

\$

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 23rd May, 2017
Pronounced on: 03rd July, 2017

+ WP(Crl.) 1350/2017 and Crl. M.A. 7450/2017

VIJAY KUMAR

..... PETITIONER

Through: Mr. Siddharth Agarwal, Mr.
Raj Mohan Gupta and Mr.
Nikhil Pillai, Advocates

Versus

STATE (GOVT. OF NCT OF DELHI) RESPONDENT

Through: Mr. Avi Singh, ASC and Ms.
Anyia Singh, Advocate with
SI Sunder Kumar, PS
Ambedkar Nagar

CORAM:
HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT

1. The import, scope and width of the discretion vested in the Judge presiding over a criminal trial to permit the cross-examination of a witness to be deferred until another witness has been examined is the issue of general importance posed in these proceedings.

2. The petition has been presented invoking the jurisdiction of this court under Articles 226 and 227 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973 (Cr. PC) seeking to assail the view taken by the Sessions Judge (South), by order dated 13.04.2017, in the course of trial of sessions case

against the petitioner on charge for offences punishable under Sections 302, 307 and 34 of Indian Penal Code, 1860 (IPC), arising out of a report under Section 173 Cr. PC, submitted on conclusion of investigation into first information report (FIR) no.375/16 of police station Ambedkar Nagar, throwing up questions that call for application of Section 231(2) Cr. PC.

3. The FIR was initially registered for the offence under Sections 307 / 34 IPC. The charge-sheet would show that the victim (Sanjay @ Arvind) succumbed to the stab injuries as a result of which the charge for the offence under Section 302 IPC was also added. Though the contentions raised here relate to a prayer made in the course of trial before the court of Sessions, the view taken respecting the discretion vested in the trial judge by Section 231(2) Cr.P.C. would also apply to trial of a warrant case instituted on a police report in the court of Magistrate in as much as the proviso to sub-section (3) of Section 242 Cr. PC confers similar discretion on the said court as well.

4. Though the petition raises a pure question of law, it is proper to consider it against such background facts as are undisputed. The case against the petitioner, and other persons facing the trial as co-accused with him, is founded primarily on the allegations made in the FIR registered on 27.06.2016 regarding an incident that statedly occurred at 4.30 p.m. on the said day. The first informant Imran told the police in the FIR that he had gone visiting a public park in Madangir area in the company of his friend Sanjay @ Arvind (the victim) where the appellant had arranged a *bhandara*. Imran and

Sanjay @ Arvind wanted to partake the food being offered in the *bhandara* but the petitioner told him that the same could not be served to them as it was meant for guests. A quarrel ensued in the course of which Sanjay @ Arvind gave a slap to the petitioner who, in turn, allegedly became abusive and exhorted his nephews Deepak and Rohit to commit physical assault. It is alleged that pursuant to such provocation, and exhortation, Rohit picked up a knife and used it for stabbing Sanjay @ Arvind in his abdomen with Deepak, statedly at the instance of the petitioner, assisting by holding on to him. It was further alleged that the petitioner had also attacked Imran (the first informant) with knife inflicting injury on his thigh. It is stated that the investigation brought out that the incident was seen by two other persons, they being Abhimanyu and Shivraj Naydu @ Sullie. It also needs to be mentioned that besides Imran, Abhimanyu and Shivraj Naydu, the prosecution also rests its case, *inter alia*, on the evidence of at least three other public witnesses, they being Joginder Kumar, Vinay and Bhushan Satija.

5. The trial of the sessions case is pending on the file of the court of Sessions Judge (South) where the case was listed at the stage of prosecution evidence on 13.04.2017. A witness named Bhushan Singh was present before the court on that date and was examined as PW-3, and after cross-examination, was discharged. Another witness Abhimanyu (one of the three eye witnesses) was also present. However, the petitioner through his counsel moved an application praying for a direction to the prosecution to conduct the examination-in-chief of the three eye witnesses (Imran, Abhimanyu and Shivraj Naydu) before the defence was called upon to cross-

examine them submitting that it was necessary to ensure that the defence was not prematurely disclosed to the prosecution, or to the said witnesses, referring in this context to the provision contained in Section 231(2) Cr. PC.

