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Epistemology of Re-Examination - Role of Public Prosecutor - An Exposition

EPISTEMOLOGY OF RE-EXAMINATION — ROLE OF PUBLIC PROSECUTOR — AN EXPOSITION

by

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The fortress of administration of criminal justice is edificed on the courts, the investigating agency, the Public Prosecutor, the defence counsel and the Prison and Correctional Service Personnel. The moment trial is commenced, the trio viz. the court, the Public Prosecutor and the defence counsel involve themselves rigorously in the process of determination of guilt. They also have their independent roles to play. For the criminal trial to proceed it is imperative on the part of the Public Prosecutor to adduce evidence through witnesses. Witness has an important role to play in the administration of justice. The witness plays a pivotal role and discharges a public duty by assisting the court in the determination of the guilt or otherwise of the accused. While assisting the court, he scarifies his time and takes the trouble to come to the court all the way to give evidence.

There is a standard procedure to adduce evidence through witnesses. Examination of a witness consists of examination-in-chief, cross-examination and re-examination if the need arises.[1] The researcher could find paucity of case law on re-examination, so also its utility in the administration of justice. The role of re-examination has not been examined adequately by the courts. Unlike the examination-in-chief and cross-examination, the phenomenon of re-examination has not gained much discourse in the legal circles, especially concerning the role of Public Prosecutor vis-à-vis the fair trial. In this write-up, an attempt is made to examine the epistemology of re-examination while clearing the mist surrounding the provision with the help of the edicts of the Supreme Court of India and to trace out the role of Public Prosecutor thereon.

Examination of a witness subsequent to the cross-examination by the party who calls the witness is called re-examination. The purpose of re-examination is to remove any doubt that may arise in the cross-examination and to enable the witness to clarify any contradiction. No leading question is allowed in re-examination unless permitted by the court. Further, in the re-examination, no new facts shall be introduced unless the court permits. When the court permits to introduce the new facts, the opposite party has got right to cross-examine the witness.

The party who calls the witness after cross-examination is entitled to re-examine the witness with the permission of the court. Though the court has got right to pose any question to witness at any point of time,[2] but the court has no right suo motu to conduct re-examination of the witness.

Etymology

As per *Black's Law Dictionary*,[3] re-examination means, an examination of a witness after a cross-examination, upon matters arising out of such cross-examination.

As per *Oxford Dictionary of Law*,[4] re-examination means, the questioning of a

witness by the party who originally called him to testify, following the cross-examination of the witness by the opposite party.

So as to gaze and gauge the epistemology of re-examination at first flush, it is imperative to trace out the object, principle and the purpose of re-examination.

Object and purpose of 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. It is accordingly limited to the explanation of matters referred to in the cross-examination.[5]

The object is to give an opportunity to reconcile the discrepancies, if any, between the statements in examination-in-chief and cross-examination 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.[6]

In the words of Jurist Wrottesley, a British Lawyer and Judge, the chief object of re-examination is to give the witness an opportunity to explain what he said on cross-examination. It is absolutely necessary in many cases to give a witness an opportunity after he had been cross-examined to explain any statements which he may have inadvertently made while he was undergoing a severe cross-examination. And an advocate whose duty it is to re-examine a witness must be on the alert to note every point which requires explanation.[7]

The Supreme Court of India in *Rammi* v. *State of M.P.*[8] explained that the very purpose of re-examination is to explain matters which have been brought down in cross-examination.

Amidst the above legal prose, what emerges clear is that verily the re-examination has a significant role to play in the examination of witnesses. The re-examination can turn the tables. The same has power to influence the faculty of the Judge that has been swayed away through the marathon cross-examination.

Abloom role of Public Prosecutor

The role of Public Prosecutor has gained immense importance in the administration of justice. The Supreme Court of India from time to time exalted the stature of the Public Prosecutor to the Everestine heights and focused the virtues of the office of Public Prosecutor in the criminal administration of justice.

The Supreme Court designated the Public Prosecutor as an important officer of the State in *Hitendra Vishnu Thakur* v. *State of Maharashtra*[9] and on him attired an independent statutory authority.

The Supreme Court in *Shiv Kumar* v. *Hukam Chand*[10], by delineating the ethos of private counsel and Public Prosecutor pithily traced out the qualities of Public Prosecutor and portrayed that; "a Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case".[11]

The Supreme Court in *Shakila Abdul Gafar Khan* v. *Vasant Raghunath Dhoble*[12], equated the office of the Public Prosecutor on a par with the court and held that it is as much the duty of the prosecutor as of the court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice.

Hitherto, the concept of fair trial used to be associated with the courts per se. In

other words, it was a Judge-centric concept. But, after *Zahira Habibulla H. Sheikh* v. *State of Gujarat*[13], the Public Prosecutor too agglomerated as one of the prime constituents on a par with the Judge to present a fair trial.

In *Manu Sharma* v. *State (NCT of Delhi)*[14] the Supreme Court elucidated the role of Public Prosecutor in the criminal justice system by holding that he is a statutory office of high regard.

