

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.924 OF 2022

Pradip Kundlikrao Kute

Age : 29 Years, Occu: Agriculture,
R/o: Salna, Taluka – Aundha Nagnath,
District – Hingoli

...Petitioner

Versus

1. The State of Maharashtra,
Through Police Station Officer,
Aundha Nagnath Police Station,
Aundha Nagnath, Dist. Hingoli.
2. Madhav S/o Sopanrao Darade,
Age : 31 years, Occu. Agriculture,
R/o. Salna, Taluka – Aundha Nagnath,
District-Hingoli.
3. Sopan S/o. Sakharam Darade,
Age : 75 years, Occu. Agriculture,
R/o. As above.
4. Vitthal Ganesh Darade,
Age : 24 years, Occu. Agriculture,
R/o. As above.
5. Uddhav S/o Sopan Darade,
Age : 41 years, Occu. Agriculture,
R/o. As above.
6. Ganesh S/o Sopan Darade,
Age : 50 years, Occu. Driver,
R/o. As above.

...Respondents

Mr Swapnil S. Rathi, Advocate for the petitioner
Mr P.G. Borade, APP for the Respondent No.1/State
Mr Dhananjay M. Shinde, Advocate for Respondent Nos. 2 to 6

CORAM : SHRIKANT D. KULKARNI, J.

DATE : 6th SEPTEMBER, 2022

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard finally with consent of both the sides at admission stage.
2. The petitioner has challenged the order passed below Exh.109 in Sessions Case No. 40/2020 by the learned Additional Sessions Judge, Basmathnagar dated 01.04.2022, thereby, cross-examination of four eye witnesses came to be deferred.
3. Heard Mr Swapnil Rathi, learned counsel for the petitioner and Mr Dhananjay Shinde, learned counsel for respondent Nos. 2 to 6 and Mr P.G. Borade, learned APP for respondent No.1/State.
4. Mr Rathi, learned counsel for the petitioner vehemently submitted that an application moved on behalf of respondent Nos. 2 to 6 (original accused) by taking aid of section 231(2) of Cr.PC, nowhere assigns any reason for deferment of the cross-examination of the eye witnesses. He submitted that it is discretion vested with the Court in view of section 231 (2) of the Cr.PC to defer the cross-examination having regard to the facts of the case. He submitted that in the present case, not a single witness is entered into witness box, when the application on behalf of the accused came to be moved vide Exh.109 under section 231 (2) of the Cr.PC. The application itself is bad in law. Secondly, the application does not disclose any reason for deferment of the cross-examination. He submitted that the learned Additional Sessions Judge has not used his discretionary power having regard to the facts of the case. He

has placed his reliance on the decision of the Hon'ble Supreme Court in case of ***State of Kerala Vs. Rasheed reported in AIR 2019 SC 721***. He took me through the relevant paras, more particularly, para Nos. 7, 9, 10 and 12. By taking help of guidelines laid down by the Hon'ble Supreme Court in above referred citation, Mr Rathi, learned counsel for the petitioner vehemently submitted that the impugned order is liable to be quashed and set aside since the original accused have not assigned any reason in their application for said deferment of the cross-examination. He submitted that the learned Judge has presupposed certain facts which are not permissible. The cross-examination can be deferred in view of the provisions under section 231 (2) of the Cr.PC but the discretion must be used judiciously having regard to the facts of the case. He submitted that the learned Additional Sessions Judge has committed an error in allowing that application. It has caused serious prejudice to the rights and interest of the prosecution agency. He, therefore, urged to quash and set aside the order.

5. Per contra, Mr Shinde, learned counsel for respondent Nos. 2 to 6/original accused supported the impugned order. He submitted that though application moved before the learned Additional Sessions Judge is not properly worded, by way of argument, the case of accused was put forth before the learned Additional Sessions Judge by taking into consideration that all the eye witnesses are interested witnesses and they are from the same family, and there was possibility of tutoring. The learned Additional Sessions Judge by considering abovesaid aspects, was pleased to allow that application and deferred the cross-examination of

those four witnesses. He submitted that the impugned order is not at all defective in the eye of law. The learned Judge has properly used his discretionary powers under section 231(2) of Cr.PC. There is no defect.

