RABINDRA KUMAR DEY

v.

STATE OF ORISSA

August 31, 1976

[P. N. BHAGWATI AND S. MURTAZA FAZAL ALI, JJ.]

Prevention of Corruption Act, 1947—*Sec.* 5(1)(c) *and* 5(1)(d) *r/w Sec.* 5(2)—*Misappropriating Govt. Funds—Retaining Govt. Funds by a Govt. servant—Evidence Act. Sec.* 154—*When can a witness be declared hostile—Can evidence of a hostile witness be accepted—Evidence Act Sec.* 105—*Onus of proving exceptions in I.P.C. on accused—Degree of proof—Criminal Trial—Effect of non examination of material witness—Conviction on evidence of a solitary witness—Whether adverse inference can be drawn against accused for not leading evidence—Onus of prosecution—Presumption of innocence.*

The appellant who was the Additional District Magistrate in overall charge of the Nizarat and the Land Acquisition sections of the Collectorate was charged for criminal misconduct under section 5(2) read with section 5(1)(c) and 5(1)(d) of the Prevention of Corruption Act, 1947. The allegation against the appellant was that he withdrew a sum of Rs. 10,000/- on 9-1-1965 on the ground that he wanted to distribute the said amount amongst the villagers whose land was acquired as the compensation; that in fact the appellant never wanted to distribute the said amount and that he retained the money with him for about 6 months dishonestly and only after that the money was deposited in the Treasury. The defence of the appellant was that the Secretary of the Works Department called a meeting in the Secretariat on 25-9-1964 and that the appellant was expressly directed to proceed to the spot and persuade the villagers to accept the compensation money; that it was pursuant to that mandate that the appellant withdrew the money on 9-1-1965; that he could not go to the village in question on that day because one of the officers who was to accompany him was not available; that he, therefore, again deposited the money back with the Nazir and collected the money from him again on 20-1-1975; that he went there along with several officials; that the villagers, however, refused to accept the compensation. The appellant was, however, hopeful of getting the compensation increased and to persuade the villagers to accept the increased compensation. He, therefore, on his return handed over the money to the Nazir, however, asked him not to deposit the same in the Treasury so that cash would be readily available as soon as needed.

Nazir was examined by the prosecution and he denied having received the money as suggested by the appellant. Secretary of the Works Department was not examined by the prosecution. The Land Acquisition Officer PW 8 deposed that the Secretary directed the appellant to take action for payment of the compensation money to the villagers and that the appellant should personally persuade the villagers to accept the compensation. The said witness was, however, declared hostile on the ground that he did not state to the Police that when the appellant and the Executive Engineer visited the village they did not persuade the villagers to receive the compensation amount. PW 7 the Executive Engineer deposed that he accompanied the appellant to the village and that the appellant tried to persuade the villagers to receive the compensation but that they refused to accept the same. This witness was also declared hostile because of certain minor omissions in his statement before the Police. PW 6, one of the villagers also deposed that the appellant persuaded them to give up possession but the villagers did not agree. This witness was also declared hostile because he omitted to state some facts before the Police.

The Trial Court and the High Court relying on the evidence of Nazir and certain documents convicted the appellant under section 5(1)(c) and 5(1)(d) read with section 5(2) of the Prevention of Corruption Act, 1947.

A Allowing the appeal by Special Leave,

HELD : 1. In a charge of misappropriation once the entrustment of money is proved and although the onus to prove the entrustment is on the prosecution, if the explanation of the accused is found to be false he must be presumed to have retained the money with himself. [444 A-B]

Jaikrishnadas Manohardas Desai and Anr. v. *State of Bombay*, [1960] 3 S.C.R. 319, 324; followed.

B

2. Three principles of criminal jurisprudence which are well settled are as under :

(i) that the onus lies affirmatively on the prosecution to prove its case beyond reasonable doubt and it cannot derive any benefit from weakness or falsity of the defence version while proving its case;

C (ii) that in a criminal trial the accused must be presumed to be innocent until he is proved to be guilty; and

(iii) that the onus of the prosecution never shifts. [444 G-H, 445 A]

3. Under section 105 of the Evidence Act the onus of proving exceptions mentioned in the Indian Penal Code lies on the accused but the said section does not at all indicate the nature and the standard of proof required. It is sufficient if the accused is able to prove his case by the standard of preponderance of probabilities as envisaged by section 5 of the Evidence Act. [445 A-B]

D

Harbhajan Singh v. *State of Punjab*, [1965] 3 SCR 235, 241 and *State of U.P.* v. *Ram Swarup & Anr.* [1975] 1 S.C.R. 409, 416-17, followed.

The accused succeeds if the probability of his version throws doubt on the presecution case. He need not prove his case to the hilt. It is sufficient for the defence to give a version which competes in probability with the prosecution version for that would be sufficient to throw suspicion on the prosecution case entailing its rejection by the court. [445 B-C]

E

4. In a criminal trial it is not at all obligatory on the accused to produce evidence in support of his defence and for the purpose of proving his version he can rely on the admissions made by prosecution witnesses or on the documents filed by the prosecution. The courts below were not justified in drawing adverse inference against the accused for not producing evidence in support of his defence. The prosecution cannot derive any strength or support from the weakness of the defence case. [446 E-G]

F

5. The courts below erred in basing conviction of the appellant on the sole testimony of the Nazir completely ignoring the important admissions made in favour of the accused by other prosecution witnesses, some of whom were declared hostile and some were not. [446 H, 447 A]

6. No explanation is coming forth why the Secretary, Works Department who was a Government servant, has not been examined. It was a part of the prosecution case that in the said meeting the Secretary did not direct the appellant to go to the village for making payment. The prosecution ought to have examined the Accountant who was a material witness in order to unfold the prosecution narrative itself. The court drew adverse inference for his non-examination. [447 D-E]

