

(2018) 10 SC CK 0079

Supreme Court Of India

Case No: Criminal Appeal No. 1321 Of 2018

State Of Kerala

APPELLANT

Vs

Rasheed

RESPONDENT

Date of Decision: Oct. 30, 2018

Acts Referred:

- Code of Criminal Procedure, 1973 - Section 154, 173, 231(2), 242(3), 251A, 251A(7), 309, 482
- Indian Penal Code, 1860 - Section 34, 109, 118, 120B, 201, 202, 231, 242, 302, 343
- Evidence Act, 1872 - Section 135, 138

Citation: (2018) 14 Scale 461 : (2018) 4 KLT 783 : AIR 2019 SC 721 : (2018) 13 SCR 587 : (2019) 13 SCC 297

Hon'ble Judges: Abhay Manohar Sapre, J; Indu Malhotra, J

Bench: Division Bench

Advocate: Nishe Rajen Shonker

Final Decision: Allowed

Judgement

INDU MALHOTRA, J.

Leave granted.

1. The present Criminal Appeal arises out of Special Leave Petition (Crl.) No. 4652 of 2018 wherein the impugned Order dated January 9, 2018

passed by the High Court of Kerala in Criminal Miscellaneous Case No. 171 of 2018 has been challenged.

2. The relevant facts for deciding the present Criminal Appeal, are briefly set out below:

2.1. A First Information Report under Section 154 of the Code of Criminal Procedure, 1973 (‘Cr.P.C.’) was registered at the instance of CW

1. Narayanan. According to the Original Statement provided by him to the Police, Krishnaprasad, who was the occupant of a flat in the building

where CW 1. Narayanan was serving as a security guard, had called for an ambulance. Krishnaprasad, along with others, then carried an

unconscious person out of the bathroom of the flat to the ambulance. The unconscious person was later identified to be Satheesan, who was declared

dead on being taken to the hospital. CW 1. Narayanan then made a statement that Krishnaprasad had been staying in the flat for two months, and

was a companion of the Respondent. Accused No. 2, Rasheed. It was alleged that the flat had been taken on rent by the Respondent. Accused No.

2.

2.2. On May 24, 2016, the Police filed a Charge Sheet under Section 173 of the Cr.P.C. before the Judicial First Class Magistrate Court II, Thrissur

against 8 persons, including the Respondent. Accused No. 2, for the alleged commission of offences under Sections 302, 343, 212, 201, 202, 118 and

109 read with Sections 120B and 34 of the Indian Penal Code, 1860. It was alleged that the deceased. Satheesan had disclosed information to his

girlfriend, CW 5. Ajitha, regarding the activities which had been taking place inside the rented flat, and about the illicit relationship between the

Respondent. Accused No. 2 and Accused No. 3. Saswathy. On learning about this, the Accused persons had allegedly detained Satheesan, tortured

him, and killed him with criminal intention.

2.3. Charges were framed by the Additional Sessions Judge, Thrissur. CWs 1 to 5 were summoned as Prosecution Witnesses on December 16, 2017.

On the same day, after the examination. in. Chief of CW 1. Narayanan was conducted, an Application under Section 231(2) of the Cr.P.C. was

filed by the Counsel for the Respondent. Accused No. 2 seeking adjournment of the cross. examination of CW 1. Narayanan, as also of CWs 2 to

5, to a date after the examination. in. Chief of CWs 2 to 5 was completed. It was stated in the said Application, that the case of the Respondent. Accused No. 2 would be adversely affected if the Application was not allowed, since the defence strategy adopted by the Respondent. Accused No.

2 would be revealed to the Prosecution.

2.4. The Application under Section 231(2) of the Cr.P.C. was opposed by the Prosecution which filed a Reply, wherein it was stated that CWs 1 to 5 were not deposing with respect to the same subject matter. It was further stated that the deferral of the cross examination would adversely affect the Prosecution evidence.

2.5. The Additional Sessions Judge vide Order dated December 20, 2017 dismissed the Application filed on behalf of the Respondent Accused No.

2.