Yet again, the Supreme Court in *Centre for Public Interest Litigation* v. *Union of India*[15], extolled the independence of the office of the Public Prosecutor, and held that; "independence of the Public Prosecutor from any governmental control is the hallmark of this high office".[16]

The Supreme Court in *Deepak Aggarwal* v. *Keshav Kaushik*[17] panegyric upon the role of Public Prosecutor and held that he is not a mouthpiece of the investigating agency.

On conspectus of above well-worn virtues of the office of the Public Prosecutor passing through many stages of development, it is expedient on the part of the Public Prosecutor to discharge his functions especially in grit and

grumption by availing the trinity of provision of examination of witnesses. Thus, he can be an epithet of the above scintillating nomenclature given to him by the Supreme Court.

Roving role of Public Prosecutor vis-à-vis re-examination

The law on re-examination under Section 138 of the Evidence Act developed as it is, when it is read in tandem with Section 311 of the Code of Criminal Procedure.

The Supreme Court in *Rajaram Prasad Yadav* v. *State of Bihar*[18] examined the law under Section 311 CrPC elaborately and expounded principles highlighting the concept and purpose of re-examination with the avowed object of reaching a just decision.

In the criminal trial and practice, as and when the Public Prosecutor tries to invoke the provision of re-examination under Section 138 of the Evidence Act, it is a common objection on the part of the defence counsel, to term the endeavour of Public Prosecutor thereto to only "fill the lacunae" in the case of the prosecution. The Supreme Court in *UT of Dadra and Nagar Haveli* v. *Fatehsinh Mohansinh Chauhan*[19], espoused the cause of Public Prosecutor and held that:

> *15*. … Calling a witness or re-examining a witness already examined for the purpose of finding out the truth in order to enable the court to arrive at a just decision of the case cannot be dubbed as "filling in a lacuna in the prosecution case" unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused resulting in miscarriage of justice.[20]

Now fair trial is a fundamental right, the Supreme Court in *Natasha Singh* v. *CBI*[21] expounded that fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardised.

Further, the Supreme Court in *J. Jayalalithaa* v. *State of Karnataka*[22] found that any obstacle in the free flow of fair trial tantamounts to violation of Article 21 and Article 14.

The constitutional spirit poured into the administration of criminal justice, and perspicuously perceived the presence of Public Prosecutor in fair trial. So it is

incumbent on the part of the Public Prosecutor to offer fair opportunity to the witness to give his evidence, even by resorting to re-examination. Eventually, the role of Public Prosecutor in fair trial vis-à-vis re-examination, retrieved.

The Supreme Court as early as in 1964 in *Dahyabhai Chhaganbhai Thakkar* v. *State of Gujarat*[23] succinctly explained the necessity of re-examination by pointing out the do's and do not's and held that right to re-examine a witness arises only after the conclusion of cross-examination and Section 138 says it

shall be directed to the explanation of any part of his evidence given during cross-examination which is capable of being construed unfavourably too his own side.

The Supreme Court in *Chanan Singh* v. *State of Haryana*[24] shunned the practice of posing two or more questions in one while conducting re-examination.

On perusal of above dictums, it is expedient on the part of the Public Prosecutor to invoke the power of re-examination as and when required, and to take every opportunity to adduce the evidence, so that the interest of the accused, the victim and the society be safeguarded. All in all, fair trial is ensured.

Re-examination — Freedom of Public Prosecutor

The Public Prosecutor need not engulf himself in an erroneous impression that re-examination shall be circumscribed only to clarify the ambiguities rolled in the cross-examination.8

The Supreme Court extended the reach and range of re-examination, attenuated the function of Public Prosecutor insofar as invoking the provision of re-examination and held thus:

> *18*. Even if the Public Prosecutor feels that new matters should be elicited from the witness he can do so, in which case the only requirement is that he must secure permission of the court. If the court thinks that such new matters are necessary for proving any material fact, courts must be liberal in granting permission to put necessary questions.[25]

On cluster reading of the above extensive domain of the Public Prosecutor insofar as the invoking the power of re-examination is concerned, it is a must for the Public Prosecutor to cogitate over the factual matrix to be elicited from the witness and request the Court to introduce even an innovative matter in the re-examination and champion the cause of justice.

In the criminal trial, the Public Prosecutor must be agile and active, keep on pouring over the queries and answers, then only he can make up a mind for re-examination, or else, he may lose the chance to make a mention for re-examination.

While appreciating the niceties of re-examination vis-à-vis the role of Public Prosecutor, the Supreme Court in *Rammi* v. *State of M.P.*[8] held that:

> *19*. A Public Prosecutor who is attentive during cross-examination cannot but be sensitive to discern which answer in cross-examination requires explanation. An efficient Public Prosecutor would gather up such answers falling from the mouth of a witness during cross-examination and formulate necessary questions to be put in re-examination. There is no warrant that re-examination should be limited to one or two questions. If the exigency requires any number of questions can be asked in re-examination.[26]

The Public Prosecutor with his elegant reasoning at no point of time shall feel shy to seek permission of the Court to pose any number of questions in the re-examination with the avowed objective of dismantling the specious defence theory evolved by the defence counsel. The defence counsel through his artistry of cross-examination attempt to confuse the witness and secure admissions that dilute the rigour of evidence in the examination-in-chief. Then the Public Prosecutor shall make a clarion call for re-examination and try to do away the ambiguity. That is how an agile Public Prosecutor shall play an aplomb role in the administration of justice by invoking the provision of re-examination, as and when expediency warrants.

