

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO. 394 OF 2023

Nannebabu Ramdev Gupta .. Applicant
Versus
The State of Maharashtra .. Respondent

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Mr. Fahad Qureshi with Mr.Shubham Upadhyay for the applicant.
Ms.P.N. Dabholkar, APP for the State.

CORAM: BHARATI DANGRE, J.
DATED : 24th APRIL 2023

P.C:-

1 The applicant is the original accused, who is facing charges in Case No.PW/30/2-22 before the Chief Metropolitan Magistrate, 23rd Esplanade Court, for the offences punishable u/s.354(c), 500, 504, 506 of the IPC.

2 On the trial being commenced, the complainant (PW 1) stepped into the witness box on 18/3/2023, and she was examined-in-chief by the Public Prosecutor. On her examination-in-chief being over, the applicant filed an application u/s.231(2) of Cr.P.C, seeking deferral of her Cross Examination, until examination in chief of other interested witness, is concluded.

The application marked as Exhibit-6, specifically pleaded as under :-

“1 *It is most respectfully submitted that in the above mentioned matter complainant & other witnesses are relatives to each other, hence they are all interested witnesses in the matter.*

2 *Since they are all interested witnesses, there is every likelihood of improvement in their statement that would be given before Hon’ble Court, and that would prejudice defense of accused person.*

3 *Hence, it is most respectfully prayed that Cross Examination of PW 1 may be deferred till Examination in Chief of other interested witnesses are recorded, to meet the ends of justice”.*

3 This application came to be rejected by recording that such a course is not available.

On 25/4/2023, the Court recorded that the cross is declined, and therefore, the matter may proceed without Cross of PW No.1.

It is this order which is challenged in the present application.

4 Heard Mr.Fahad Qureshi along with Suresh Upadhyay who represent the applicant.

The learned counsel would place reliance upon the decision of this Court (Justice A.M. Thipsay) in *Dattu Vs. State of Maharashtra in Criminal Writ Petition No.158/2014* {2014 SCC Online Bom, 215}, and he would submit that the discretion vest in a Court under sub-section (2) of Section 231 and it must

be judiciously exercised, but since the impugned order fail to record any reason in rejecting the application, the order cannot be sustained. He would request this Court to follow the course of action adopted in case of Dattu (supra).

The learned APP Ms.Dabholkar would vehemently oppose the application and she would submit that the parties seeking Deferral u/s.231(2) of Cr.P.C must give sufficient reasons to justify the exercise of discretion by the Judge, and in any case, deferral cannot be asserted as a matter of right. She would submit that since no case was made out for exercise of the discretion, the application has been rightly rejected and the impugned order do not warrant any interference.

5 With the able assistance of the respective counsel, I have perused the material placed on record which include the charge-sheet as well as the application.

The charge-sheet charge the applicant of video-graphing the act of copulation between the complainant and her partner, without their permission and of sharing the same with certain persons, which has resulted in defaming her and outraging her modesty. In the said charge-sheet, several persons are cited as witnesses, the complainant being cited as PW 1 and the other witnesses cited, being the father and their close associates belonging to the same clan.

Since it is the allegation levelled against the applicant that he had shown the video to her own relatives, who are to be examined as witnesses, there is every possibility that if PW 1 is cross-examined, his defence might be revealed, and any lacunae therein, would be filled in by another witness, which is cited by the prosecution who was shown the video clip. The submission advanced is to the effect that if they undergo the examination-in-chief and are cross-examined at a later stage, no prejudice would be caused. The provision of Cr.P.C in form of Section 231(2) is pressed into service.

6 Since the argument focus on Section 231 of Cr.P.C, I deem it expedient to reproduce the same.

“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”

Undisputedly, the said provision has to be read along with Sections 135 and 138 of Indian Evidence Act, 1872, which determines the sequence in which the witnesses are to be examined.

Section 135 and Section 138 of the Evidence Act
read thus :-

135. Order of production and examination of witnesses. —

The order in which witnesses are produced and examined shall be regulated by the 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.

138. Order of examinations.—Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined. The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief. Direction of re-examination.—The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

7 Reading of the above provisoin would reveal that the witness shall be first examined in chief and then cross-examined. However, sub-section (2) of Section 231 confer a discretion in the Judge to permit the cross-examination of any witness, to be deferred until any other witness or witnesses have been examined.