6. The learned sessions judge, by her order dated 13.04.2017, adjourned the matter without calling upon the prosecution to examine Abhimanyu, presumably for the reason that the case property had not been produced. The first informant (eye witness) Imran had not been served, his available address having been reported to be incomplete while the third eye witness Shiv Raj Naydu was reported to be in judicial custody in another case for which reason appropriate process was directed to be issued.

7. The application for the petitioner with prayer in terms of Section 231(2) Cr.P.C., however, was dismissed by the trial judge holding that it was not possible to use discretion in favour of the accused in view of the observations of this court in Bail Application No.2163/2016, titled *Himanshu @ Tiddi @ Kala vs. State (NCT of Delhi)*.

8. It may be added here that the learned Sessions Judge apparently misread the application of the petitioner construing it as one praying for deferment for cross-examination of six witnesses, including the above mentioned three eye witnesses, the others being Joginder Kumar, Vinay and Bhushan Satija.

9. By the petition at hand, it is urged that if all the three eye witnesses are not allowed to be cross-examined at the same time,

grave prejudice is likely to be caused as the petitioner would be compelled to disclose his defence prematurely giving an opportunity to the prosecution to fill up lacuna. The petitioner relies on the view taken in *Jayakar vs. The State*, ILR 1996 Karnataka 2783 and *R. Selvan vs. Sate*, CrI.RC (MD) No. 744 of 2016, a case decided by a learned Single Judge of Madras High Court on 24.01.2017.

10. *Per contra*, the respondent State through the learned Additional Standing Counsel argued that the view taken by the learned Sessions Judge in the impugned order does not call for any interference, submitting that the possibility of the deferment being abused to brow-beat or unduly influence the eye witnesses compelling them to turn hostile cannot be ruled out, referring in this context to the view taken in *Himanshu @ Tiddi @ Kala* (supra). The learned Additional Standing Counsel also referred to *S.J. Chaudhary vs. State (Delhi Administration)*, 1984 (1) SCC 722; *Shamoon Ahmed Sayed & Anr. vs. Intelligence Officer Narcotic Control Bureau, Chennai* 2009 CrI.L.J. 1215 (Karnataka); and *State of Maharashtra vs. Rajaram Appana Mane*, Criminal Writ Petition No.578 of 2016, decided on 23.1.2017 by a learned Single Judge of High Court of Judicature at Bombay.

11. It is settled that in a criminal prosecution, the onus of proving the necessary facts constituting the guilt of the accused is entirely and squarely that of the prosecution. The prosecution, being the master of the proceedings, generally has the prerogative to decide on the order in which the witnesses supporting its case are to be

brought in to give their respective evidence, this, however, being regulated in terms of Section 135 of the Indian Evidence Act, 1872, by the law and practice for the time being related to the relevant procedure and, in the absence of any such law, by the discretion of the court. It is also trite that all facts, except the contents of documents (or electronic records) may be proved by oral evidence (Section 59 Evidence Act), which must, in all cases (with some exceptions) be direct (Section 60 Evidence Act), such oral evidence being inclusive of (Sections 137 and 138 Evidence Act) the examination-in-chief by the party who calls the witness, followed by cross-examination by the adverse party (if it so desires) and concluded by re-examination by the party at whose instance the witness has appeared (if it so desires). To put it simply, the statement made by a witness – say, for the prosecution – during examination-in-chief cannot be treated as “evidence” unless and until the adverse party (the defence) has been given an opportunity to subject him to cross-examination and, further, if a case and request be properly made for re-examination unless and until such opportunity has also been afforded. In other words, it is the statement of a witness during chief-examination and cross-examination, followed by re-examination (if allowed), which together constitute “evidence”.

12. The fairness of the procedure of a criminal trial is as important as is the intended end result of the judicial process. The Code of Criminal Procedure, 1973 governs the entire spectrum of the process right from the time of a crime being reported through the investigative stages till the matter is brought to a logical end,

inter alia, by bringing the offender to book leading to his trial and, if found guilty, he being punished in accordance with law. The Code, as it presently exists, is what has evolved as the uniform procedural law gaining from experience over the years since the first consolidation (by the Criminal Procedure Supreme Court Act, 1852), the basic considerations borne in mind for its present shape being to ensure, per the objects and reasons, to the accused person “a fair trial in accordance with the accepted principle of natural justice”, every effort being made “to avoid delay in investigation and trial” since it is “harmful not only to the individuals involved but also to society (at large)”.

