

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.799 OF 2022

Rajesh Mahadev Kunte, Age 47 years,
Occ.Business, R/o.Kanchangauri,
Kasral Bhiwandi, District Thane.

Petitioner

versus

1. Rahul Rajeev Gandhi,
Age 50 years, Occ.Politician,
R/o.12, Tughlak Lane, New Delhi-110 011.

2. The State of Maharashtra.

Respondents

Mr.Tapan Thatte, Advocate for petitioner.

Mr.Sudeep Pasbola i/by Mr.Kushal Mor, Advocates for respondent
no.1.

Mr.S.R.Agarkar, APP, for State.

CORAM : PRAKASH D. NAIK, J.

DATE : 22nd June 2022

PC :

1. The petitioner has challenged order dated 22nd February 2022 passed by learned Judicial Magistrate, First Class, at Bhivandi below Exhibit-94 in Summary Criminal Case No.2425 of 2014 rejecting the application for issuance of witness summons.

2. The petitioner is the complainant in Summary Criminal Case no.2425 of 2014. The complaint was filed on 18th March 2014. The complainant has alleged that while addressing the election campaign rally on 6th March 2014, the accused made defamatory statements. Process was issued for the offence punishable u/s.500 of Indian Penal Code.

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3. The facts enumerated in this petition indicate that the accused had challenged the order of process before this Court and the petition challenging the process has been rejected and thereafter the petitioner had approached the Supreme Court and the Special Leave Petition challenging the order of this Court has been dismissed.

4. The petitioner/complainant preferred an application before the Trial Court to exhibit a transcript, copy of the speech made by respondent no.1 under Section 294 of Code of Criminal Procedure ('Cr.P.C.'). The said application was rejected by order dated 10th September 2018. Aggrieved by the said order the petitioner had preferred Criminal Writ Petition No.376 of 2019 before this Court. The said petition was rejected by this Court by order dated 20th September 2021, with observation that there is no infirmity in the order dated 10th September 2018 passed by learned JMFC, Bhiwandi below Exhibit-61 in Summary Criminal Case No.2425 of 2014.

5. The petitioner preferred application below Exhibit-94 before the Court of learned JMFC, Bhiwandi for issuing witness summons to Dev Sumon Mohanpuria. The said application was preferred on 22nd February 2022. The application was opposed by the accused by written say. Vide order dated 22nd February 2022, the learned JMFC, Bhiwandi rejected the said application with directions to both the parties to avoid unnecessary adjournments and co-operate for speedy trial

6. Learned advocate for petitioner submit that the accused had preferred Criminal Writ Petition No.4960 of 2014 before this Court

against the issue of process order passed in the present complaint. The affidavit filed in the said writ petition was affirmed before the notary Mr.Dev Suman Mohanpuria on 15th December 2014 at Sr.No.687/2014. The accused denied admitting the said affidavit and annexure which were part of the writ petition, though notarized. The facts admitted in the notarized affidavit in the said petition are required to be proved before the Trial Court. The admission of defamatory text speech contained and incorporated in the affidavit in said writ petition stands on higher pedestal a proof of facts, which the complainant is required to prove by oral evidence. It is further submitted that the learned Magistrate has assumed that the law mandates that in summons trials, the complainant is duty bound to step in the witness box first before he can examine any other witness. For that purpose the learned Magistrate had relied on Section 254(1) of Cr.P.C. There is no law which requires that in all summons trials the complainant himself must step into witness box first. No words of that section can be reasonably interpreted to connote that meaning. The learned Magistrate has held that to make evidence of notary relevant, it would be necessary to first examine the complainant. This reasoning does not find any support from provisions of the Evidence Act. The Evidence Act and Cr.PC allows the parties at the trial to examine witnesses in any order they deem proper. Although Section 135 of Evidence Act confer certain discretion over the order of production and examination of the witness to the Court, it is settled principle of law that the discretion has to be exercised on sound and compelling circumstances. The learned Magistrate has failed to rely on any rationale to compel the examination of the complainant first.

7. Learned advocate for petitioner has relied upon the following decisions :

(i) **Karmapa Charitable Trust and others Vs. State of Sikkim and others¹**;

(ii) **Md.Sanjoy and Md.Mahtab Vs. The State of West Bengal²**;

(iii) **State of Kerala vs. Rasheed³**.

8. Learned advocate for respondent no.1 urged that the application preferred by the petitioner-complainant before the Trial Court was devoid of merits. The matter is pending for recording evidence of complainant on 22nd February 2022. The complainant has to step in to witness box and depose on oath. The complainant has right to examine witnesses but subsequently after his examination. Reference was made to Section 135 and 136 of the Evidence Act. The learned Magistrate has rightly rejected the application by assigning cogent reasons. In the factual matrix of this case the learned Magistrate has exercised its discretion in rejecting the application. Reliance is placed on the decision of High Court of Rangoon in the case of **Shwe Pru Vs. The King⁴**.

