

S.C. No. - 07(09)18

S.T. No. - 223(09)18

Order No. 10

Dated: 25.02.2019

Today is fixed for hearing of a petition dated 21.02.2019 filed on behalf of all accused persons Under Sub Section- (2) of Section- 231 of Code of Criminal Procedure (hereinafter referred to as Cr.P.C.) and evidence.

Accused persons, namely, 1. Biswanath Patra, 2. Sripati Halder and 3. Narayan Rang are produced from J/C and remanded to J/C till next date.

The case record is taken up for hearing.

Heard Ld. Defence Counsel as well as Ld. P.P. in Charge at length. Ld. P.P. in Charge submitted a Written Objection. Copy served. Perused the case record and previous order sheets.

Before entering into the merit of the petition the factual backdrop of the present case requires to be discussed first. The instant case was instituted on the strength of a written complaint filed by one Rebati Halder on 19/02/2018 over the issue of assault upon her son, namely, Naresh Halder by the present accused persons. Injured Naresh Halder was taken to different hospital for better treatment. Since lodging of F.I.R. on the next day Naresh Halder succumbed to his injuries at Sana Nursing Home. Investigating Officer after due investigation submitted charge sheet against the present three accused persons who are in Judicial Custody. Charge was framed on 28/09/2018. No witness could be examined during first schedule fixed for evidence. Next schedule for evidence of prosecution was fixed on 21/02/2019 for C.S.W. 1, i.e. de facto complainant, on 22/02/2019 for C.S.W. 2 and 3, i.e. daughters of de facto complainant, and on 25/02/2019 for C.S.W. 4 and 5. On 21/02/2019 after completion of examination in chief of C.S.W. 1 as P.W. 1, Ld. Defence Counsel filed one petition under Sub Section (2) of section 231 of Cr.P.C. praying for deferring cross examination of P.W. 1 till completion of examination in chief of C.S.W. 2, 3 and 4 on the solitary ground that C.S.W. 1, 2, 3 and 4 all are from the same family and they are the witnesses of same set of facts.

Ld. Defence Counsel submitted that C.S.W. 1 is mother of deceased, C.S.W. 2 and 3 are sisters of deceased and C.S.W. 4 is brother in law of deceased and they are witnesses of same facts. In case of rejection of this prayer the accused petitioner will be seriously prejudiced in defending the present case. Ld. Defence Counsel further submitted that as the above noted witnesses are from the same family and are witnesses

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(2)

of same fact, it would amount to divulge the defence strategy beforehand which would deprive the accused petitioners from getting a reasonable opportunity to defend themselves. Ld. Defence Counsel also submitted that if opportunity for deferred cross examination of P.W. 1 is not given to the accused petitioners in that event prosecution will try to fill up the lacuna of evidence of P.W. 1 with the help of subsequent witnesses which is absolutely against the principle enshrined in Sub Section (2) of Section 231 of Cr.P.C. Ld. Defence Counsel relied upon one judgement of **Hon'ble Apex Court reported in, 2019 SAR (Criminal) 33, passed in Criminal Appeal no. 1321 Of 2018, decided on 30.10.2018, (State of Kerala Vs. Rasheed).**

In this gracious judgement Hon'ble Apex Court has been pleased to hold in para 12 that-

“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-calender must be prepared at the commencement of the trial after framing of charges;

ii) the case-calender must specify the dates on which the examination in chief and cross examination (if required) of witnesses is to be conducted;

iii) the case-calender 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-calender;

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 court 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-calender, 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.”

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Ld. P.P. in Charge raised strong objection against the prayer of the accused petitioners and submitted that the prayer of the accused petitioners was made only in order to delay the present trial. It was further contention of Ld. P.P. in Charge that this petition should have been filed by the accused petitioners on the day on which schedule was fixed for evidence of prosecution and this application at such delayed stage does not show bona fide intention on the part of the accused petitioners. It is his further submission that mere relationship between prosecution witnesses does not entitle the accused petitioners to ask for deferral of cross examination of a witness and deferral of cross examination of P.W. 1 in the present case would affect the prosecution case adversely. It is also submitted by Ld. P.P. in Charge that the accused petitioners are persons having criminal background and they are very influential persons of the locality, so there is every possibility of undue influence or threatening the witnesses.

In order to decide an application Under Section 231(2) Cr.P.C. apart from this section, a conjoint reading of section 309 (1) Cr.P.C. and Section 135 and 138 of Indian Evidence Act is necessary.