13. Separate procedures have been prescribed for trial of various offences, the categorization generally being of cases exclusively triable by the court of Sessions, and those triable by the courts of Magistrate, the former (Chapter XVIII) being the most elaborate, given the gravity of the crimes thereby covered or the severity of punishment provided therefor.

14. For the courts of Magistrates, three separate procedures of trials are provided, one for warrant cases (Chapter XIX), another for summons cases (Chapter XX), and yet another for petty offences it being known as summary trial (Chapter XXI). There is another classification within the procedure for trial of warrant cases, one for cases instituted on a police report (commonly known as “State cases”) and the other for cases instituted otherwise than on police report (commonly known as “private complaint cases”).

15. Broadly speaking, the stages for trial of any given criminal case, whether a sessions case or one triable by the Magistrate, are similar. After the charge has been framed, or notice of accusations has been given to the accused, in the event of accused pleading not guilty, prosecution is called upon to lead evidence and prove its case. After the prosecution has adduced its evidence, in the event of incriminating evidence having come on record, the accused is afforded opportunity to explain the circumstances appearing in the evidence against him by he being examined (under Section 313 Cr.P.C.). This is followed by the opportunity for defence evidence and, thereafter, both parties having been heard, the court renders its decision.

16. Generally speaking, fairness of the procedure is ensured by the law requiring the accused to be duly informed of the evidence on the basis of which accusations have been levelled against him by supply of copy of the police report, statements or documents (Sections 207 and 208 Cr.P.C.) and by his attention being drawn to the substance of accusations, *inter alia*, by formal charge and/or notice (as the case may be) and further, by seeking his explanation of the incriminating circumstances at the stage of his own statement, as indeed by the opportunity for effective cross-examination of witnesses for prosecution.

17. While expeditious trial is desirable, not only from the perspective of the society at large, but also, and more importantly, from that of the accused facing the criminal proceedings, the process cannot also be unduly hurried – lest it results in the defence

being stifled. Yet, the general principle that the trial court must proceed with a sense of urgency so that there is no inordinate delay or prejudice to either side must always be borne in mind. After all, experience has shown, delay in progress of the trial, particularly at the stage of gathering evidence, often results in evidence being lost, *inter alia*, on account of undue influence or intimidatory tactics being adopted against witnesses by unscrupulous elements. It is primarily with the objective to preclude such a possibility that while vesting it with the power to postpone or adjourn the proceedings, Section 309 Cr.P.C. enjoins upon the criminal court to continue the proceedings in every inquiry or trial “*from day to day until all the witnesses in attendance have been examined*”, the adjournment “*beyond the following day*” being an exception only if it be found “*to be necessary for reasons to be recorded*”.

18. The matter relating to *Himanshu @ Tiddi @ Kala* (supra), which has been referred to by the learned Sessions Judge in the impugned order and which has been relied upon by the State in these proceedings, had arisen out of an application for release on regular bail by the petitioner facing trial in that case on charge for offences under Sections 302/120-B/34 IPC and Section 25 and 27 of the Arms Act. The short order rendered by a learned Single Judge of this court permitting the said bail application to be withdrawn refers to some “*developments*” which had taken place in that matter. It is not very clear from the order as to what was the nature of said developments. Going by the drift of the observations made, however, it appears that there had been some delay in the progress of the trial on one hand and there was some reason afforded to

suspect that attempt had been made to unduly influence the witnesses. It is against this backdrop that the learned Single Judge observed thus:-

“Looking to the developments which have taken place in this case, I direct that the Trial Courts should endeavour to, and insist upon recording the complete testimony of crucial/star/eye-witnesses on the same day and not to defer the same as quite often it is seen that such witnesses resile from their earlier testimony and turn hostile. The reasons therefor are not difficult to imagine. It is often observed that the crucial/star/eye-witnesses are either not cross-examined, or are only partly cross-examined by the accused, and their cross-examination/ further cross-examination is deferred. Without any explicable reason, the witness then turns hostile. Particularly in cases involving heinous crimes, the possibility of the witnesses being pressurised, or coerced, or threatened, or bought over at the behest of the accused cannot be ruled out. This familiar pattern observed in several cases reflects very poorly on the capacity of the State to grant protection to such witnesses. Such cases, where crucial/ star/ eye-witness turns hostile without any basis, or for unexplained reasons, and the same result in acquittal, could well be cases in which the Rule of Law is a casualty.

