

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 677 OF 2018

The State of Maharashtra,
Through : Police Inspector,
Jamner Police Station, Dist.
Jalgaon.

... **Petitioner.**

VERSUS.

1) Murlidhar Mansaram Sapkale,
Age 65 years.

2) Shantaram Murlidhar Sapkale,
Age 38 years,

3) Ravindra Murlidhar Sapkale,
Age 32 years.

4) Anil Shankar Shelke, Age 37
years.

5) Gajanan Damu Malkhede,
Age 32 years.

6) Sau. Shantabai Murlidhar Sapkale,
Age 65 years.
All r/o. Maldabhadi, Tq. Jamner,
District Jalgaon.

... **Respondents.**

...

Mr. S. D. Ghayal, APP for petitioner.

Mr. Satej S. Jadhav, Advocate for respondents.

CORAM : MANGESH S. PATIL, J.

RESERVED ON : 12th February 2019.

PRONOUNCED ON : 20th February 2019.

JUDGMENT :

Heard.

2. Rule. Rule is made returnable forthwith. The learned advocate Mr. Jadhav waives service of notice on behalf of the respondents. At the request of both the sides the matter is heard finally at the stage of admission.

3. The facts leading to filing of this writ petition under Article 227 of the Constitution of India are as under:

The respondents in Sessions Case No. 11/2016 in Sessions Court at Jalgaon are facing the charge for the offences punishable under section 302, 323, 504, 143, 147, 148, 149 of the Indian Penal Code for allegedly committing murder of one Yogesh Vasant Kapse. Three of them are under trial prisoners. The prosecution examined four witnesses including panch witnesses and a Medical Officer. On 13.12.2017 one eye witness and the informant were summoned for recording their deposition. However, the respondents filed an application (Exhibit 82) under section 231 (2) of the Code of Criminal Procedure. It was averred that there are number of eye witnesses. Considering the nature of the evidence to be adduced as revealed from their statements recorded under section 164 of the Code of Criminal Procedure it would be desirable and in the interest of justice that examination-in-chief of all the eye witnesses to be first recorded and thereafter the cross-examination of those witnesses may be permitted

to be commenced. It was averred that the defence will be open once the cross-examination of these witnesses commences and there was possibility of remaining witnesses to improve upon, causing serious prejudice to the respondents. The application was opposed by the prosecution. It was contended that if such a course was adopted the respondents would pressurize the witnesses and the application may be rejected. After hearing both the sides, by the impugned order dated 17.01.2018 the learned Additional Sessions Judge allowed the application (Exhibit 82) and directed that there was possibility of subsequent witnesses making improvement if the cross-examination of the first eye witness was recorded. There was no possibility of respondents' pressurizing the witnesses and the matter to be proceeded day-to-day till examination of all the eye witnesses was complete. Being aggrieved, the State has preferred this writ petition.

4. I have heard the learned APP as well as the learned advocate for the respondents. As can be easily discerned , the only legal point that is involved is regarding the scope and ambit of the provision of section 232 (2) of the Code of Criminal Procedure and its applicability to the fact situation of the matter in hand. In my considered view, the law in this respect is now well settled by the Supreme Court in the case of **State of Kerala Vs. Rasheed, 2018 SCC Online SC 2251**. With

respect, after considering several decisions of different High Courts as well as that of the Supreme Court, elaborate guidelines have been laid down. The present writ petition can easily be disposed of if one applies the ratio laid down in this case. For that purpose the following observations in paragraph No. 13 and 14 are eloquent and read thus :

"13. Section 231(2) of the Cr.P.C., however, confers a discretion on the judge to defer the cross-examination of any witness until any other witness or witnesses have been examined, or recall any witness for further cross-examination, in appropriate cases. Judicial discretion has to be exercised in consonance with the statutory framework and context while being aware of reasonably foreseeable consequences. The party seeking deferral under Section 231(2) of the Cr.P.C. must give sufficient reasons to invoke the exercise of discretion by the Judge, and deferral cannot be asserted as a matter of right.

14. Several High Courts have held that the discretion under Section 231(2) of the Cr.P.C. should be exercised only in "exceptional circumstances", or when "a very strong case" has been made out. However, while it is for the parties to decide the order of production and examination of witnesses in accordance with the statutory scheme, a Judge has the latitude to

exercise discretion under Section 231(2) of the Cr.P.C. if sufficient reasons are made out for deviating from the norm."

It was then observed in paragraph No. 18 to 20 as under :

18. There cannot be a straitjacket formula providing for the grounds on which judicial discretion under section 231(2) of the Cr.P.C. can be exercised. The exercise of discretion has to take place on a case-to-case basis. The guiding principle for a judge under Section 231(2) of the Cr.P.C. is to ascertain whether prejudice would be caused to the party seeking deferral, if the application is dismissed.

19. While deciding an Application under section 231(2) of the Cr.P.C., a balance must be struck between the rights of the accused, and the prerogative of the prosecution to lead evidence.

20. The following factors must be kept in consideration :

- . possibility of undue influence on witness(es);
- . possibility of threats to witness(es);
- . possibility that non-deferral would enable subsequent witnesses giving evidence on similar facts to tailor their testimony to circumvent the defence strategy;
- . possibility of loss of memory of the witness(es) whose examination-in-chief has been completed;

- . occurrence of delay in the trial, and the non-availability of witnesses, if deferral is allowed, in view of Section 309(1) of the Cr.PC."

Bearing in mind these erudite principles and guidelines, perusal of the application (Exh. 82) filed by the respondents before the Trial Court clearly shows that like it was in the case of **State of Kerala Vs. Rashid (supra)**, a bald assertion was made in the application (Exh. 82) stating that the defence would be prejudiced if the cross-examination of the eye witnesses was not deferred. It is not specifically mentioned as to in what manner a prejudice was likely to be caused to the defence. It was also not hinted as to how the witnesses would improve.

5. In this regard it is also pertinent to note that since statements of witnesses have already been recorded under section 161 of the Code of Criminal Procedure, there is always a very little scope for making any improvement and even if it is made, such an improvement would clearly be open for an attack by the defence. Minor contradictions and omissions have always to be overlooked. But any improvement made by a witness over and above what has been stated by him under section 161 of the Code of Criminal Procedure would suffer from the vice which would certainly make his testimony vulnerable. Therefore merely by saying that if the first eye witness is allowed to be cross-

examined the subsequent eye witnesses would suitably make an improvement in their examination-in-chief could be said to be a mere hypothesis and clearly overlooks the principles which govern appreciation of the testimonies of the witnesses particularly in criminal trials.

6. Ignoring the least possibility of eye witnesses making any improvement except by making their testimony vulnerable to the attack of calling them partisan witnesses, the learned Additional Sessions Judge has allowed the application (Exhibit 82) merely for asking. The impugned order is equally vague and bereft of sound reasons for exercising the discretion under Sub-section 2 of Section 231 of the Code of Criminal Procedure. Therefore, the writ petition deserves to be allowed.

7. The writ petition is allowed.

8. The impugned order passed by the learned Additional Sessions Judge on the application of the respondents (Exh. 82) dated 17.01.2018 is quashed and set aside.

9. Rule is made absolute in above terms.

(MANGESH S. PATIL, J.)

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