Section- 231 Cr.P.C. is reproduced hereinbelow:

“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.”*

Upon perusal of Section- 231(2) Cr.P.C. it is aptly clear that an accused can not claim deferral of cross examination of a witness as a matter of right. It is a discretionary right of the Trial Court which is to be exercised judicially. Deferral of cross examination of a witness in a criminal trial is not an ordinary practice and it can not be claimed in general on the ground that the witnesses are going to depose on the same facts and it would amount to divulge the defence strategy beforehand.

A conjoint reading of Section- 231 Cr.P.C. alongwith Section- 135 of the Indian Evidence Act makes it clear that production and examination of witnesses shall be regulated by concerned procedural law and practice for the time being and in absence of any such law, by the discretion of the Court. Whereas Section 138 of Indian Evidence Act provides the order of examination of a witness in clear terms, i.e. a witness 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. This is the general rule and any departure

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from this rule is an exception which warrants a very strong reason in its support. Again as per mandate of Section 309 (1) of Cr.P.C. in every inquiry or trial the proceeding shall be continued from day to day until all the witnesses in attendance have been examined, unless it is necessary to adjourn for reasons to be recorded.

In the present case in hand schedule for evidence of prosecution witnesses i.e. C.S.W. 1 to 5, has been fixed beforehand and the witnesses as alleged to be deposing on the same facts is proximately scheduled on three consecutive dates. Apart from that there is possibility of loss of memory of P.W. 1, which adversely affect the case of the prosecution. Furthermore Ld. Defence Counsel could have filed the present petition Under Section- 231(2) Cr.P.C. at the time of fixing schedule for evidence of prosecution, but such petition at this stage compelled this Court to think twice about bona fide intention of the accused petitioner. On the other hand, I find substance in the submission of Ld. P.P. in Charge that the incident took place in the broad daylight and the accused petitioners are very much influential persons of the locality. So there is every possibility of undue influence, harassment or intimidation to the witnesses. Keeping in view guidelines laid down by the Hon'ble Apex Court in the abovenoted gracious judgement, this Court does not find any force in the argument advanced by the Ld. Defence Counsel for granting deferral of cross examination of P.W. 1 till completion of examination in chief of CSW 2, 3 and 4.

Ld. Defence Counsel repeatedly draws attention of this Court to the fact that CSW. 1 to 4 are all from the same family, so there will be an opportunity for prosecution to fill up the lacuna of a witness by subsequent witnesses.

Hon'ble Calcutta High Court in C.R.R. No. 2533 of 2017, decided on 2nd August, 2017, in, Sisir Debnath Vs. State of W.B. & another, has been pleased to hold that-

“Mere relationship between the witnesses is no ground to defer their cross examination during trial. Deferment of cross examination of the witness is not ordinarily permitted unless exceptional circumstances justifying such procedure is warranted.”

Relying on the abovenoted gracious judgement of Hon'ble Calcutta High Court, this Court has no hesitation to turn down the argument placed by the Ld. Defence Counsel that deferral of cross examination of P.W. 1 in the instant case is necessary till completion of examination in chief of C.S.W. 2 to 4 as they belong to the same family and are going to depose on the same fact.

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In view of the discussion made hereinabove, this Court is not inclined to defer cross- examination of P.W. 1 till completion of examination-in-chief of C.S.W. 2, 3 and 4.

Hence, petition dated 21/02/2019 filed on behalf of the accused petitioners Under Section- 231(2) of Cr.P.C stands rejected on contest, but without any order as to cost.

Thus, the petition dated 21/02/2019, Under Section 231(2) Cr.P.C. is disposed of. Now the case record is taken up for cross examination of P.W. 1.

Ld. P.P. in Charge is present with P.W. 1.

Ld. Defence Counsel files one petition praying for an adjournment on the ground stated therein.

Copy served. Ld. P.P. in Charge raised no objection against the prayer of adjournment.

Heard both sides. Considered.

Prayer of Ld. Defence Counsel is allowed with a direction to proceed with cross examination of P.W. 1 positively on the next date fixed for this case.

Accused persons in J/C be produced of the date fixed.

To date 16/03/2019 for production and cross examination of P.W. 1.

D/C by me.

2nd A.D.J., Kakdwip

2nd Addl. Dist. & Sessions Judge,
Kakdwip, South 24-Parganas.