This direction be circulated in all the districts and the concerned District & Sessions Judge, in turn, communicate the same to all the Trial Courts dealing with heinous offences.”

19. Whilst there can be no quarrel with the proposition that it is the responsibility of the State, as indeed of the criminal court, to ensure insulation of the witnesses in a criminal case from undue pressure or intimidatory tactics or allurements and, for such purposes, to proceed with the criminal trial with all expedition, by examining the witnesses in attendance on the day they appear

without unnecessary deferment, the said norms cannot render nugatory or take away the discretion vested in the presiding Judge by the statute to postpone the proceedings when it is necessary to do so.

20. Section 231 Cr.P.C., which is at the core of this discussion falls in the Chapter for trial before a court of Sessions (Chapter XVIII) and reads thus:-

“231. Evidence for prosecution. - (1) On the date so fixed, the Judge shall proceed to take all such evidence as may be produced in support of the prosecution.

(2) The Judge may, in his discretion, permit the cross-examination of any witness to be deferred until any other witness or witnesses have been examined or recall any witness for further cross-examination.”

21. Noticeably, sub-Section (1) of Section 231 Cr.P.C. resonates what is the general prescription in Section 309(1) Cr.P.C. The Sessions Judge is required to proceed to take evidence of all such witnesses as are produced by the prosecution on the date fixed for such purposes. Sub-Section (2) of Section 231 carves out an exception. The Judge may, in his discretion, permit cross-examination of any of such witnesses “to be deferred”, *inter alia*, until any other witness (or witnesses) has (or have) been examined.

22. As indicated earlier, a similar discretion is vested in the court of Magistrate presiding over trial of a warrant case on a police report, the relevant clause being Section 242(3) Cr.P.C. which reads thus:-

“(3) On the date so fixed, the Magistrate shall proceed to take all such evidence as may be produced in support of the prosecution;

Provided that the Magistrate may permit the cross-examination of any witness to be deferred until any other witness or witnesses have been examined or recall any witness for further cross-examination.”

23. It may be added here that the clause contained in Section 231(2) Cr. PC was not in existence for purposes of session trial under the Code of Criminal Procedure, 1898 (“old Code”) but was borrowed, and added to the sessions trial procedure, from similar provision contained in Section 251A (7) of old code which pertained to trial procedure for warrant cases and which corresponds to Section 242(3) of Code of Criminal Procedure, 1973 (“new Code”) quoted above. The new Code thus makes it part of the procedure for all sessions crimes.

24. The expression “*discretion*” appearing in Section 231(2) does not find place in the proviso to Section 242(3) Cr.P.C. This, however, does not mean there is no discretion available to the Magistrate presiding over the trial of a warrant case on police report. The use of the words “*may permit*” by itself, reflects that the Magistrate may or may not permit. It all depends on his “discretion”, as explicitly stated in Section 231(2), vis-à-vis a court of Sessions.

25. It is trite that the “*discretion*”, explicitly indicated in section 231(2), or implicit in the proviso to Section 242(3), cannot be an unguided discretion depending on whims or fancies of an individual. Such discretion, like any other discretion available to

the court, must be a “*judicial discretion*”. In other words, the discretion ought to be favourably exercised if there are sound reasons to do so. After all, the court is neutrally placed and holds the scales of justice evenly.

26. The exercise of discretion of the kind envisaged in Section 231(2) for allowing cross-examination of a particular witness to be deferred until certain other witness (or witnesses) have been examined, creates an exception to the general rule in Section 231(1) read with Section 309(1) in terms of which the evidence of the witnesses must be recorded on the day they appear which necessarily means not only examination-in-chief but also cross-examination. The use of the discretion resulting in cross-examination being deferred has the consequence of the witness being called upon to appear again on the date to which the case is adjourned so that his evidence can be completed by taking on board his testimony during cross-examination. It practically means the deposition of the concerned witness is split over two days, unless the other witness is also in attendance. The possibility of the time gap resulting therefrom being abused to win over the witness does exist. But, a balance can always be struck and suitable measures can always be adopted so that the witness remains properly insulated from undue pressure or influences while, the reasons set out by the accused to seek deferment of the cross-examination having been found to be good and valid, it is ensured that the defence is not prejudiced.