The Additional Sessions Judge held that Section 231(2) of the Cr.P.C. confers a discretion on the Trial Judge to defer the cross examination of any witness until any other witness or witnesses have been examined. Section 231(2) of the Cr.P.C. does not confer a right on the accused to seek deferral in a wholesale way on the ground that the defence of the accused would become known to the Prosecution. The deferral of cross examination, in the present case, would run counter to the general provisions of the Indian Evidence Act, 1872.

The Additional Sessions Judge held that the deferral of cross examination in this case could give rise to the possibility of loss of memory on the part of the witnesses, who had already been examined in chief, which would adversely affect the case of the Prosecution.

The Additional Sessions Judge also observed that no specific reason for deferring the cross examination had been pleaded on behalf of the Respondent Accused No. 2, apart from a general averment that the defence would be disclosed to the Prosecution.

The Additional Sessions Judge was of the view that the Respondent Accused No. 2 and Accused No. 7 are "highly influential political leaders", and the possibility of the threats to witnesses after their examination in chief, could not be ruled out.

Furthermore, it was observed that CWs 1 to 5 would be deposing on different facts and aspects of the case.

The Additional Sessions Judge keeping in view the provisions of Sections 231(2) and 309 of the Cr.P.C. held that deferral of cross examination is not an ordinary practice in a criminal trial, and dismissed the Application filed on behalf of the Respondent Accused No. 2.

2.6. Aggrieved by the Order dated December 20, 2017 passed by the Additional Sessions Judge, the Respondent-Accused No. 2 filed Criminal

Miscellaneous Case No. 171 of 2018 under Section 482 of the Cr.P.C. before the High Court of Kerala.

The High Court reversed the Order of the Additional Sessions Judge by a short unreasoned cryptic Order dated January 1, 2018, and allowed Criminal

Miscellaneous Case No. 171 of 2018. It was directed that the cross-examination of CWs 1 to 4 be adjourned till after the examination-in-chief of

CW 5.

2.7. Aggrieved by the Order dated January 1, 2018 passed by the High Court, the State of Kerala has filed the present Special Leave Petition (Crl.)

No. 4652 of 2018 before this Court.

3. The legal issue which arises for consideration in the present Criminal Appeal is whether the exercise of discretion under Section 231(2) of the

Cr.P.C. by the Additional Sessions Judge was valid and legally sustainable.

4. The statutory framework governing the order of production and examination of witnesses is contained inter alia in Sections 135 and 138 of the

Indian Evidence Act, 1872. A conjoint reading of Sections 135 and 138 would indicate that the usual practice in any trial, be it civil or criminal, is for

the examination-in-chief of a witness to be carried out first; followed by his cross-examination (if so desired by the adverse party), and then re-

examination (if so desired by the party calling the witness).

“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 examination.” “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 in his examination-in-chief.”

5. Section 231 of the Cr.P.C. indicates that the Judge is given the discretion to defer cross-examination of a witness, until any other witness or witnesses have been examined.

Section 231 is set out hereinbelow:

“231. Evidence for prosecution.”(1) On the date so fixed, the Judge shall proceed to take all such evidence as maybe 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.”

(Emphasis supplied)

The phraseology of Section 231(2) mirrors Section 242(3) of the Cr.P.C. which provides for a similar discretion to a Magistrate in the trial of a Warrant Case under Chapter XIX of the Cr.P.C.

“242. Evidence for prosecution.”

(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.”

6. Section 242(3) is analogous to Section 251A(7) of the repealed Code of Criminal Procedure, 1898 and is identically worded. Section 251A was inserted vide the Code of Criminal Procedure (Amendment) Act, 1955 (Act No. 26 of 1955) in the erstwhile Code of Criminal Procedure, 1898.

The Statement of Objects and Reasons of the Code of Criminal Procedure (Amendment) Act, 1955 suggests inter alia that changes were introduced to simplify the procedure in warrant cases, to ensure speedy disposal of criminal judicial business, to minimise inconvenience caused to witnesses, and to ensure that adjournments are not allowed without the examination of witnesses present in court, except for an unavoidable cause.

The Karnataka High Court in *Shamoon Ahmed Sayed & Anr. v. Intelligence Officer* 2009 Cri LJ 1215 : ILR 2008 Karnataka 4378, delivered by

Shantanagoudar, J. (as he then was), had observed that Section 231(2) as well as Section 242(3) of the Cr.P.C. must be interpreted in light of the legislative intent behind the enactment of Section 251A of the Code of Criminal Procedure, 1898.