G

7. Section 154 of the Evidence Act confers a discretion on the court to permit a witness to be cross-examined by a party calling him. The section confers a judicial discretion and must be exercised judiciously and properly in the interest of justice. The court will not normally allow a party to cross-examine his own witness and declare the same hostile unless the court is satisfied that the statement of the witness exhibits an element of hostility or that he has resiled from a material statement which he made before an earlier authority. [448 G-H, 449 A]

H

Dahyabhai Chhaganbhai Thakker v. *State of Gujarat*, [1964] 7 S.C.R. 361, 368, 69, 70 followed. A

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 his own witnesses cannot be allowed. The contingency of permitting the cross-examination of the witness by the party calling him is an extra-ordinary phenomenon and permission should be given only in special cases. [449 G-H, 450 C]

8. On the facts the court found that the Trial Court wrongly exercised its discretion in permitting the prosecution to cross-examine its own witnesses. [451 F] B

9. Merely because a witness is declared hostile it does not make him unreliable so as to exclude his evidence from consideration altogether. [450 E-F]

Bhagwan Singh v. *State of Haryana*, [1976] 1 S.C.C. 389, 391-92 followed.

10. The court found that the defence version was rendered probable by the testimony of witnesses as well as documents. [457 A-D] C

11. The Court found that the Nazir was not a reliable witness and that the courts below ought not to have acted on his sole testimony. [455-C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 193 of 1971.

Appeal by Special Leave from the Judgment and Order dated 11-5-71 of the Orissa High Court in Criminal Appeal No. 14/70. D

Gobind Das, Mrs. Sunanda Bhandare, A. K. Mathur, A. K. Sharma and M. S. Bhandare, for the Appellant.

S. C. Agarwal and *G. S. Chatterjee,* for the Respondent.

The Judgment of the Court was delivered by— E

FAZAL ALI, J. In this appeal by special leave, the appellant has been convicted for criminal misconduct under s.5(2) read with s.5(1)(c) of the Prevention of Corruption Act, 1947 and sentenced to rigorous imprisonment for three years. He has also been convicted under s. 5(1)(d) of the Prevention of Corruption Act but no separate sentence has been passed thereunder. The appellant preferred an appeal to the High Court of Orissa against the order of the Special Judge which was, however, dismissed, and the convictions and sentences imposed on him were confirmed by the High Court. Thereafter an application for leave to appeal to this Court was made before the High Court, which having been refused the appellant obtained special leave from this Court, and hence this appeal. F G

After going through the judgments of the Courts below, we are constrained to observe that the High Court as well as the Trial Court have made a wholly wrong approach in applying the provisions of the Prevention of Corruption Act in the case of the appellant. Put briefly, the prosecution case was as follows :

The appellant was the Additional District Magistrate, Cuttack from September 1964 to June 1966 and in that capacity he was in H

A overall charge of the Nizarat and land acquisition sections of the Collectorate. Sayad Allamuddian Ahmed P.W. 8 was the District Land Acquisition Officer and one A. Ballav Pradhan P.W. 9 was the Nizarat Officer, whereas Prahalad Mahapatra P.W. 1 was the Nazir and Rajkishore Das P.W. 2 was the Assistant Nazir under P.W. 1 P.W. 3 Bhakta Charan Mohanti was the Land Acquisition Inspector. It appears that a number of lands had been acquired by the Govern-
B ment for certain public projects in various villages particularly Mauza Balichandrapur with which we are concerned in the present case. A huge compensation amount to be given to land-owners had been deposited in the treasury for payment to them. It appears that a sum of Rs. 31,793.85 had been disbursed by July 24, 1964 leaving a balance of Rs. 11,650-61 but no disbursement could be made between
C July 24, 1964 and January 20, 1965 as the villagers refused to accept the payments and wanted the Land Acquisition proceedings to be withdrawn. The prosecution case further is that the appellant as Additional District Magistrate attended a meeting at the Secretariat in the office of the Secretary of Works Department at Bhubaneswar on September 25, 1964 where certain decisions were taken. There appears to be some divergence of opinion between the appellant and
D the prosecution on the deliberations of the aforesaid meeting which we shall consider later. It is further alleged that on January 9, 1965 the appellant directed the Nazir to pay him a sum of Rs. 10,000/- from the cash which remained with the Nazir P.W. 1 for the purpose of distributing the amount to the land-owners of the village Balichandrapur. As, however, the A.D.M.'s visit to Balichandrapur could not materialise because the Executive Engineer with whom he was to
E go there was not available, the visit was postponed and the A.D.M. went to some other place. On January 20, 1965 the appellant again took a sum of Rs. 10,000/- from the Nazir and decided to visit the village Balichandrapur along with the Executive Engineer and the Land Acquisition Inspector. It is said that the S.D.O., P.W.D., also accompanied the party to the village Balichandrapur, and the case of the appellant is that the Land Acquisition Inspector also travelled
F to Balichandrapur with the appellant, though this fact is disputed by the Land Acquisition Inspector. It is, however, the admitted case of the prosecution that there was no disbursement in village Balichandrapur and thereafter the amount of Rs. 10,000/- was not deposited with the Nazir but remained in the personal custody of the appellant who appears to have retained it dishonestly for about six months. This is the gravamen of the charges against the appellant.
G We may also mention that the amount was paid to the Nazir towards the end of September 1965 when it was deposited in the treasury. On receiving certain applications, the Vigilance Organisation of the State of Orissa instituted an inquiry against the appellant and after completing the same lodged a formal F.I.R. on May 13, 1966. The appellant thereafter was challaned under various sections of the Prevention of Corruption Act and ultimately convicted as indicated above.