8 In normal circumstances, in any criminal trial, a witness will have to be called for examination-in-chief, to be

followed by cross-examination and re-examination, if required, but sub-section (2) of Section 231 vest a discretion in a Judge, to defer the cross-examination in appropriate cases. Needless to state that the judicial discretion which vests in the learned Judge has to be exercised, on being satisfied that there is sufficient cause for exercising the discretion. The parties seeking deferral under sub-section (2) of Section 231 must make out a case for exercise of the discretion and deferral cannot be asserted as a matter of right.

9 The Hon'ble Apex Court in case of *State of Kerala vs. Rasheed (2019) 13 SCC 297*, authoritatively held as under :-

19 “Several High Courts have held that the discretion under Section 231(2) 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.

“20 The circumstances in which the High Courts have approved the exercise of discretion to defer cross-examination, so as to avoid prejudice due to disclosure of strategy are:

(i) where witnesses were related to each other, and were supposed to depose on the same subject-matter and facts.

(ii) Where witnesses were supposed to depose about the same set of facts. However, the circumstances in which deferral has been refused are

(i) where the ground for deferral was the mere existence of a relationship between the witnesses;

(ii) where specific reasons were not given in support of the claim that prejudice would be caused since the defence strategy would be disclosed¹¹;

(iii) where no prejudice would have been caused.

22 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.

23 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 :

(i) possibility of undue influence on witness(es);

(ii) possibility of threats to witness(es);

(iii) possibility that non-deferral would enable subsequent witnesses giving evidence on similar facts to tailor their testimony to circumvent the defence strategy;

(iv) possibility of loss of memory of the witness(es) whose examination-in-chief has been completed;

(v) 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.

10 In the wake of the aforesaid authoritative pronouncement, one of the relevant consideration for exercise of the discretion would be a possibility where nondeferral may enable subsequent witnesses, giving evidence on similar facts to tailor their testimony to circumvent the defence strategy.

In any case, the factors highlighted by Their Lordships as indicated above, are only illustrative and not exhaustive.

11 Applying the aforesaid ratio to the facts of the present case, it is seen that the applicant has invoked Section 231(2) for deferring the cross-examination of the prosecution witness no.1 on the ground that his defence would be revealed at the initial stage and it may allow other prosecution witnesses to be prepared, to deal with the same.

11 When I perused the list of prosecution witnesses, it can be seen that Shri Nityanand Yadav and Smt.Rambhadevi Yadav, the parents of the informant and one Kumari Anushka Aliya, who is also related to the informant are to be examined as prosecution witness, hence it cannot be said that the apprehension expressed by the applicant is unfounded. If his defence is made open while cross-examining PW 1/complainant,

then the lacunae would be filled in by the prosecution through the other three witnesses who are her father, mother and a close relative, interested in the version of the complainant.

12 The circumstances narrated, therefore, would justify the exercise of discretion in sub-section (2) of Section 231, which is a tool available to the defence to defer the cross-examination of the prosecution witnesses until other witnesses are examined, as it would lead to making the defence open, while the first witness of the prosecution itself is examined and the contingency which would specifically fall within one of the consideration as laid down by Apex Court in *State of Kerala Vs. Rasheed* (supra), for exercising the discretion under sub-section (2) of Section 231.

In any case, no prejudice would be caused to the prosecution if the cross-examination of PW 1 (complainant) is deferred till the examination-in-chief of the above mentioned three witnesses is concluded, so as to avoid the prosecution filling up the lacunae in its case, as may be disclosed by PW 1 or the subsequent witnesses related to her.

Since the case made out by the applicant clearly fall within one of the contingency laid down by the Hon'ble Apex Court in *Rasheed*, the learned Judge has failed to exercise its discretion despite the contingency being made out and hence, the impugned order cannot be sustained.

13 Resultantly, application filed by the applicant vide Exhibit-06 is allowed by deferring the cross-examination of PW 1 till the examination in Chief of the other interested witnesses, three of whom are cited by the prosecution in the list of witnesses anenxed along with the charge-sheet at Sr.Nos.8, 9 and 10.

Application is allowed in the aforesaid terms.

(SMT. BHARATI DANGRE, J.)