27. The prosecution examines its witnesses to bring on record all the relevant facts. As observed earlier, the oral evidence must (with some exceptions) be direct. There are certain restrictions within which the chief-examination may be conducted. In contrast, the scope for questioning during cross-examination is wider. To illustrate, unlike chief-examination, the defence in cross-examination may also put leading questions (Section 143 Evidence Act) or put any questions as tend to (Section 146 Evidence Act) test his veracity, discover his identity or position in life or to shake his credit.

28. In a criminal trial, it is quite often seen that the prosecution may be called upon to produce more than one witness of the same event. While the investigating police may have elicited only such facts from the witnesses during their statements (under Sections 161 or 164 Cr.P.C.) as may be crucial (or relevant) to its case, possibility of certain other facts (beyond what the witness had shared with the investigating police) being within his knowledge, and such facts being crucial to the defence, always exists. Further, the possibility that the witness for prosecution may be privy to certain facts but, may be inclined to withhold the same – because the same belies his version or suits the defence – cannot be ruled out. To put it simply, it is part of the exercise of effective cross-examination of a witness that the adverse party brings on record its own version either to discredit the version of the witness or to show the facts in different light.

29. If in such fact-situation as above, one of the several witnesses to the same fact or event were to be examined and cross-examined before other similarly placed witnesses of the same fact or event are called for, the defence would be bound to disclose its facts by putting the same to the former thereby exposing its version before the other like witnesses enter the witness box. In such a scenario, the possibility of the remaining witnesses modulating (or twisting) their version in such a way as to neutralize the defence version cannot be ruled out. This indeed could be a situation where the defence would stand prejudiced.

30. In *S.J. Chaudhary* (supra), the order of the High Court directing the trial to be proceeded with “from day to day” was challenged before the Supreme Court. In that context, the Court ruled thus:-

“2. We think it is an entirely wholesome practice for the trial to go on from day-to-day. It is most expedient that the trial before the Court of Session should proceed and be dealt with continuously from its inception to its finish. Not only will it result in expedition, it will also result in the elimination of manoeuvre and mischief. It will be in the interest of both the prosecution and the defence that the trial proceeds from day-to-day. It is necessary to realise that Sessions cases must not be tried piecemeal. Before commencing a trial, a Sessions Judge must satisfy himself that all necessary evidence is available. If it is not, he may postpone the case, but only on the strongest possible ground and for the shortest possible period. Once the trial commences, he should, except for a very pressing reason which makes an adjournment inevitable, proceed de die in diem until the trial is concluded”.

31. In *Shamoon Ahmed Sayed* (supra), a prayer similar to the one made by the petitioner in the case at hand under Section 231(2) Cr.P.C. had been declined by the trial court. The petition challenging the said view was repelled by a learned single judge of High Court of Karnataka ruling that such deferment could not be claimed as of right observing, in the factual matrix of that case, that the right of cross-examination available to the defence was a very effective weapon for unearthing the falsity. The petition was dismissed holding that the discretion under Section 231(2), or under proviso to Section 242 (3) Cr.P.C, could be exercised only in exceptional circumstances. The reasons were set out thus:-

“6. Such discretion may be exercised by the Court only in an exceptional circumstance, particularly when the Court feels that deferring the matter for cross-examination of witness/witnesses by the adverse party may not result in delaying the proceedings. It is both irregular and inconvenient to allow all the witnesses to be examined-in-chief at one stretch and to reserve the cross-examination of all the witnesses to a subsequent date. Though sub-Section (2) of Section 231 and proviso to Section 242(3) of Cr. P.C. give a discretion to the Judge to permit cross-examination of any witness to be deferred until any other witness or witnesses have been examined, the same should not be construed to mean that the accused has right to ask for deferring the cross-examination of witnesses in a wholesale way on the plea that the prosecution may take chance to fill up the lacuna in its case that may be disclosed in the cross-examination of its witnesses. Since, the burden is on the prosecution to prove its case, ordinarily it should be for the prosecution to decide, the manner and in what order it will lead its evidence before the Court. Ordinarily, therefore, it is the requirement of law that each witness shall be first

examined-in-chief and shall be then cross-examined before the next witness is called for examination”.