H

The case of the appellant was that he had no doubt withdrawn a sum of Rs. 10,000/- from the Nazir on January 9, 1965 but on his return from tour as he could not disburse the money to the

villagers he had returned it to the Nazir at Cuttack on January 13, 1965. When, however, he again decided to go to the village with the Executive Engineer and others on January 20, 1965 he again directed the Nazir to pay him the amount for disbursement. He went to the village Balichandrapur and tried to persuade the villagers to accept the compensation amount so that the Government project may be started as soon as possible. The villagers wanted some other alignment to be made or the compensation to be increased, and the appellant persuaded them to accept part payment and assured them that he will try to get the amount increased. It was also the definite case of the appellant that in the meeting held in the secretariat on September 25, 1964, the appellant was expressly directed to proceed to the spot and persuade the villagers to accept the compensation money and it was in consequence of this mandate from the Secretary of Works Department that the A.D.M. proceeded to the village Balichandrapur and made all possible efforts to persuade the tenants to accept compensation even by holding out promises to them. Unfortunately, however, the villagers refused to accept the compensation and the party had to come back to Cuttack disappointed. The appellant further seemed to suggest that although he had failed to persuade the villagers to accept the money he had not completely lost all hopes and that there was a possibility of the villagers coming round to his point of view and ultimately decide to accept the compensation and for this reason the appellant returned the sum of Rs. 10,000/- to the Nazir on his return from the village but directed him not to deposit the same in the treasury or to make any entry in the Cash Register so that if the villagers came to Cuttuck to demand the money they could be given the same immediately without any formality of a fresh withdrawal. The appellant further averred that because of some personal jealousies, a false complaint was made against him which necessitated an inquiry. The Courts below accepted the prosecuiton case and disbelieved the version of the defence completely. The High Court has found that as the entrustment was proved and admitted by the appellant himself and the explanation given by him was absolutely false, this would lead to the irresistible inference that the appellant had temporarily misappropriated the money. It was also suggested by the prosecution that at the relevant time the appellant was building a house and he had already applied for loans from the Government and it may be that for this purpose he might have been in need of the money to build his house.

One of the essential peculiarities of this case is that as many as three witnesses examined by the prosecution to prove its case, namely, P.Ws. 6, 7 and 8, had been declared hostile and the Public Prosecutor sought permission of the Court to cross-examine those witnesses which was readily allowed. According to the prosecution these witnesses tried to help the accused and made certain statements which supported the case of the appellant and, therefore, had to be cross-examined by the prosecution.

Having regard to the stand taken by the parties, the matter lies within a very narrow compass. So far as the entrustment of Rs.

A 10,000/- is concerned that is undoubtedly admitted by the appellant, and the only explanation given by him is that he had returned the money to the Nazir after his return from the village Balichandrapur and he had also directed the Nazir not to deposit the money in the treasury. If once the explanation of the accused is disbelieved, or proved to be absolutely false, then it is quite natural that he must be presumed to have retained the money with himself for a period B of six months. Although the onus lies on the prosecution to prove the charge against the accused, yet where the entrustment is proved or admitted it will be difficult for the prosecution to prove the actual mode or manner of misappropriation and in such a case the prosecution would have to rely largely on the truth or the falsity of the explanation given by the accused. In *Jaikrishnadas Manohardas Desai* C *and Anr.* v. *State of Bombay*(1) this Court observed as follows :

> "The principal ingredient of the offence being dishonest misappropriation or conversion which may not ordinarily be a matter of direct proof, entrustment of property and failure in breach of an obligation to account for the property entrusted, if proved, may in the light of other circumstances, justifiably lead to an inference of dishonest misappropriation on conversion. Conviction of a person for the offence of criminal breach of trust may not, in all cases, be founded merely on his failure to account for the property entrusted to him, or over which he has dominion, even when a duty to account is imposed upon him, but where he is unable to account or renders an explanation for his failure to account which is untrue, an inference of misappropriation with dishonest intent may readily be made."

D

E

The Courts below appear to have convicted the appellant on the basis of the decision referred to above and have held that since the explanation given by the appellant was false, an inference of misappropriation could reasonably be drawn against him. This proposition cannot F be doubted. But the question is whether the explanation given by the appellant in this case can be said to be absolutely false? Another question that arises is what are the standards to be employed in order to judge the truth or falsity of the version given by the defence? Should the accused prove his case with the same amount of rigour and certainty, as the prosecution is required, to prove a criminal charge, or it is sufficient if the accused puts forward a probable or G reasonable explanation which is sufficient to throw doubt on the prosecution case? In our opinion three cardinal principles of criminal jurisprudence are well-settled, namely :

(1) that the onus lies affirmatively on the prosecution to prove its case beyond reasonable doubt and it cannot derive any benefit from weakness or falsity of the defence H version while proving its case;

(1) [1960] 3 S.C.R. 319, 324.

(2) that in a criminal trial the accused must be presumed to be innocent unless he is proved to be guilty; and

(3) that the onus of the prosecution never shifts.

It is true that under section 105 of the Evidence Act the onus of proving exceptions mentioned in the Indian Penal Code lies on the accused, but this section does not at all indicate the nature and standard of proof required. The Evidence Act does not contemplate that the accused should prove his case with the same strictness and rigour as the prosecution is required to prove a criminal charge. In fact, from the cardinal principles referred to above, it follows that, it is sufficient if the accused is able to prove his case by the standard of preponderance of probabilities as envisaged by s. 5 of the Evidence Act as a result of which he succeeds not because he proves his case to the hilt but because probability of the version given by him throws doubt on the prosecution case and, therefore, the prosecution cannot be said to have established the charge beyond reasonable doubt. In other words, the mode of proof, by standard of benefit of doubt, is not applicable to the accused, where he is called upon to prove his case or to prove the exceptions of the Indian Penal Code on which he seeks to rely. It is sufficient for the defence to give a version which competes in probability with the prosecution version, for that would be sufficient to throw suspicion on the prosecution case entailing its rejection by the Court. This aspect of the matter is no longer *res integra* but is concluded by several authorities of this Court. In *Harbhajan Singh* v. *State of Punjab*(1) this Court observed as follows :