6. Mr Shinde, learned counsel has also placed his reliance on the same decision of the Hon'ble Supreme Court in case of ***State of Kerala Vs. Rasheed***. He also invited my attention to para Nos. 19, 20, 22, 23 and 24. He submitted that request for deferment of the cross-examination was moved on behalf of the accused before any witness is entered into witness box which was the proper stage to submit an application as per the guidelines given by the Hon'ble Supreme Court in para Nos. 24/5 and 24/6. He has also referred decision of the Karnataka High Court in case of ***Shankar Vs. State of Hebbagodi Police Station, Rep. By State Public Prosecutor, High court of Karnataka, Bengaluru reported in 2017 SCC Online Kar 4805*** and decision of Calcutta High Court in case of ***Masiur Rahman Molla @ Mongla and others Vs. State of West Bengal and others reported in 2016 SCC Online 12074***. He submitted that above said decisions of Karnataka High Court and Calcutta High Court are considered by the Hon'ble Supreme Court in case of ***State of Kerala Vs. Rasheed*** and approved those decisions. He submitted that in view of the guidelines laid down by the Hon'ble Supreme Court in case of ***Rasheed*** (supra), there is no legal defect in the order passed by the learned Additional Sessions Judge. No interference is required. If cross-examination is not deferred, the defence of the accused would be opened and it may cause serious prejudice to the rights and interest of the accused and that aspect has been taken into consideration by the learned

Additional Sessions Judge while allowing the application. He submitted that there is no merit in the petition.

7. Mr P.G. Borade, learned APP for the State supported the order passed by the learned Additional Sessions Judge.

8. Having regard to the submissions of the learned counsel for both the sides and learned APP for the State, I have gone through the copy of application moved on behalf of the accused/respondent Nos. 2 to 6 (Page No.30-A). I have also gone through the citation relied upon by both the sides in case of **State of Kerala Vs. Rasheed** and two decisions, one is of Calcutta High Court and another is of Karnataka High Court, which are referred in the case of **Rasheed** by the Apex Court while laying down the guidelines for exercising discretionary powers vested under section 231(2) of the Cr.PC.

9. First of all, I will look into the application which is moved on behalf of the accused vide Exh. 109. On going through the contents of the application, it would reveal that the case was posted for evidence when the application under section 231(2) of the Cr.PC came to be moved on behalf of the accused. It is stated in the application that there are eye witnesses to the incident. As such, the prosecution may be directed to adduce the evidence of eye witnesses which they want to examine and the cross-examination of those witnesses may be deferred until other witnesses are examined.

10. On careful examination of the application, it is evident that no reason is assigned in the application for exercising such discretionary

powers under section 231(2) of the Cr.PC for deferment of the cross-examination. It is only stated that there are eye witnesses and their examination-in-chief may be recorded and cross-examination may be deferred until other witnesses are examined. It cannot be said to be a sufficient reason for deferment of cross-examination as contemplated under section 231(2) of Cr.PC. It is pointed out by Mr Shinde, learned counsel for respondent Nos. 2 to 6 that while making submissions before the Additional Sessions Judge, the learned counsel appearing for the accused had made submissions elaborately as to how the rights of the accused are likely to be prejudiced if cross-examination of the eye witnesses is not deferred. He submitted that though the application is not happily worded, but the learned counsel for the accused has put forth sufficient reasons before the learned Additional Sessions Judge while making his submissions. To some extent, an attempt is made by the learned counsel for the accused to put forth his case while making submissions before the learned Additional Sessions Judge while conducting the hearing on application vide Exh.109.

11. The crucial question is whether the Additional Sessions Judge has invoked his judicial discretion vested under section 231(2) of the Cr.PC having regard to the facts of the case and in view of the guidelines laid down by the Hon'ble Supreme Court. It would be appropriate to reproduce the guidelines laid down by the Hon'ble Supreme Court in case of ***State of Kerala Vs. Rasheed***.

10. 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.

11. 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.

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.P.C.

“309. Power to postpone or adjourn proceedings.- (1) In every inquiry or trial the proceedings shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded...” See also *Vinod Kumar v. State of Punjab*,

(2015) 3 SCC 220 : (AIR 2015 SC 1206); and, Lt. Col. S.J. Chaudhary v. State (Delhi Administration), (1984) 1 SCC 722 : (AIR 1984 SC 618).

These factors are illustrative for guiding the exercise of discretion by a Judge under Section 231(2) of the Cr.P.C.

12. The following practice guidelines should be followed by trial courts in the conduct of a criminal trial, as far as possible:

- i. a detailed case-calendar must be prepared at the commencement of the trial after framing of charges;
- ii. the case-calendar must specify the dates on which the examination-in-chief and cross-examination (if required) of witnesses is to be conducted;
- iii. The case-calendar must keep in view the proposed order of production of witnesses by parties, expected time required for examination of witnesses, availability of witnesses at the relevant time, and convenience of both the prosecution as well as the defence, as far as possible;
- iv. testimony of witnesses deposing on the same subject-matter must be proximately scheduled;
- v. the request for deferral under Section 231(2) of the Cr.P.C. must be preferably made before the preparation of the case-calendar;
- vi. the grant for request of deferral must be premised on sufficient reasons justifying the deferral of cross-examination of each witness, or set of witnesses;

vii. While granting a request for deferral of cross-examination of any witness, the trial courts must specify a proximate date for the cross-examination of that witness, after the examination-in-chief of such witness(es) as has been prayed for;

viii. The case-calendar, prepared in accordance with the above guidelines, must be followed strictly, unless departure from the same becomes absolutely necessary;

ix. in-cases where trial courts have granted a request for deferral, necessary steps must be taken to safeguard witnesses from being subjected to undue influence, harassment or intimidation.