7. What follows from the discussion is that the norm in any criminal trial is for the examination—chief of witnesses to be carried out first, followed by cross—examination, and re—examination if required, in accordance with Section 138 of the Indian Evidence Act, 1872.

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.

A Constitution Bench of this Court in *Gurbaksh Singh Sibbia & Ors. v. State of Punjab*, (1980) 2 SCC 565 had elucidated upon the nature and manner of exercise of judicial discretion in paragraph 21. The relevant extract has been reproduced hereunder:

“Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hall mark of a prudent exercise of judicial discretion.”

Several High Courts have held that the discretion under Section 231(2) of the Cr.P.C. should be exercised only in “exceptional circumstances”

Sisir Debnath v. State of West Bengal & Anr. [C.R.R. No. 2533 of 2017; decided on August 2, 2017 by the High Court of Calcutta (Appellate Side)];

Shamoon Ahmed Sayed & Anr. v. Intelligence Officer, 2009 Cri LJ 1215 : ILR 2008 Karnataka 4378, or when “a very strong case” *Amit Kumar*

Shaw & Ors. v. State of West Bengal & Anr. [C.R.R. No. 3846 of 2009; decided on June 23, 2010 by the High Court of Calcutta (Appellate Side)].

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.

8. 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:

Where witnesses were related to each other, and were supposed to depose on the same subject-matter and facts *Sri Shankar v. State by Hebbagodi*

Police Station, [Crl. P. No. 8774 of 2017; decided on December 7, 2017 by the High Court of Karnataka, at Bengaluru]; *Masiur Rahman Molla @*

Mongla & Ors. v. The State of West Bengal & Ors. [C.R.R. No. 2411 of 2016; decided on August 10, 2016 by the High Court of Calcutta (Appellate

Side)]; *Jayakar v. The State, by Frazer Town Police*, ILR 1996 KARNATAKA 2783 : 1996 (3) Kar LJ 747.

Where witnesses were supposed to depose about the same set of facts *R. Selvan v. State* [Crl.R.C. (MD) No. 744 of 2016; decided on January 24,

2017 by High Court of Madras, at Madurai] : 2017 (2) Crimes 509 (Mad.)..

However, the circumstances in which deferral has been refused are:

where the ground for deferral was the mere existence of a relationship between the witnesses *Sisir Debnath v. State of West Bengal & Anr.* [C.R.R.

No. 2533 of 2017; decided on August 2, 2017 by the High Court of Calcutta (Appellate Side)];

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

Pradeep Kumar Kolhe v. State of Madhya Pradesh [M.C.R.C. No. 20240 of 2018; decided on July 11, 2018 by the High Court of Madhya Pradesh,

at Indore]; *State of Maharashtra v. Raja Ram Appana Mane & Ors.* [Criminal Writ Petition No. 578 of 2016 and Criminal Application No. 2485 of

2016; decided on January 23, 2017 by the High Court of Bombay, at Aurangabad]; *Amit Kumar Shaw & Ors. v. State of West Bengal & Anr.*

[C.R.R. No. 3846 of 2009; decided on June 23, 2010 by the High Court of Calcutta (Appellate Side)]; Md. Sanjoy & Anr. v. The State of West

Bengal, 2000 Cri LJ 608 : 2001 (1) RCR (Criminal) 431.

where no prejudice would have been caused.

The High Court of Calcutta in *Lalu Alam v. State of West Bengal* [Cr. Revision No. 385 of 1996; decided on June 12, 2002 by the High Court of

Calcutta (Appellate Side)] : 2002 (3) CHN 301 had noted:

“So, the plea, taken by the petitioner in this case that if Miss. Bannerjee is cross-examined before the examination of the other

named witnesses on the same point, the prosecution will certainly have an opportunity to fill up a lacuna, cannot be accepted as a general rule as in a

criminal trial the accused has an additional advantage inasmuch as the copies of earlier statement of the prosecution witnesses, recorded under

Section 161 Cr.P.C. are supplied well in advance so that he can not only know to his advantage what each prosecution witness is expected to tell

while in the witness box but has also the advantage of cross-examining each and every witness with reference to their earlier statement made by

them during the investigation.” In a situation like this, hardly it can be accepted that if the cross-examination of Ms. Bannerjee is allowed to be

proceeded with before examination of the other witnesses in this case, the present petitioner would be highly prejudiced and prosecution will have the

opportunity in filling up the lacuna in this case.”

