The Right of Cross-Examination of an Adverse Party : When is a Party an Adverse Party to Another Party?

Introduction

1 Sections 137 and 138 of the Evidence Act 1950 provide for "cross-examination" of a witness by "the adverse party". These sections and other relevant sections of the Act apply to both criminal and civil cases.

Who is an "Adverse Party"?

2 Is a defendant an "adverse party" as against another defendant? Is a defendant necessarily an "adverse party" to the plaintiff?

3 It can be seen from the authorities that clearly a party does not become an adverse party to another merely by they being on opposite sides in the title to the case concerned. And two persons being on the same side in the title to a case may well be in an adversarial position to each other.

4 While terms used in civil cases are used here, the points raised here would need to be considered in criminal cases as well, including as regards a case where there are a number of accused persons who may or may not be in an adversarial position to the other accused person or persons. There may arise an issue as regards whether an accused person or one of the accused persons may properly be treated either as an adverse party or not as an adverse party when a witness called by the prosecution gives evidence.

5 It appears that these questions have not always been addressed when they should have been in the course of trials in the courts in Malaysia.

Restrictions on the Right of Cross-Examination

6 Some assistance is provided by the editors of Sarkar's Law of Evidence (Malaysian Edition), Lexis Nexis, 2016.

7 To quote Sarkar at pp 3381-3382:-

> *"…. The right of cross-examination can be exercised by co-respondents when their interest is in direct conflict with each other … Where the interest of the defendants no. 2 and 3 is common to certain extent with defendant no. 1, the court would permit them to cross-examine the defendant no. 1 and would call upon the plaintiff to cross-examine the defendant no. 1 at the end".*
>
> ……...
>
> *"The Evidence Act gives the right of cross-examination only to the adverse party. So, defendant can cross-examine a co-defendant only when the interest of co-defendant is adverse to the interest of defendant … A defendant having no conflicting interest with plaintiff cannot be permitted to cross-examine the plaintiff. The right of cross-examination is available only to an adverse party …."*
>
> ……...
>
> *"An order allowing cross-examination to the extent of clash of interest of co-defendant is permissible …."*

8 There appears to be an incomplete sentence at p. 3382 as follows:-

> *"Since there was cross-examination of co-defendant by another co-defendant."*

<u>Leading Questions in Cross-Examination</u>

9 Leading questions are a commonly used tool in cross-examination.

10 Section 141 of the Act defines a leading question as follows:-

> *"141 Any question suggesting the answer which the person putting it wishes or expects to receive or suggesting disputed facts as to which the witness is to testify, is called a leading question."*

11 Section 143 of the Act provides as follows:-

> *"(1) Leading questions may be asked in cross-examination, subject to the following qualifications:*
>
> *(a) the question may not put into the mouth of the witness the very words which he is to echo back again; and*

(b) the question may not assume that facts have been proved which have not been proved, or that particular answers have been given contrary to the fact.

(2) The Court, in its discretion, may prohibit leading questions from being put to a witness who shows a strong interest or bias in favour of the cross-examining party."

12 This is what is said in Noel Shaw's Effective Advocacy (1st edition, Sweet & Maxwell 1996), at p. 1:-

"A leading question is traditionally defined as one which suggests its own answer."

……...

"… [A] more useful definition may be:

*"**A leading question gives evidence***

"The test of whether a question is leading is whether evidence comes from the advocate …."

13 However, it is contended that it would be better if a helpful answer can and is obtained without counsel resorting to using leading questions. A favourable answer (for the cross-examiner's purpose) which is given to even a proper leading question should carry less credibility and weight than a favourable answer which is given to a question which is not a leading one, *ceteris paribus.*

14 Leading questions should therefore be asked as sparingly as possible.

Cross-Examination by a Party of That Party's Own Witness

15 Section 154 of the Act provides as follows:-

"154. 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."

16 The section may be used where the court is persuaded that a witness called by a party is a hostile witness and exercises its discretion so as to allow questions which may be put in cross-examination, e.g. leading questions.

17 The hostile witness rule is a rule of the common law. The Australian Law Reform Commission in its Interim Report on Evidence, ALRC 26 (Interim) Vol 1 (1985), [623], criticised the rule as irrational and anachronistic. It proposed in substitution for that stringent rule an "unfavourable" witness rule.

18 One of the results of the Commission's criticism is section 38(1) of the Evidence Act 38 of Australia. The Act applies, *inter alia*, as a federal law in a country made up of states and also territories, internal and external, with there being a federal court system and separate court systems in the states and territories (the states and internal territories have power to make legislation regarding evidence). The High Court of Australia is the joint highest court of appeal for the systems at the federal level and the level of the states and territories.

19 Section 38(1) of the Act provides as follows:-

> *"(1) A party who called a witness may, with the leave of the court, question the witness, as though the party were cross examining the witness, about:*
>
> *(a) evidence given by the witness that is unfavourable to the party; or*
>
> *(b) a matter of which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination in chief, making a genuine attempt to give evidence; or*
>
> *(c) whether the witness has, at any time, made a prior inconsistent statement."*

20 In the Malaysian Act, the broad wording of section 154 would permit the court to apply the "unfavourable" evidence rule in place of the hostile witness rule.

Conclusion

21 It is important to note the limits to the right to cross-examine a witness.

22 An injustice can arise with the misuse of leading questions put to a witness even by an adverse party. And there can be also an injustice, especially when such questions are put (even without objection) to a witness who is not in an "adverse" position to the party questioning that witness.

23 Unfortunately, it is thought by some that there is an unqualified right vested in a defendant or an accused person to cross-examine another defendant or accused person or a party on the opposite side in the title to a case.

24 As shown by the authorities, the court can, in certain circumstances, refuse to allow cross-examination by a plaintiff of a defendant and a witness called by the defendant and *vice versa*.

25 The extreme and impermissible form of a leading question which calls for echoing back of the answer which is supplied by the question can lead to the examining party or counsel losing credibility.

26 There is anecdotal evidence of counsel for a non-adverse party trying to justify a leading question (and even an echoing type of leading question put to an adverse party's witness) by saying that the witness can say either *"*yes*"* or *"*no*"* in answer to the question. There appears to be no authority, especially a credible one, supporting such a position.

27 An objection is to be taken not to the answer that may come from a witness but, as provided in the Malaysian Act, to the content of the question. The justification for a leading question based on the purported choice for the witness between a "yes" answer or a "no" answer is not mentioned in the Malaysian Act. A witness has no choice but to tell the truth.

28 A key point in section 141 of the Malaysian Act is the use in it of words such as "suggesting", "wishes" and "expects" so as to render a question objectionable on the ground that it is a leading question which has been put by someone who is not an adverse party. And even if the right to put a leading question is available, the question must not be of the echoing type. What is

relevant is the intention behind the question, and not the choice of the answer to the question purportedly vested in the witness.

29 If a question runs afoul of the provisions of the Malaysian Act, and there is an objection to the question, which objection is allowed, the court should not allow the witness to answer the question. The court need not address a further point as to whether a witness' answer which is given to an improperly put question is true and of weight.

30 To seek to justify leading questions, especially of the echoing type, by raising the "yes" or "no" argument, is to make nonsense of the law as contained in sections 141 and 143 of the Malaysian Act.

31 It is important that there be tightening of the practice in the courts and greater control of the parties and counsel as regards the right of cross-examination and the accompanying right to put leading questions.