32. Similar questions arose in *Rajaram Appana Mane* (supra). Referring to the view taken by the Supreme Court in *S.J. Chaudhary* (supra) and by Karnataka High Court in *Shamoon Ahmed Sayed* (supra), a learned single judge of the High Court at Bombay rejected the prayer for deferment observing thus:-

“6. It cannot be accepted that if examination and cross examination of one witness is completed, prejudice will be necessarily caused to the accused. This is because there are sufficient checks available in Cr.P.C. and in Evidence Act. If witnesses are changing version in Court and different version was given before police, it is always open to the defence to bring that inconsistency, omission or addition on the record. In view of this procedure, it cannot be said that prejudice will be caused to the accused if one witness is examined and cross-examined first in time. Thus, it can be said that the order made by the learned Judge of the Trial Court is under some misconception. The accused has no such right. Further, no specific reasons are given either in the application given by the accused or in the order made by the learned Judge of the Trial Court”.

33. It is clear that the Supreme Court in the case of *S.J. Chaudhary* (supra) was not considering the issue from the perspective of Section 231(2) Cr.PC. In *Shamoon Ahmed Sayed* (supra), the Karnataka High Court did observe that the discretion could be exercised but qualified it by saying this could be done only in exceptional circumstances. The ruling in *Rajaram Appana Mane* (supra) is also on the basis of facts and circumstances peculiar to that case. The prayer for deferment was declined since the accused

had failed to give any specific reason in support. It cannot, thus, be argued that the statutory discretion under Section 231(2) Cr.PC. or Section 242 (3) Cr.PC. has been taken away.

34. In *Zahira Habibullah Sheikh Vs. State of Gujarat and Ors.*, (2006) 3 SCC 374, the Supreme Court quoted with approval, the observations of Vice-Chancellor Knight Bruce in *Pearse Vs. Pearse* [(1846) 1 De GT& SM 12: 16 LJ Ch. 153: 63 ER 950: 18 Digest (Repl.) 91, 748], that the discovery and vindication and establishment of truth are main purposes certainly of the existence of courts of Justice. Observing further that the “*fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice*”, it was further held that “*failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law*”, it being “*inherent in the concept of due process of law that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence*”.

35. Quoting *Bentham* to reiterate that witnesses are eyes and ears of justice, the court held thus :

“..If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors, like the witness being not in a position for reasons beyond control to speak the truth in the Court or due to negligence or ignorance or some corrupt collusion. Time

has become ripe to act on account of numerous experiences faced by Courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface rendering truth and justice, to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the Court and justice triumphs and that the trial is not reduced to a mockery...”

(emphasis supplied)

36. The following further observations of the Supreme Court in *Zahira Habibullah Sheikh* (supra) are of great relevance :

“35. This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crime being public wrong in breach and violation of public rights and duties, which affect the whole community as a community and are harmful to the society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting

agencies. Interests of society is not to be treated completely with disdain and as persona non grata. Courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice - often referred to as the duty to vindicate and uphold the 'majesty of the law'. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a Court of law in the future as in the case before it. If a criminal Court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.

36. The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the Courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning a Nelson's eye to the needs of the society at large and the victims or their

family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.”

(emphasis supplied)

37. While the concerns expressed by the State in resisting the prayer under Section 231(2) Cr. PC cannot be lightly brushed aside, as observed earlier, judicial use of discretion by the judge presiding over the trial to defer, or postpone, the cross-examination of a witness till after another witness has been examined ought not be taken away. The exercise of the said discretion, judicial and judiciously and for sound or valid reasons, may be necessitated in some cases to ensure fair procedure. As held by the Supreme Court in *Zahira Habibullah Sheikh* (supra), the evolution of principles of fair trial “is a constant, ongoing development process continually adapted to new and changing circumstances, and exigencies of the situation - peculiar at times and related to the nature of crime, persons involved - directly or operating behind, social impact and societal needs and even so many powerful balancing factors which may come in the way of administration of criminal justice system”.