> "But the question which often arises and has been frequently considered by judicial decisions is whether the nature and extent of the onus of proof placed on an accused person who claims the benefit of an Exception is exactly the same as the nature and extent of the onus placed on the prosecution in a criminal case; and there is consensus of judicial opinion in favour of the view that where the burden of an issue lies upon the accused, he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt. That, no doubt, is the test prescribed while deciding whether the prosecution has discharged its onus to prove the guilt of the accused; but that is not a test which can be applied to an accused person who seeks to prove substantially his claim that his case falls under an Exception. Where an accused person is called upon to prove that his case falls under an Exception, law treats the onus as discharged if the accused person succeeds "in proving a preponderance of probability." As soon as the preponderance of probability is proved, the burden shifts to the prosecution which has still to discharge its original onus. It must be remembered that basically, the original onus

(1) [1965] 3 S.C.R. 235, 241

A never shifts and the prosecution has, at all stages of the case, to prove the guilt of the accused beyond a reasonable doubt."

The same view was taken in a later case in *State of U.P.* v. *Ram Swarup & Anr.*(1) where this Court observed as follows :

B "That is to say, an accused may fail to establish affirmatively the existence of circumstances which would bring the case within a general exception and yet the facts and circumstances proved by him while discharging the burden under section 105 of the Evidence Act may be enough to cast a reasonable doubt on the case of the prosecution, in which event he would be entitled to an acquittal. The burden which rests on the accused to prove the exception is not C of the same rigour as the burden of the prosecution to prove the charge beyond a reasonable doubt. It is enough for the accused to show, as in a civil case, that the preponderence of probabilities is in favour of his plea."

While the Courts below have enunciated the law correctly, they seem to have applied it wrongly by overlooking the mode and nature D of proof that is required of the appellant. A perusal of the oral and documentary evidence led by the parties goes to show that the Courts not only sought the strictest possible proof from the appellant regarding the explanation given by him, but went to the extent of misplacing the onus on the accused to prove even the prosecution case by rejecting the admissions made by the prosecution witnesses and by not relying on the documents which were in power and possession of the E prosecution itself on the speculative assumption that they were brought into existence by the accused through the aid of the officers. Furthermore, the Courts below have failed to consider that once the appellant gives a reasonable and probable explanation, it is for the prosecution to prove affirmatively that the explanation is absolutely false. In a criminal trial, it is not at all obligatory on the accused to produce evidence in support of his defence and for the purpose of proving his F version he can rely on the admissions made by the prosecution witnesses or on the documents field by the prosecution. In these circumstances, the Court has to probe and consider the materials relied upon by the defence instead of raising an adverse inference against the accused, for not producing evidence in support of his defence, because as we have already stated that the prosecution can not derive any strength or support from the weakness of the defence G case. The prosecution has to stand on its own legs, and if it fails to prove its case beyond reasonable doubt, the entire edifice of the prosecution would crumble down. Thus it would appear to us that both the Courts below have made an absolutely wrong approach in deciding the truth of the defence version and have not followed the principles laid down by this Court in judging the case of the accused.

H The Courts below have based the conviction of the appellant on the sole testimony of P.W. 1 the Nazir who has categorically stated

(1) [1975] 1.S.C.R. 409, 416-17.

in the Court that the appellant had taken a sum of Rs. 10,000/- on January 9, 1965 and thereafter he never returned this amount to the Nazir until September 30, 1965. The Courts below have chosen to place implicit reliance on the evidence of P.W. 1 completely ignoring the important admissions made in favour of the accused by other prosecution witnesses some of whom were declared hostile and some of whom were not. Before analysing the evidence, it may be necessary to describe the exact allegation made by the prosecution against the accused. The starting point of the case is a meeting which is said to have taken place in the Secretariat on September 25, 1964 in which according to the appellant he was positively directed to visit the villages and persuade the land-owners to receive the compensation and this formed the occasion for the A.D.M. to have withdrawn the money to visit the spot with the money. According to the prosecution no such decision was at all taken in the meeting and the visit to the village Balichandrapur might have been for some other purpose and the question of distribution was only a pretext invented by the accused to shield his guilt. We would, therefore, now take up the evidence regarding the meeting said to have taken place on September 25, 1964. We might also mention that the learned Special Judge has believed the statement of the accused that he did attend the meeting in the Secretariat on September 25, 1964, as would appear from the finding given by him at p. 79 of the Paper Book. What the Special Judge has not accepted is the assertion of the accused that he had been directed to visit the village personally and distribute the amounts to the villagers. The meeting is said to have been called by the Secretary Works Department and therefore the Secretary Works Department was the best person who would have thrown light on the subject and would have clinched the issue. The Secretary, Works Department, was a Government servant and it was not at all difficult for the prosecution to have examined him to settle the controversy on this matter. For the reasons best known to the prosecution, the Secretary, Works Department, was not at all examined and we have to decide this question on the basis of oral and documentary evidence produced by the prosecution. The Special Judge, instead of drawing an adverse inference against the prosecution, has placed the onus on the accused for not having summoned the Secretary, Works Department, as a witness in defence forgetting that it was part of the prosecution case itself that no decision to distribute the amount was taken in the meeting and, therefore, the money was not taken for distribution to tenants in the village but was misappropriated. It was not for the defence to prove the prosecution case which formed the bulwark of the charge of misappropriation. Further more, the Secretary, Works Department, was a high Officer of the Government and he could have thrown a flood of light on this question.