12. The case of ***Masiur Rahman Molla and case of Shankar*** of the Calcutta High Court and Karnataka High Court respectively were considered by the Hon'ble Supreme Court while deciding the case of ***Rasheed***. While referring to various Judgments of the High Courts, it is observed by the Hon'ble Supreme Court in para No. 19 is as under :-

"....Several High Courts have held that discretion under Section 231(2) of Cr.PC 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 Cr.PC if sufficient reasons are made out for deviating from the norm...."

13. In para 21, it is further observed that -

(viii) If the defence intends to invoke the jurisdiction of the criminal court to exercise the discretion for deferment of cross-examination of particular witnesses(es) in terms of Section 231(2), or Section 242(3) CrPC, 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.

14. Having considered the guidelines laid down by the Hon'ble Supreme Court in case of **Rasheed** (supra), let me examine the impugned order passed by the learned Additional Sessions Judge. According to the guidelines laid down by the Hon'ble Supreme Court, the application under section 231(2) of Cr.PC seems to have been moved on behalf of the accused before any witness is entered into witness box which is in tune with guideline No.24.5 which speaks that the request for deferral under section 231(2) of Cr.PC must be preferably made before the preparation of the case-calendar, meaning thereby before any evidence of a witness is recorded. As such, there is no defect while submitting the application under section 231(2) of Cr.PC before the Court.

15. Now, the question is about reasons whether the accused have assigned reasons for deferment of the cross-examination. As pointed out earlier, no reasons are assigned in the application moved on behalf of the

accused under section 231(2) of Cr.PC for deferment of the cross-examination except stating that these are the eye witnesses and their cross-examination needs to be deferred. As per guidelines laid down by the Hon'ble Supreme Court (supra), it is for the accused to mention the reasons for such deferment of the cross-examination. As such, the application is found defective in the eye of law in view of the guidelines laid down by the Hon'ble Supreme Court.

16. An attempt was made by Mr Shinde to patch up this lacuna by pointing out impugned order. However, that lacuna cannot be cured. Even for the sake of argument accepted that there was sufficient reason to move an application, again the question comes whether the guidelines laid down by the Hon'ble Supreme Court are followed and whether it is a proper case of use of discretion provided to the Court under section 231(2) of Cr.PC. Only because certain stock of witnesses are from the same family and they are interested witnesses, in every case, their cross-examination cannot be deferred. A case has to be made out on behalf of the accused that if the cross-examination of those witnesses is not deferred, their right would be seriously prejudiced. After all, section 231(2) of Cr.PC must be read in conjunction with section 309 of Cr.PC. which provides that as soon as trial begins, the work of recording of evidence shall go on day to day basis so that witness may not get any chance for tutoring or getting influenced from any other person.

17. In the present case, no such case is made on behalf of the respondent Nos. 2 to 6/accused. The learned Additional Sessions Judge

without applying his judicial mind to the facts of the case in a proper way, has allowed the application in contravention of the guidelines laid down by the Hon'ble Supreme Court. The cross-examination of four eye witnesses is deferred in a wholesale manner without recording sufficient reasons. Moreover, while granting a request for deferral of cross-examination of four witnesses in one stroke, not specified proximate date for their cross-examination. No steps are taken to safeguards four eye witnesses, from being subjected to undue influence, harassment or intimidation. In a very casual manner, order of deferral of cross-examination of four witnesses seems to have been passed by the Additional Sessions Judge.

18. On careful study of the impugned order in the background of guidelines laid down by the Hon'ble Supreme Court in case of **Rasheed** (supra), the impugned order is found bad in law. It is liable to be quashed and set aside.

ORDER

- (i) The Criminal Writ Petition stands allowed.
- (ii) The impugned order passed below Exh.109 in Sessions Case No. 40/2020 dated 01.04.2022 is hereby quashed and set aside.
- (iii) Rule is made absolute in the above terms.
- (iv) No order as to costs.
- (v) The Criminal Writ Petition is accordingly disposed of.

[SHRIKANT D. KULKARNI, J.]