(Emphasis supplied)

The High Court of Karnataka in *Shamoon Ahmed Sayed & Anr. v. Intelligence Officer*, 2009 Cri LJ 1215 : ILR 2008 Karnataka 4378, had noted that

no prejudice be caused since:

“In most of the criminal cases, there may be more than one eye witness and definitely will be more than one mahazar witness. Many cases

depend upon the official witness only, who may have to depose about the similar facts. Thus the defence may choose to file application invoking

Section 231(2) or under Section 242(3) of Cr.P.C. on the ground of alleged prejudice to be caused in every matter. But the same cannot be allowed by

the Court. As aforementioned, the defence of the accused will not be prejudiced at all as the examination of the witnesses generally will

proceed based on either the statement recorded under Section 161 of Cr.P.C. or based on mahazar, etc.

(Emphasis supplied)

9. The Delhi High Court, in *Vijay Kumar v. State (Govt. of NCT of Delhi)* W.P. (Crl.) No. 1350 of 2017 and Crl. M.A. No. 7450 of 2017; decided

on July 3, 2017 by the High Court of Delhi : 2017 Cri LJ 3875, laid down useful directions for the conduct of criminal trials. The directions are

commendable, and relevant excerpts are reproduced hereinbelow:

“(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.

Â (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 crossÂexamination 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 crossÂ examination is carried out in the then onÂgoing schedule immediately after the witness whose examination ahead of such exercise has been prayed for.â€

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 caseÂtoÂcase 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 nonÂdeferral 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 examinationÂ inÂchief has been completed;

occurrence of delay in the trial, and the nonÂavailability of witnesses, if deferral is allowed, in view of Section 309(1) of the Cr.P.C.

â€œ309.Â PowerÂ toÂ postponeÂ orÂ adjourn proceedings.â€"(1) In every inquiry or trial the proceedings shall be continued from dayÂtoÂday

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 recordedâ€|â€

See also Vinod Kumar v. State of Punjab, (2015) 3 SCC 220; and, Lt. Col. S.J. Chaudhary v. State (Delhi Administration), (1984) 1 SCC 722.

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 caseÂcalendar must be prepared at the commencement of the trial after framing of charges;

ii. the caseÂcalendar must specify the dates on which the examinationÂinÂchief and crossÂexamination (if required) of witnesses is to be conducted;

iii. the caseÂcalendar 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 subjectÂmatter 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 caseÂcalendar;

vi. the grant for request of deferral must be premised on sufficient reasons justifying the deferral of crossÂexamination of each witness, or set of

witnesses;

vii. while granting a request for deferral of crossÂexamination of any witness, the trial courts must specify a proximate date for the crossÂ-

examination of that witness, after the examinationÂinÂchief of such witness(es) as has been prayed for;

viii. the caseÂcalendar, 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.

13. In the present case, a bald assertion was made by the Counsel for the RespondentÂAccused No. 2 that the defence of the RespondentÂAccused

No. 2 would be prejudiced if the cross-examination of CWs 1 to 5 is not deferred until after the examination-in-chief of CWs 2 to 5.

The impugned Order is liable to be set aside since the High Court has given no reasons for reversal of the Order of the Additional Sessions Judge,

particularly in light of the possibility of undue influence and intimidation of witness(es) since the Respondent-Accused No. 2 and Accused No. 7 are

“highly influential political leaders”.

14. In view of the aforesaid discussion, the present Criminal Appeal is allowed, and the impugned Order dated January 9, 2018 passed by the High

Court of Kerala in Criminal Miscellaneous Case No. 171 of 2018 is set aside. The Order dated December 20, 2017 passed by the Additional Sessions

Judge dismissing the Application filed on behalf of the Respondent-Accused No. 2 stands restored. The observations made hereinabove will,

however, have no bearing on the merits of the case during the course of trial.

Ordered accordingly.