Now coming first to the oral evidence, P.W. 8 Sayad Allamuddin who was the Land Acquisition Officer Cuttack has testified to the fact that in the meeting held on September 25, 1964 the appellant had been asked to take early action for payment of compensation money by going personally to persuade the tenants. Perhaps, it was because of this statement, that this witness was declared hostile, and the prosecution

A sought permission to cross-examine him. The actual statement made by him in the Court may be quoted thus :

> "The accused had been asked to take early action for payment of the compensation money, by going personally and by persuading the tenants. It was the duty of the accused to see that compensation amounts were paid for land
B acquisition."

When the witness was declared hostile, all that was elicited from him was as follows :

> "It is not a fact that I had not stated to Investigating Officer that the accused and the Executive Engineer persuaded the tenants to receive the compensation amount. It is
C not a fact that I had stated to the Investigating Officer that while we were returning, some people wanted to take part payments for the lands already acquired, but no payment was made by the accused as we were then leaving."

Thus the prosecution even in cross-examination did not give any
D suggestion that the witness who was present in the meeting held on September 25, 1964 had stated on earlier occasions that no decision was taken in the meeting directing the accused to visit the village and persuade the tenants to receive the compensation amounts. He merely did not state to the police that when the accused and the Executive Engineer visited the spot they did not persuade the tenants to receive the compensation amounts. This was a case of a mere
E omission of a broad detail and not a case of contradiction. In these circumstances, therefore, the evidence of this witness on the question as to what transpired in the meeting and the nature of the directions given to the appellant remains unchallenged, and even if he was declared to be a hostile witness, he does not cease to be a reliable witness, if the Court chooses to accept his testimony.

F Before proceeding further we might like to state the law on the subject at this stage. Section 154 of the Evidence Act is the only provision under which a party calling its own witnesses may claim permission of the Court to cross-examine them. The section runs thus :

> "The Court may, in its discretion permit the person who
G calls a witness to put any question to him which might be put in cross-examination by the adverse party."

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 discretion. It is, however, well-settled that the discretion must be judiciously and properly exercised in the
H interests of justice. The law on the subject is well-settled that a party will not normally be allowed to cross-examine its own witness and declare the same hostile, unless the Court is satisfied that the statement of the witness exhibits an element of hostility or that he has

resiled from a material statement which he made before an earlier authority or where the Court is satisfied that the witness is not speaking the truth and it may be necessary to cross-examine him to get out the truth. One of the glaring instances in which this Court sustained the order of the Court in allowing cross-examination was where the witness resiles from a very material statement regarding the manner in which the accused committed the offence. In *Dahyabhai Chaganbhai Thakker* v. *State of Gujarat*(1) this Court made the following observations :

> "Section 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 clever witness in his examination-in-chief faithfully conforms to what he stated earlier to the police or in the committing court, but in the cross-examination introduces statements in a subtle way contradicting in effect what he stated in the examination-in-chief. If his design is obvious, we do not see why the court cannot, during the course of his cross-examination, permit the person calling him as a witness to put questions to him which might be put in cross examination by the adverse party."

> "Broadly stated, the position in the present case is that the witnesses in their statements before the police attributed a clear intention to the accused to commit murder, but before the court they stated that the accused was insane and, therefore, he committed the murder."

A perusal of the above observations will clearly indicate that the permission to cross-examination was upheld by this Court because the witnesses had categorically stated before the police that the accused had committed the murder but resiled from that statement and made out a new case in evidence before the Court that the accused was insane. Thus it is clear that before a witness can be declared hostile and the party examining the witness is allowed to cross-examine him, 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. In other words a witness should be regarded as adverse and liable to be cross-examined by the party calling him only when the Court is satisfied that the witness bears hostile animus against the party for whom he is deposing or that he does not appear

(1) [1964] 7 S.C.R. 361, 368, 369-70.

A to be willing to tell the truth. In order to ascertain the intention of the witness or his conduct, the Judge concerned may look into the statements made by the witness before the Investigating Officer or the previous authorities to find out as to whether or not there is any indication of the witness making a statement inconsistent on a most material point with the one which he gave before the previous authorities. The Court must, however, distinguish between a state-
B ment made by the witness by way of an unfriendly act and one which lets out the truth without any hostile intention.

It may be rather difficult to lay down a rule of universal application as to when and in what circumstances the Court will be entitled to exercise its discretion under s. 154 of the Evidence Act and the matter will largely depend on the facts and circumstances of such
C case and on the satisfaction of the Court on the basis of those circumstances. Broadly, however, this much is clear that the contingency of cross-examining the witness by the party calling him is an extra-ordinary phenomenon and permission should be given only in special cases. It seems to us that before a Court exercises discretion in declaring a witness hostile, there must be some material to show
D that the witness has gone back on his earlier statement or is not speaking the truth or has exhibited an element of hostility or has changed sides and transferred his loyalty to the adversary. Further more, it is not merely on the basis of a small or insignificant omission that the witness may have made before the earlier authorities that the party calling the witness can ask the Court to exercise its discretion. The Court, before permitting the party calling the witness
E to cross-examine him, must scan and weigh the circumstances properly and should not exercise its discretion in a casual or routine manner.

It is also clearly well settled that the mere fact that a witness is declared hostile by the party calling him and allowed to be cross-examined does not make him an unreliable witness so as to exclude
F his evidence from consideration altogether. In *Bhagwan Singh* v. *State of Haryana*(1), Bhagwati, J., speaking for this Court observed as follows :

> "The prosecution could have been avoided requesting for permission to cross-examine the witness under Section 154 of the Evidence Act. But the fact that the court gave permission to the prosecutor to cross-examine his own
G 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."

