which they are called to depose. 'To test their veracity, the truth of the story to which they have been called to testify, or to learn if and how far 'they will support the case of the adverse party, the latter is allowed to put leading questions in cross-examination, as it is not to be expected that such witnesses would give answers favourable to the adverse party unless the answers were suggested to them. Assume then that a witness has responded favourably to the cross-examiner, and by his answers has contradicted what he has previously said when examined in chief. It will be the duty of the Judge in a criminal trial to draw the attention of the jury to what the witness said in his examination-in-chief, to the contradictions elicited by cross-examination and to require them to form their own opinion whether they should accept either statement in preference to the other or reject the witness's evidence altogether. In civil proceedings the deposition will be similarly considered by the Judge who tried the case, the law of evidence makes no distinction between the two.

41. Section 154, Evidence Act, provides 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. Though this section, in its practical application, is limited to the asking of leading questions by the party calling a witness, as a matter of construction of the sections, it is referable also to Section 155. That section lays down four different ways in which the credit of a witness may be impeached, which-may not be done by the party, who calls him except with the leave of the Court. When a party who has called a witness seeks to impeach his credit by calling other witnesses (see Sub-sections 1 and 4), assuming that to have been allowed by the Court for sufficient reasons, no question such as we have to consider can arise. A case may arise where a party calling a witness may ask the leave of the Court to be allowed to put questions within Sub-sections (2) or (3), but it is impossible to conceive a case where, upon such application being allowed, it would not allow that the Court would allow the witness to be cross-examined, thereby invoking Section 154. This may be the genesis of the confusion which is to be found in some of the Indian decisions; but be that as it may, it does not affect the question to be decided. In this connexion the learned Chief Justice has uttered a warning as to the effect of cross-examination eliciting former statements inconsistent with any part of the witness's evidence which is liable to be contradicted, and this should not be overlooked.

42. As a practical matter therefore Section 154 refers exclusively to cross-examination of a witness by the party calling him. We are not asked to state the circumstances in which the Court

may exercise its discretion in favour of the party seeking to cross-examine, and indeed it would be impossible to formulate any comprehensive rule. One observation however is permissible. The object of calling witnesses is to elicit the facts, and if the facts to be elicited are such as ought to be elicited from a witness, and if they cannot be elicited without cross-examining him it would be difficult to say that the discretion was wrongly exercised. Testamentary proceedings furnish an admirable example of what is meant. The only surviving witness to a will may be unwilling to depose in favour of the executor who applies for probate. He may however be more unwilling to commit perjury, and if cross-examined a few leading questions suggesting the essential facts may elicit all that is necessary to entitle the Court to direct probate to issue. This instance exposes the fallacy of the proposition that as a matter of law the evidence of a witness who has been allowed to be cross-examined by the party who calls him must be wholly disregarded. When a witness has made contradictory statements in examination-in-chief and in cross-examination, whether such cross-examination be by the party who has called him or by the adverse party or by both parties, the resultant position as regards his deposition is the same. It makes not one iota of difference whether his answers have been given in reply to questions by one side or by the other or even by the Court itself. The deposition itself and what it is to which the witness has deposed is all that matters, and the direction to the jury should be the same in every case and their attention should be drawn to the contradictions with such observations as to the circumstances in which contradictory statements were made as the Judge may consider to be necessary, and the jury should be left to form its own conclusions as to the value to be attached to the statements which the witness has made. There can be no question as a matter of law of rejecting the evidence of such a witness either so far as it is in favour of the party calling the witness or so far as it is in favour of the adverse party.

43. Under Section 297, Criminal P.C. it is the duty of the Judge in charging the jury to sum up the evidence for the prosecution and defence. Under the Evidence Act "evidence" means and includes all statements which the Court permits or requires to be made before it by witnesses in relation to matters of" fact under enquiry, a definition which read with Section 297, Criminal P. C, leaves-no room for the introduction of any rule such as is suggested by the earlier-questions referred.

44. In my judgment questions 3, 4 and 5 should be answered in the negative and question 6 should be answered in the affirmative. It is unnecessary to answer questions 1 or 2 and the reply to the last question should be given by the Bench dealing with the case in accordance with the replies given today to the questions referred.

Suhrawardy, J.

45. I fully agree in the order proposed to be made by the learned Chief Justice.

Cuming, J.

46. I agree in the order-proposed to be made by the learned Chief. Justice for the reasons given by him.