38. The discretion given to the court of Sessions by Section 231(2), or to the court of Magistrate by Section 242(3), is with the

hallowed objective of ensuring fair play. The said objective cannot be rendered a dead letter by blindly denying the exercise of discretion because the prosecution apprehends that the period of deferment might be misused for unduly influencing the witness(es). In order to show such possibility and resist the move for deferment, the prosecution must support the objection with some material.

39. As observed earlier, the possibility of misuse of deferment can always be plugged by appropriate measures. At the same time, the deferment need not be so blanket or broadly granted, so as to postpone the cross-examination of a witness indefinitely or till all other similarly placed witnesses have been examined. Given the time consumed in the recording of evidence, and the heavy workload which the criminal courts carry, recording of chief-examination of multiple witnesses in one particular case on same day may not always be possible. It would all depend on the volume of work and the length of deposition(s) involved. No hard and fast rule with regard to, or exhaustive list of, possible measures for insulating the witnesses can be laid down. To put it simply, the grant of prayer for deferment in terms of Section 231(2), or Section 242(3) Cr.P.C., must always be subject to judicial discretion, depending on the facts and circumstances of each case and may be on suitable conditions for precluding the possibility of its abuse.

40. I may add that the decisions of the learned Single Judges in the cases of *Jayakar* (supra) and *R. Selvan* (supra) of Karnataka and Madras High Courts respectively take similar view as expressed above.

41. *While* summing up, it can be said that the possibility of witnesses for the prosecution in the criminal case being prone or susceptible to undue influences or pressures or intimidatory tactics is a universal phenomenon. It is a challenge faced by criminal justice administration in almost all jurisdictions the world over. It is a reality concerns respecting which cannot be trivialized or brushed aside. Primarily, it is the obligation of the State (read, the executive branch of the State) to adopt appropriate measures for protection of witnesses against such onslaughts as have the effect of debilitating the course of justice. But the criminal court presiding over the judicial process, when it becomes alive to such polluting endeavours, cannot be a mute spectator. It is inherent in its powers and jurisdiction to issue requisite directions for appropriate measures to be adopted so that the witnesses stand insulated and are able to depose before the court freely. It is the solemn and sacred duty of the court to hold a fair trial and this responsibility cannot be abdicated. Denying deferment of cross-examination of a witness, where genuine reasons have been shown to the court, would amount to acting in other extreme and, therefore, not fair. As said before, a balance can always be struck and while permitting some leeway in the form of deferment of cross-examination of a particular witness, suitable safeguards against its abuse can be put in position.

42. Against the above backdrop, in the opinion of this court, the exercise of judicial discretion by a criminal court in terms of Section 231(2), or Section 242(3) Cr. PC, may be properly exercised by bearing in mind the following principles :-

(i). The objective of a fair trial is to reach out to the truth so that justice can be administered; a fair trial must not only be not unduly hurried or hasty but also not be allowed to suffer unnecessary delay, the concept of due process of law inherent in fair trial procedure demanding observance not merely of the form but of its principles in substance;

(ii). It is the mandate of law that every criminal trial or “inquiry” is held and continued “from day-to-day” until all the witnesses in attendance have been examined - adjournment or postponement of the proceedings beyond the following day being only by way of an exception and for adequate reasons;

(iii). Ordinarily, the prerogative to decide the order in which witnesses are to be examined at the criminal trial is to be left to the prosecution; to ensure that there is fair play and the story of the prosecution unfolds sequentially and coherently, it may be regulated by the court in its judicial discretion;

(iv). Though it must generally be ensured that adducing of evidence by a particular witness is concluded in one go – giving evidence here means deposition under chief examination, followed by cross-examination and re-examination (if allowed) – if there are sound reasons supporting a prayer made to such effect, the trial judge may, in exercise of the judicial

discretion in terms of Section 231(2), or Section 242 (3) Cr. P.C., permit the cross-examination of the particular witness to be deferred till another witness of the same fact or event has been examined.