Applying these principles, we would now examine the position.
H So far as P.W. Sayad Allamuddin was concerned, he was the Land Acquisition Officer and merely because he happened to be working

(1) [1976] 1 S.C.C. 389, 391-92.

under the accused, there was no reason for him to depose falsely at a time when the appellant had been suspended and was facing a trial before the Special Judge. Further more, on the basic point that the accused had been asked in the meeting to go personally to the village and persuade the tenants to receive compensation money nothing has been elicited from him even in cross-examination to show that this statement was an after-thought or was in any event incorrect or false. We shall presently show that this statement is supported by documents of an unimpeachable nature which have been produced by the prosecution itself and whose genuineness cannot be doubted. Exhibit 2 which is a note by this witness dated January 9, 1965 long before an inquiry started against the accused contains categorically a statement which runs as follows :

> "In the last meeting held in the Secretariat the Secretary, Works Department suggested that the A.D.M. and the Executive Engineer (R & B) should try to persuade the villagers and make payment of the compensation."

This note further shows that the appellant proposed to pay a visit to the area along with the Executive Engineer and he had suggested that the A.D.M. should take an amount of Rs. 10,000/- for disbursement if the villagers agreed to receive compensation. This document, according to P.W. 1, the Nazir, who is the star witness of the prosecution, was received by him as far back as January 9, 1965 along with Ext. 1 the order of the appellant directing the Nazir to pay him Rs. 10,000/-. It would be impossible to suggest that as early as January 9, 1965 the witness Sayad Allamuddin Ahmed P.W. 8 was fabricating this document regarding an event which had taken three or four months ago without any rhyme or reason. Thus Ext. 2 fully corroborates the evidence of P.W. 8 on the point as to what transpired at the meeting held in the Secretariat and demolishes the prosecution case that no instructions were given to the appellant on September 25, 1964 in the meeting for visiting the spot and persuade the tenants to accept compensation money. In these circumstances, therefore, we feel that the Trial Court was not at all justified in declaring P.W. 8 as a hostile witness or in allowing the prosecution to cross-examine him. Even if he was cross-examined his evidence appears to be fully acceptable and worthy of credence. He is a person of status and responsibility and there is nothing to show why he should depose falsely merely to help the accused knowing full well that being a Government servant he might be harmed if he made a false statement in order to support the appellant.

This fact is further supported by another official document which is Ext. 10, namely, the tour diary of the appellant dated January 7, 1965 to January 31, 1965. In this diary the appellant, as far back as January 7, 1965, made a clear mention of the facts that transpired at the meeting and stated thus :

> "Discussed with Revenue Secretary regarding various allegations of Kanika Tahasil pending for enquiry. He also wanted that I should visit the spot and enquire into the matter

A personally and also make a thorough enquiry into the various encroachments in different forest blocks of Kanika Tahasil."

This statement which is made in an official document in the discharge of his duties has been made even before the money was sought to be withdrawn from the treasury and at a time when there was no dispute at all regarding the question of misappropriation. This document also fully corroborates the evidence of P.W. 8. Thus from the evidence of the prosecution itself, the fact that in the meeting held in the Secretariat a decision was taken by which the appellant was directed to visit the village Balichandrapur and persuade the tenants to accept the compensation has been amply proved. The only person who could have contradicted this fact or falsified the same would have been the Secretary, Works Department, in whose presence the meeting took place whom the prosecution did not choose to examine. On the materials produced by the prosecution itself, it is manifest that the prosecution has miserably failed to prove that the visit of the A.D.M. to the village Balichandrapur on January 9, 1965 was not in connection with the payment of compensation to the villagers as no such decision was taken in the meeting.

The next question that arises is whether the appellant had actually taken the money for disbursement to the village Balichandrapur. On this point also oral and documentary evidence led by the prosecution clearly proves the version given by the appellant. To begin with, P.W. 7 who was an Executive Engineer at the relevant time has categorically stated that he had accompanied the appellant to village Balichandrapur and the appellant did try to persuade the tenants to receive the compensation but they refused to accept the same. In this connection the witness deposed as follows :

> "The accused thereafter enquired from the parties as to on what terms they were willing to give up possession of their lands which had already been selected for acquisition. The parties stated that if they were paid compensation at the rate of Rs. 200/- per gunth, they would part with their lands. The accused stated that he did not have sanction for payment of Rs. 200/- per gunth and could not pay them off hand, but if the parties wanted payment at the rate of Rs. 150/- per gunth he was willing to pay them cash at the spot. The parties did not agree. The accused said that they would be paid Rs. 200/- when that rate would be sanctioned and he was going to write about it."

This witness was also declared hostile and that too not because he had not made the statement referred to above before the police, but because of certain minor omissions in his statement before the police. These omissions consisted of the facts that there is no mention about the previous visit to Balichandrapur or that he had stated that while he was returning to Cuttuck he remained sitting in the car and the accused asked P.W. 3 to follow him with the bag

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and things like that. It has, however, not been elicited from him in cross-examination nor has it been argued that the witness had told the Investigating Officer that the accused had not met or had not talked at all with the tenants in his presence in order to persuade them to accept the compensation.

P.W. 6 Udaynath Parida who is a villager of Balichandrapur has categorically supported the statement of P.W. 7 that the accused had B agreed to pay compensation at the rate of Rs. 200/- per gunth and persuaded them to give up possession but the villagers refused. In this connection, the witness stated thus :

> "On hearing of the arrival of the accused we met him in Balichandrapur near the market place. We demanded payment of compensation money at a rate higher than what C was proposed by Government. The accused and his party agreed to pay us compensation at the rate of Rs. 200/- per gunth and persuaded us to give up possession so that Government may not be forced to take possession forcibly with the help of police."
>
> "The accused had informed the villagers including me that if we would be willing to accept the rate already D fixed by Government, at Rs. 150/- per gunth, he would pay us at the spot;"

This witness was also declared hostile, merely because of certain facts which he had omitted to state before the police. Thus it would appear that all the prosecution witnesses P.Ws. 6, 7 and 8 had been allowed to be declared hostile without any justification and the Trial Court appear to have exercised its discretion mechanically in readily E accepting the prayer of the prosecution without making any probe into the reasons for allowing the cross-examination. Indeed if such a discretion is freely exercised, then the accused will suffer serious prejudice and will be deprived of taking advantage of any damaging admission made by the prosecution witnesses, merely because the prosecution is allowed to cross-examine them by declaring them hostile. Such a course of action would have serious repercussion on F the fairness of the trial.

