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JUDGMENT SHEET

**PESHAWAR HIGH COURT
MINGORA BENCH
(Judicial Department)**

Cr.R. No. 77-M/2022
With Cr.M No. 503-M/2022

JUDGMENT

Date of hearing: 30.01.2023

Petitioner: (Fazal Subhan) by Miss Mehnaz, Advocate.

Respondents:- (respondents are not represented being a motion case).

MUHAMMAD IJAZ KHAN J.- Through the instant criminal revision petition, petitioner has challenged the order and judgment of learned Additional Sessions Judge 1st Bajaur dated 20.10.2022 whereby an application of the present petitioner for declaring PW-12 namely Khan Badshah, ASI as hostile witness has been dismissed.

2. Precisely the facts of the case are that an FIR No. 131 dated 15.07.2020 under sections 302/324/34/337 A (i)/337 F (ii)/337-D PPC has been registered against the accused/respondents No. 1 & 2 at police station Khar District Bajaur, whose trial is in progress in the Court of learned Additional Sessions Judge 1st Bajaur in which statements of eleven (11) witnesses have so far been recorded and the present controversy cropped up in the cross-

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examination of PW-12 namely Khan Badshah, ASI when he replied to the few questions of defence counsel, which as per the wisdom and estimate of the petitioner/ complainant would favour the defence, therefore, he then and there requested to the trial Court that the said witness be declared as hostile witness and in this regard he also submitted an application in which notice was given to the learned District Public Prosecutor and after hearing both the parties the said application was dismissed by the learned trial Court vide the impugned order and judgment dated 20.10.2022, which order has now been challenged by the petitioner/complainant before this Court through the instant petition.

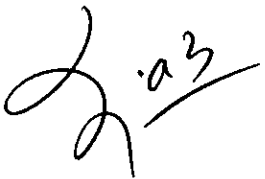
3. Arguments of learned counsel for the petitioner were heard in considerable detail and the record perused with his able assistance.

4. The record would show that petitioner/complainant has challenged the legality and propriety of the impugned order dated 20.10.2022 whereby his application for declaring PW-12 namely Khan Badshah, ASI as hostile witness has been dismissed, therefore, the only question before this Court would be that as to whether the application filed by the present petitioner/

complainant has rightly been dismissed and as to whether PW-12 could be declared as hostile witness during the course of his cross-examination or not? It is relevant to mention that under Article 150 of *The Qanun-e-Shahadat Order*, 1984 any witness could be declared as a hostile witness by the Court, the said Article being relevant for the present controversy is reproduced below;-

150. Question by party to his own witness: 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

The aforesaid Article unmistakably confer discretion upon the trial Court to permit the person who calls a witness to put any question to him, which might be put in cross-examination by the adverse party. There is no cavil with the aforesaid mandate of the trial Court, however, the only controversy in this case is that at what stage of the proceedings a party who has called a witness is to be permitted to put any question to such witness or in other words when a witness could be declared as hostile witness? It is relevant to mention here that in this case PW-12 namely Khan Badshah, ASI is the witness of prosecution and who recorded his examination-in-chief which prima facie supporting the version of the prosecution and thereafter the



defence started cross-examination of the aforesaid witness of the prosecution and it was in the middle of his cross-examination when the present petitioner being complainant of the instant FIR made a request to declare him as hostile witness, which request was turned down by the learned trial Court vide the impugned order and rightly so as it is settled that a party can ask the Court to declare a witness as hostile when it is his witness, however, when once he complete the process of examination-in-chief and the moment when the opposite party starts cross-examination then such witness did not remain his witness and thus at such stage (cross-examination) he cannot ask the Court to declare him as a hostile witness.

5. It may be clarified that a party can ask for declaring the witness as hostile when the opposite party has not started the cross-examination but when once cross-examination starts or commence then such request could not be entertained as after putting the first question in the cross-examination the said witness did not remain the witness of the prosecution or the complainant, as the case may be. This Court in a situation akin to the present one in the case of "Faisal Khan v/s The State" reported as 2022 YLR 1341 has held that there is no concept of declaring a

witness hostile during his cross-examination by the defence. The right of cross-examination of defence is very valuable right and if the witness knowingly or otherwise in cross-examination makes a statement which creates doubt qua the truthfulness of prosecution case, the benefit of such doubt is always given to the accused and cannot be withheld in favour of prosecution. In the case of "Muhammad Boota & another v/s The State & another" reported as 1984 SCMR 560 it was held by Apex Court that a witness who is unfavourable is not necessarily hostile, for 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 to the Court ; that the witness's answer to certain question is in direct conflict with evidence of other witnesses and is not and can never be a reason for allowing the witness to be treated as hostile and permitted to be cross-examined However, section 154, Evidence Act in no way fetters the discretion of the Court to permit leading questions to be put by a party to his own witnesses; the Court has unfettered discretion to allow the prosecutor to cross-examine the prosecution witnesses. Similarly, in the case of "Muhammad Zafar & 04 other v/s The State & another" reported as PLD 2013 Lahore 178 it was held/observed by the Lahore High Court that the fact

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that answers given by a witness to questions were in direct conflict with the evidence of other witnesses was not a reason for allowing the witness to be treated as hostile and for getting permission to cross-examine him.

6. In view of the above discussion and exposition of law the impugned order and judgment of learned trial Court is not open to any exception and accordingly the instant petition being bereft of any merit is hereby dismissed, in limine.

Announced
Dt. 30.01.2023


JUDGE

File
03/03/2023