9. Having heard both the sides and perusing the documents on record, it is apparent that the petitioner has filed a complaint alleging defamation by respondent no.1. The complaint was due for recording the evidence. Initially the petitioner had preferred an application u/s.294 of Cr.PC for exhibiting the transcript of the

1 2021-SCC OnLine-Sikk-181

2 1999-SCC OnLine-Cal-371

3 (2019)13-SCC-297

4 AIR-1941-Rangoon-209

alleged speech in evidence and the said application was rejected by the Court of learned JMFC vide order dated 10th September 2018. The said order was challenged before this Court by preferring Criminal Writ Petition No.376 of 2019. The petition was dismissed by this Court by order dated 20th September 2021. The petitioner has contended that the said order has been challenged before the Supreme Court by preferring Special Leave Petition which is pending. The issue which had arisen in the present petition is about the application preferred by the petitioner issuing witness summons to Dev Suman Mohanpuria. According to petitioner, in the writ petition preferred by the petitioner before this Court, he had filed certain documents as its annexures. The affidavit filed in the said writ petition was affirmed before the notary Dev Suman Mohanpuria on 15th December 2014. The accused has denied or admit the affidavit and annexures which are part of the petition although the affidavit was notarized before the High Court and Supreme Court and the facts admitted in the notarized affidavit in the petition are required to be proved before the Court. The course open to prove that affidavit is to examine the notary. The said application has been rejected as stated hereinabove by the Trial Court vide order dated 22nd February 2022. The case of the petitioner is that the accused in his speech dated 6th March 2014 has uttered the words which amounts to defamation. The petitioner had set out a list of witnesses to be examined and list of documents sought to be relied upon in the complaint. The order of process was challenged by the respondent no.1 by filing Writ Petition No.4960 of 2014 challenging order of process which petition was dismissed by this Court. The said order was challenged before Supreme Court and the Special Leave Petition was dismissed. In the petition the transcript of speech was annexed

on 12th June 2018. The petitioner filed an application u/s.294 of Cr.PC and called upon the accused to admit or deny the genuineness and correctness of certified copy of the petition along with annexures and affidavit thereto filed by respondent no.1 in this Court. The said application was “filed” as according to the petitioner, the respondent no.1 had not disputed the making of speech and annexed the transcript of the speech to the petition. Say was filed by the accused. The learned Magistrate by order dated 12th June 2018 observed that the accused is admitting only the documents such as, copy of the Writ Petition No.4960 of 2014 and affidavit. Accordingly the document is exhibited. The petitioner filed another application on the same day and prayed for exhibiting transcript of speech. The said application was rejected which was challenged before this Court by preferring Writ Petition No.376 of 2019. This Court as stated above has dismissed the said petition by order dated 20th September 2021. While rejecting the said petition it was observed that the accused cannot be completed to admit/deny the document. The right of the accused to remain silent flows from article 20(3) of the Constitution of India. Thereafter the impugned application was preferred seeking issuance of summons to the aforesaid witness which has been rejected by the Trial Court.

10. The respondent no.1 had in fact filed say opposing impugned application and stated that the complainant can examine the witnesses but after his examination is completed. The application preferred by the complainant can be kept pending and accused may be allowed to file reply and in the mean time the evidence of complainant be recorded in the interest of justice. The Trial Court has passed well reasoned order and do not find any infirmity to set

aside the same. The learned JMFC has observed that the complaint was instituted on 10th March 2014. It is a summons triable case. Pleas of accused was recorded on 12th June 2018. On the same day application Exhibit-61 was preferred by the complainant u/s.294 of Cr.P.C which was rejected by order dated 10th September 2018. The matter was due for recording evidence of complainant. On 29th January 2021, 5th February 2022 and 10th February 2022 directions were given to the complainant to proceed with his evidence. However, the complainant sought adjournments from time to time. It is a matter of record that complainant has not examined himself till today. The case is fixed for evidence of complainant. It is also a matter of record that the question of admissibility of documents mentioned in the application is already decided vide order below Exhibit-61 dated 10th September 2018. The complainant has to begin the evidence with his deposition to prove the basic fact or cause for which the complaint is instituted. Later he may examine any other witnesses in support of his contention. It is worth to note that the proposed witness is not a witness of a fact in question but he is the notary before whom the accused affirmed affidavit filed before the High Court. Thus, having regard to the nature of allegations and facts of the case calling the proposed witness at this stage of the proceedings without evidence of complainant would result in unnecessary delay in the proceedings. The complainant has not given any reason in the application as to why complainant did not want to examine himself first and intends to examine the person before whom accused affirm affidavit after filing of complaint. The present case is summons trial case. In the light of the facts and discussion, it is necessary that the complainant should first examine himself. So far as issuing summons to propose witness is concerned,