After going through the evidence of P.Ws. 6 and 7 we see absolutely no reason to distrust their evidence. So far as P.W. 7 is concerned he is a very high officer being an Executive Engineer at the relevant time and in no way subordinate to the appellant. He has admitted in his cross-examination by the prosecution that even G his confidential reports are not written by the accused. There is also nothing to show that he was in any way interested in the accused or was his great friend and supporter. In these circumstances, he had no reason to make a false statement that the accused had visited the village and persuaded the tenants to accept the compensation. The evidence of the villager P.W. 6 Udayanath Parida who is an independent witness also proves that the accused had taken the money to the village and made efforts to persuade the tenants to accept the H money. In fact the evidence of these two witnesses on this point follows as a logical corollary from the decision taken at the meeting held by the Secretary, Works Department, where the appellant was

directed to visit the spot and persuade the tenants to accept compensation. The evidence of P.W. 7 is fully corroborated by Ext. B a letter written by P.W. 7 Executive Engineer dated July 6, 1966, a copy of which was sent to the appellant and other officers. In this letter which is addressed to the Assistant Engineer, Road, Office of the Chief Engineer, Bhubaneswar, P.W. 7 as Executive Engineer had clearly mentioned that he along with the appellant had visited the site at Balichandrapur and persuaded the tenants to accept the money by enhancing the amount to Rs. 200/- per gunth to which the tenants agreed but for this the sanction had to be taken. It was, however, submitted by counsel for the State that this letter appears to have been brought into existence after the inquiry against the accused was launched in order to help him. This was an official letter and we do not see any reason why such a high officer as the Executive Engineer should have gone to the extent of fabricating an unnecessary letter to help the appellant against whom an inquiry had been ordered. Even if this letter be excluded from consideration, the other evidence both oral and documentary clearly show that the appellant had visited the spot in village Balichandrapur on January 20, 1965 with a view to distribute the compensation money and did make an attempt to persuade the tenants to accept the compensation but they refused to accept the same unless the compensation was raised to Rs. 200/- per gunth.

As against this the prosecution relied merely on the fact that in the tour diary of the accused Ext. 8 of the even date, viz. January 20, 1965, as also in the office report there is no clear mention that the appellant tried to persuade the tenants to accept the money or that he had taken the money with him to the spot. These documents undoubtedly contain the statement regarding the visit of the appellant to the spot and some other matters. The question of actual distribution or persuasion of the tenants being a matter of detail does not appear to have been mentioned in those documents. It would have been necessary to be mentioned in the documents, if the tenants had agreed to accept the money and if the money was actually disbursed to them. As the proposal suggested by the appellant did not materialise, there was no occasion for mentioning these facts in those documents.

As we have already indicated, it was not for the accused but for the prosecution to prove, before raising an adverse inference against the accused, that the visit of the appellant to Balichandrapur was merely a hoax. On the materials placed before us, not only the prosecution has miserably failed to prove this fact, but the explanation given by the accused appears to be not only probable but proved by the accused, even applying the standard of benefit of doubt. For these reasons, therefore, we do not agree with the finding of the Courts below that the accused did not take the money with him to Balichandrapur or made any attempt to distribute it to the tenants but has misappropriated and retained it dishonestly.

We might mention here that P.W. 3 Bhakta Charan Mohanti is another witness who has supported the case of the accused. But as

the witness has made inconsistent statements which sometimes go to support the prosecution and sometimes the accused and is further contradicted by his own tour diary and T.A. Bills, we do not choose any reliance on the evidence of this witness.

The next and the last question that falls for determination is as to whether or not the accused after returning from Balichandrapur handed over the money to the Nazir. It may be mentioned that the appellant had made no secret of the fact that after returning the money to the Nazir he had instructed him not to deposit the same in the treasury but to keep it out of cash for the reason which we have already indicated. In this connection we have only the word of P.W. 1 the Nazir as against the word of the appellant. The Nazir also does not appear to be a witness who is completely above suspicion. Cross-examination of this witness clearly revealed that the manner in which he had kept the accounts was not at all satisfactory and he was in the habit of allowing huge amounts to remain with him without depositing them in the treasury and that he was also building a house for which he had taken some loans.. Instead of applying a very strict standard to test the testimony of such a witness, the High Court seems to have explained the irregularities committed by the Nazir P.W. 1 thus :

> "Heavy cash remaining with the Nazir that Ext. D discloses and the facts of the Nazir having secured house-building advance during September 1965 may raise speculations and surmises against the Nazir."

There are, however, important circumstances to indicate that the explanation given by the appellant is both probable and reasonable. P.W. 9 who was the Nizarat Officer and *who had not been declared hostile* (emphasis ours) has clearly stated that the amount was taken by the appellant for disbursement. The witness further deposes that in March 1965 he had a discussion with the appellant regarding the amount of Rs. 10,000/- taken by him and the appellant had then told him that the amount could not be disbursed as the tenants did not agree to take the amounts and that he had kept the amount with the Nazir. In this connection his statement is as follows :

> "In March, 1965, I had a discussion with the accused regarding the amount of Rs. 10,000/- taken by him and the accused then told me that the amount could not be disbursed as the tenants did not agree to take the amounts and that he had kept the amount with the Nazir. I did not make any enquiry from the Nazir regarding this as the balance amount as shown in the cash Book was the same in the cash sheet. The accused had told me that the Nazir had kept the amount of Rs. 10,000/- outside the cash as per his instructions."