(v). The deferment of cross-examination under Section 231(2), or Section 242(3), Cr. P.C. cannot be claimed as matter of right, it being a matter of “discretion” vesting in the judge presiding over the criminal trial. In order to persuade the presiding judge to use the discretion under Section 231 (2), or Section 242(3), Cr.P.C., the defence must show sound reasons in support of the prayer, it being not available just for the asking, if so required by the presiding judge, by sharing material, may be in confidence, supporting the plea of possible prejudice if the discretion were not to be favourably granted.

(vi). Since the expectation of law is that the trial, once it commences, would continue from day-to-day till it is concluded, it is desirable that, keeping in mind the possible time required for recording of evidence (particularly of the prosecution), a detailed schedule of the dates of hearing on which evidence would be recorded is drawn up immediately after charge is framed – this, taking into account not only the calendar of the court but also the time required by the prosecution to muster and secure the presence of its

witnesses as well as the convenience of the defence counsel. Once such a schedule has been drawn up, all sides would be duty bound to adhere to it scrupulously.

(vii). While drawing up the schedule of dates for recording of the evidence for the prosecution, as indicated above, the presiding judge would take advice from the prosecution as to the order in which it would like to examine its witnesses, clubbing witnesses pertaining to the same facts or events together, for the same set of dates.

(viii). If the defence intends to invoke the jurisdiction of the criminal court to exercise the discretion for deferment of cross-examination of particular witness(es) in terms of Section 231(2), or Section 242(3) Cr. PC, it must inform the presiding judge at the stage of setting the schedule so that the order in which the witnesses are to be called can be appropriately determined, facilitating short deferment for cross-examination (when necessary) so that the recording of evidence continues, from day-to-day, unhindered avoiding prolonged adjournments as are often seen to be misused to unduly influence or intimidate the witnesses.

(ix). It is the bounden duty of the presiding judge of the criminal court to take appropriate measures, if

the situation so demands, to insulate the witnesses from undue influence or intimidatory tactics or harassment. If the court has permitted deferment in terms of Section 231(2), or 242(3) Cr. PC, for cross-examination of a particular witness, it would not mean that such cross-examination is to be indefinitely postponed or scheduled for too distant a date. The court shall ensure that the deferred cross-examination is carried out in the then on-going schedule immediately after the witness whose examination ahead of such exercise has been prayed for.

(x). If there are more than two witnesses pertaining to the same fact or event, it is not necessary that the court would use its discretion to have all of them examined-in-chief first and thereafter call them one by one for their respective cross-examinations. It would suffice, given the facts and circumstances of the particular case, if the request is granted vis-à-vis two of such multiple witnesses.

(xi). While exercising the discretion in favour of deferment in terms of Sections 231(2), or 242(3) Cr. PC, the court will bear in mind not only the reasons set out by the prosecution in opposing such a request but also the material, if any, submitted in support, as indeed the fact that the witness(es) whose prior examination is being asked for (before the cross-

examination of another witness), may not be readily available, being one whose presence cannot be secured without inordinate delay, considerations of the kind last mentioned possibly being good reason to decline the request.

(xii). The discretion to allow deferment of cross-examination in terms of Sections 231(2), or 242(3), Cr. PC can always be re-visited or recalled by the presiding judge as the trial proceeds, particularly if its misuse or abuse is brought to the notice of the court.

43. In the case from which the present proceedings arise, the learned Sessions Judge did not apply her mind to the reasons set out in support of the request under Section 231(2) Cr. PC. In this view, the order dated 13.04.2017 dismissing the application of the petitioner under Section 231(2) Cr. PC is set aside. The learned Sessions Judge shall reconsider the prayer in the said application on the date of hearing next fixed in the matter before her and pass a fresh order in light of the above-noted guidelines.

44. Since issues of this kind may be arising before other criminal courts, in the context of Section 231(2), or Section 242(3) Cr. PC, it is directed that a copy of this judgment shall be circulated amongst all judicial officers through the concerned District & Sessions Judges and Delhi Judicial Academy. The Registry shall transmit the copies for necessary compliance.

45. The petition and the pending application are disposed of in above terms.

(R.K. GAUBA)
JUDGE

JULY 03, 2017
yg/vk/nk