the complainant may prefer such application after he examine himself, if required. It is essential that the complainant must prove his case first by his own deposition. Having regard to the facts of the case and role of proposed witness in the present proceedings, the testimony of proposed witness would be relevant once the examination of complainant is over. The Court also noted the submission of the counsel for complainant that there is no provision that the complainant must be examined first. The present complaint is summons trial case. It would be necessary to refer to provisions of Chapter-XX, Section 254(1) of Cr.PC, which provides that if the Magistrate does not convict the accused u/s.254 and 253, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of prosecution and also to hear the accused and take such evidence as he produce in his defence. It is further observed that the words `Magistrate shall proceed to hear the prosecution” connotes that the prosecution must begin with the evidence. Thus, the complainant must begin with his deposition on oath to prove the fact which give rise to present complaint. Moreover, it is not the case of the complainant that he is not going to examine himself in the present matter. Thus, at this stage of proceedings, no purpose would be served to examine the proposed witness unless complainant first prove his own contention on oath in accordance with the provisions of law.

11. It is pertinent to note that the complainant has alleged in the complaint that the defamatory speech was addressed by the respondent-accused in a rally for election campaign on 6th March 2014. It is also alleged that the petitioner is associated with RSS and hurt by the defamatory imputation made by the accused. The

complainant has also stated that he is the aggrieved person within the meaning of Section 199(1) of Cr.P.C and entitled to file the complaint. Thus, the locus of the complainant is also in question about his right to initiate the defamation proceedings in view of Section 199(1) of Cr.P.C. In the context of the factual matrix of this case and the reasons assigned by the Trial Court for rejecting the application of the petitioner holding that the complainant first prove his own contention on oath in accordance with provisions of law, I do not find any reason to deviate from the observations and the findings of the Trial Court while rejecting the application Exhibit-94.

12. Section 135 of the Evidence Act incorporated under Chapter X relating to examination of witnesses refers to order of production and examination of witnesses. As per the said provision the order in which witnesses are produced and examined shall be regulated by law and practice for the time being relating to civil and criminal procedure respectively and in the absence of any such law, by the discretion of the Court. Section 136 of the Evidence Act relates to the Courts discretion to decide the admissibility of evidence. The section provides that when either party proposes to give any fact, the Judge may ask the party proposing to give evidence in what manner the alleged fact, if proved, would be relevant and the Judge shall admit the evidence if he thinks that the fact if proved would be relevant and not otherwise.

13. In the case of State of Kerala Vs.Rasheed (supra), it was held that the norm in any criminal trial for examination-in-chief of witness to be carried out first, followed by cross-examination and re-examination, if required, in accordance with Section 138 of Evidence

Ac, Section 231(2) of Cr.PC, however, confers a discretion on Judge to defer 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 statutory frame work and context while being aware of reasonably forcible consequences. Parties seeking deferral under 231(2) Cr.PC must give sufficient reasons to invoke exercise of discretion by Judge and deferral cannot be ascertained as a matter of right. There cannot be straight jacket formula providing for grounds on which judicial discretion u/s.231(2) of Cr.PC can be exercised. Exercise of discretion has to take place on case to case basis. Guiding principle for a Judge u/s.231(2) of Cr.PC is to ascertain whether prejudice would be caused to the parties seeking deferral if application is dismissed. Balance must be struck in the rights of the accused and prerogative of the prosecution to lead evidence. The Court also enumerated the factors to be taken into consideration while exercising such discretion.

In the case of Karmapa Charitable Trust and another (supra), the Sikkim High Court has observed that undoubtedly if any exigency or circumstances so require, the law provides that the Court shall exercise its discretion, otherwise it shall be for the party concerned to decide which witness he seeks to examine first and cannot be based on the dictate of the opposite party or for their convenience.

In the case of Sanjoy Mehta (supra), the Calcutta High Court has observed that if exigency of the circumstances so requires in an appropriate case, the Court has always a discretion to direct that the witnesses be examined in a particular order, but in the absence of

any exigency or compelling reason it should be for the party to decide in which order it will produce and examine its witnesses.

In the case of Shwe Pru Vs. The King (supra), the High Court of Rangoon had observed that the Trial was unsatisfactory in number of respects but especially in regard to the failure to examine the witnesses for the prosecution in their proper order. In a trial of importance therein, the public prosecutor should be required as far as possible to examine his witnesses so as to bring out the facts in their logical sequence and particularly the expert witnesses, such as, medical witness, ought not to be examined at the early stage of trial, when it is impossible to realize on what points their opinion is necessary.

14. Applying the principles enunciated in various decisions and considering the factual matrix of the present case, the reasons assigned by the Trial Court while adjudicating the application, I am of the opinion that the discretion exercised by the learned Magistrate is not arbitrary or contrary to provisions of law. The impugned order does not require any interference and it has to be confirmed. Hence I pass following order :

ORDER

(i) Criminal Writ Petition No.799 of 2022 stands rejected and disposed off.

(PRAKASH D. NAIK, J.)