It is, therefore, clear from the admission made by this witness that the case of the accused that he had given money to the Nazir is fully supported by him because he has referred to the statement made to him by the appellant as far back as March 1965 when there was absolutely no dispute, no inquiry and no allegation of misappropriation against the appellant. Much was made by the learned counsel for the

A State out of the fact that the accused had directed the Nazir to keep the amount outside the cash which betrayed the falsity of his explanation. A careful study of the circumstances in which the accused was placed would show that the accused was very much anxious to disburse the payments to the villagers, he had tried to persuade them to accept the money, but the villagers wanted more compensation and he had already taken steps to move the Government for increasing the amount B of compensation to Rs. 200/- per gunth. In these circumstances, therefore, there may be some justification in his thinking that the money should be readily available to be paid as soon as the villagers decided to accept the same. It is possible that he may have made an error of judgment or calculation or he was rather too optimistic but this conduct by itself does not lead to the inference of dishonest intention C to misappropriate the money. At any rate, in view of the evidence of P.W. 9 the Nizarat Officer that the amount was given to the Nazir by the appellant which fact was disclosed to him as far back as March 1965, it will be difficult to accept the uncorroborated evidence and testimony of P.W. 1 the Nazir, that he did not receive the money from the appellant after January 9, 1965.

Further more there were other important circumstances why no D reliance should be placed on the evidence of the Nazir P.W. 1. It would appear from the evidence of the Nazir himself that on September 15, 1965 the cash in the hands of the Nazir was Rs. 11,16,066.57 out of which Rs. 7,36,810.86 were for land acquisition proceedings. Admittedly he did not deposit this amount until October 20, 1965. He has given no explanation as to why he had kept such a huge amount with him without depositing the same in the E Treasury. This was undoubtedly a grave lapse on the part of the Nazir and should have been taken notice by the Courts below. Exhibit D is the order of the appellant dated September 27, 1965 by which the Nazir was directed to deposit the amount in the treasury and it was only on October 20, 1965 as would appear from Ext. D/4 that the Nazir deposited this amount in the treasury. The Nazir has given no explanation for this delay. Again it appears that the Nazir was F also building a house and he had received advances from the Government which he had not repaid and the possibility that he might have himself misappropriated the money handed over to him by the appellant for the purpose of returning the advances cannot safely be excluded. It would appear that the Nazir had taken a loan of Rs. 4,500/- on September 8, 1965 and another loan of Rs. 4,500/- was taken by him on September 27, 1965, total being Rs. 9,000/-, and it is quite G possible that the Nazir may have paid these amounts of the loans from out of the money given to him by the appellant.

Finally even if the accused had not given any money to the Nazir P.W. 1 right from January 9, 1965 he should have at least approached him and should have drawn the attention of the appellant to the fact that the money paid to him for the purpose of disbursement had not H so far been deposited with him. No such thing was done by the Nazir. It was suggested by the prosecution that as the appellant was in charge of the Treasury, the Nazir did not think it proper to interrogate him. It was, however, not a question of interrogation. It was

only a question of a subordinate officer pointing out something of very great importance to a superior officer which a superior officer would never misunderstand. In view of these circumstances, therefore, we are not in a position to place implicit reliance on P.W. 1. A

There is yet another very important document which has been brought on record by the appellant which is Ext. A dated December 8, 1965. This is a statement by P.W. 3 which to a very great extent supports the case of the accused, but as we do not propose to rely on the evidence of P.W. 3, we would exclude this document from consideration. Another document Ext. H is a statement of the Accountant Ghansham Das which appears at p. 215 of the Paper Book wherein Mr. Ghansham Das clearly mentions that when he found that Rs. 10,000/- were not traceable, he brought the matter to the notice of the officer in charge and he was told by the Nazir that the amount of Rs. 10,000/- had been left with him by the appellant with instructions not to refund in the treasury. This statement clinches the issue so far as the defence case is concerned and fully proves that the explanation given by the appellant was correct. This document would also have falsified the evidence of P.W. 1 who has tried to put the entire blame on the shoulders of the appellant. Unfortunately, however, the prosecution did not choose to examine Ghansham Das the Accountant who was a very material witness in order to unfold the prosecution narrative itself, because once a reasonable explanation is given by the appellant that he had entrusted the money to the Nazir on his return from Balichandrapur on January 20, 1965 which is supported by one of the prosecution witnesses, P.W. 9, as referred to above, then it was for the prosecution to have affirmatively disproved the truth of that explanation. If Ghansham Das would have been examined as a witness for the prosecution, he might have thrown a flood of light on the question. In his absence, however, Ext. H cannot be relied upon, because the document is inadmissible. At any rate, the Court is entitled to draw an inference adverse to the prosecution for not examining Ghansham Das Accountant as a result of which the explanation given by the appellant is not only reasonable but stands unrebutted by the prosecution evidence produced before the Trial Court. B C D E F

Having regard to these circumstances, it is not necessary for us to consider the other documents, like Exts. F, G and E produced by the appellant because they do not throw much light on the question and the facts contained therein have been seriously disputed by the prosecution. Similarly we have not referred to the other documents produced by the prosecution which show the entry of the money received by the appellant and so on because these facts are not disputed by the appellant at all. G

On a consideration of the evidence and the circumstances we are satisfied that the appellant has been able to prove that the explanation given by him was both probable and reasonable judged by the standard of the preponderance of probabilities. This being the position, it was for the prosecution to prove affirmatively in what manner the amount was misappropriated after it had been transferred from the custody of H

A the appellant to the custody of the Nazir. Such proof is wholly lacking in this case. As the accused has given a reasonable explanation, the High Court was in error in drawing an adverse inference against him to the effect that he had misappropriated the money.

For these reasons, the appeal is allowed, the judgments of the Courts below are set aside, the convictions and sentences imposed on B the appellant are quashed and he is acquitted of the charges framed against him.

P.H.P. *Appeal allowed.*