The Supreme Court in the same decision (*Rammi*[8]) cautioned the Public Prosecutor not to be complacent while the witness is in the box and exhorted the Public Prosecutor to avail all the opportunities available to him to put forth the evidence in an attempt to unravel the truth. And at the same time left a sarcastical comment on the Public Prosecutor that he must not allow the defence counsel to have an uninterrupted session during trial.

The Public Prosecutors who prosecute the cases before the Court of Magistrates of First Class, Metropolitan Magistrates and the Court of Sessions, have to come across those accused who perpetrated the horrendous and grave crime. They need to bear the excruciating cross-examination conducted by the defence counsel, amidst such pain and agony, at no time the Public Prosecutor can let loose the reins of administration of justice, and forego a chance to re-examine the witness. The Public Prosecutor shall utilise his good office and enjoy the freedom to put those questions which he deems fit in the re-examination with the permission of the court and shall march forward to place the best evidence before the court bereft of doubts and ambiguities.

The Supreme Court in a recent case of *Vinod Kumar* v. *State of Punjab*[27], while reiterating the intricacies of re-examination, widened the freedom to Public Prosecutor in invoking the re-examination and eulogised that:

> *33*. … Emphasis on re-examination by the prosecution is not limited to any answer given in the cross-examination, but the Public Prosecutor has the freedom and right to put such questions as it deems necessary to elucidate certain answers from the witness. It is not confined to clarification of ambiguities, which have been brought down in the cross-examination.[28]

The Supreme Court in *Ramsevak* v. *State of M.P.*[29] has cautioned the Public Prosecutors to be more circumspect in doing away the doubts while using the re-examination process and observed that:

> "even assuming that there is some doubt as to the interpretation of this part of his evidence since the same is not clarified by the prosecution by way of re-examination, the benefit of doubt should go to the defence"[30].

In the criminal trial, there will be flow of grandiloquent evidence before the court. The defence counsel tries to impress the court to appreciate the evidence

in his angle and of course the Public Prosecutor endeavours to unravel the truth. But if there is any doubt in the evidence and need clarification on certain aspects, it is incumbent on the part of the Public Prosecutor to do away the doubts and present a pleasant (bereft of doubts) evidence before the Court, so that the Court can make use

of the same in dispensing justice.

Conclusion

On perambulation of the above captions, it is concluded that the Public Prosecutor with his copia verborum shall leave no stone unturned in grabbing the chance to re-examine the witness countervailing the rigour of cross-examination when the art of bamboozling the witness has attained high degree of perfection by the refined defence counsel.

Altogether, it is incumbent on the part of the Public Prosecutor to consider the re-examination as one of the important tools in his kit to excel the artistry of unravelling the truth. It is essential on the part of the Public Prosecutor to venerate the available edicts of the Supreme Court to excel his efficacy in discharging the duties in the administration of justice.

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[1] See Sections 137 and 138 of the Evidence Act, 1872.

[2] See Section 165 of the Evidence Act, 1872.

[3] *Black's Law Dictionary* (St. Paul Minn, West Publishing Co., 3rd Edn., 1933) p. 1512.

[4] *Oxford Dictionary of Law* (Oxford University Press, 5th Edn., 2002) p. 415.

[5] Ratanlal and Dheerajlal, *The Law of Evidence* (Wadhwa and Company, 19th Edn., Nagpur 1997) p. 449.

[6] Quoted in approval in *Rajaram Prasad Yadav* v. *State of Bihar*, (2013) 14 SCC 461, 476, para 22.

[7] As quoted in Woodroffe & Amir Ali, *Law of Evidence* (Law Book Company, 14th Edn., Allahabad 1981) pp. 3512-13.

[8] (1999) 8 SCC 649.

[9] (1994) 4 SCC 602.

[10] (1999) 7 SCC 467.

[11] Id, 472, para 13.

[12] (2003) 7 SCC 749.

[13] (2004) 4 SCC 158.

[14] (2010) 6 SCC 1.

[15] (2012) 3 SCC 117.

[16] Id, 124, para 21.

[17] (2013) 5 SCC 277.

[18] (2013) 14 SCC 461.

[19] (2006) 7 SCC 529.

[20] Id, 538, para 15.

[21] (2013) 5 SCC 741.

[22] (2014) 2 SCC 401.

[23] AIR 1964 SC 1563.

[24] (1971) 3 SCC 466.

[25] *Rammi* v. *State of M.P.* (1999) 8 SCC 649, para 18.

[26] Id, 655-56, para 19.

[27] (2015) 3 SCC 220.

[28] Id, 238, para 33.

[29] (2004) 11 SCC 259.

[30] Id, 265, para 14.