
(2002) 06 CAL CK 0003
In the Calcutta High Court
Case No : C.R.R. No. 1147 of 2002

Debasis Dutta and Others

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 18-06-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 407, 409
Penal Code, 1860 (IPC) — Section 120B, 302, 34

Citation : (2003) 2 CALLT 105

Hon'ble Judges : Debiprasad Sengupta, J

Bench : Single Bench

Advocate : Dipak Sengupta, for the Appellant; Sudipta Moitra and S. Panchnal, for the Respondent

Final Decision : Dismissed

Judgement

D.P. Sengupta, J.—This is an application u/s 407 of the Code of Criminal Procedure for transfer of a Sessions case being S.T. No. XVII/March/2002 under Sections 302, 120B, 34 IPC from the Court of learned Additional Sessions Judge, 3rd Court, Midnapore to some other Court of competent jurisdiction.

2. Mr. Sengupta, learned advocate appearing on behalf of the petitioners at the very outset refers to the order dated 22.4.2002 passed by the learned trial Judge. From the said order it appears that on the said date four accused persons, out of 18 accused's filed petitions before the learned trial Judge through the Superintendent, Midnapore Central Correctional Home stating that they were not in a position to engage any lawyer to defend them. Such petition dated 4.4.2002 was placed before the learned trial Judge on 22.4.2002, when the case was fixed for recording evidence. However, on such petition filed by those four accused persons the learned trial Judge appointed Mr. G. Chowdhury, learned advocate from the defence panel to represent the said four accused persons in view of the provision of Section 304 Cr.PC.

3. It further appears that on the same date a submission was made by Mr. A.

Mukherjee, learned advocate of another set of accused persons that since at the time of framing of charge the aforesaid four accused persons were not represented by any lawyer, the charge might be altered or modified.

4. It also appears from the said order dated 22.4.2002 that Miss Sarbani Roy, learned advocate filed another petition before the Court that her clients did not receive any legible copies of documents and as such she prayed for supply of legible copies to her clients.

5. It may be mentioned here that all such prayers made by the learned advocates were turned down by the learned trial Judge. Prayer was made for adjournment of the case on the ground of moving the higher Court, but such prayer was also rejected by the learned trial Judge as he was not inclined to alter or shift the trial date. The reasons given by the learned trial Judge was that all the 18 accused persons, including those 4 undefended accused, were present in Court at the time framing of charge and recording pleas and all of them replied that they were innocent and they "claimed to be tried. Charge was framed after hearing all the accused persons and thereafter schedule of dates for the trial was fixed on 2.4.2002, when the dates for recording evidence was fixed on an from 22.4.2002.

6. After the aforesaid order was passed Mr. A. Mukherjee and Sarbani Roy and some other advocates submitted that they intended to leave the Court and their absence might be recorded in the order sheet. Mr. G. Chowdhury, learned advocate, who was engaged by the Court to defend the four undefended accused"s wanted to retire from the case and his prayer was allowed by the learned Judge.

7. It appears from the order dated 22.4.2002 that one Mr. Dipankar Das, panel state defence lawyer gave his consent to conduct the sessions case on behalf of the said four undefended accused persons.

8. It may be mentioned here that on the same date, i.e., on 22.4.2002, an application u/s 409 Cr.PC was filed in the Court of learned Sessions Judge. Midnapore praying for recalling the case record of the sessions case from the Court of learned Additional Sessions Judge, 3rd Court, Midnapore. On such application the learned Sessions Judge called for the records of the case and stayed all further proceeding in the Sessions case. The date for hearing was fixed on 29.4.2002. Such order of stay was communicated to the Court of learned Additional Sessions Judge, 3rd Court on the following day, i.e., on 23.4.2002, who directed stay of the trial till 29.4.2002.

9. The aforesaid application u/s 409 Cr.PC was rejected by the learned Sessions Judge by his order dated 30.4.2002.

10. After the aforesaid application u/s 409 Cr.PC was rejected by the learned Sessions Judge, the case record was received back by the learned Additional Session Judge, 3rd Court, Midnapore on 2.5.2002.

11. The present application u/s 407 Cr.PC was moved thereafter before this Court on 10.5.2002, when this Court granted stay of all further proceeding in the Sessions trial till one week after the summer vacation.

12. Referring to the order dated 22.4.2002 passed by the learned Additional Sessions Judge, 3rd Court, Midnapore, it is submitted by Mr. Sengupta, learned advocate of the petitioners that free legal assistance at State cost is a fundamental right of a person accused of an offence and the State is under a constitutional mandate to provide free legal aid to an accused person who is unable to secure legal services on account of indigence. It is further submitted by Mr. Sengupta that after any advocate is engaged by the Court to represent an undefended accused person, sufficient time should be allowed to the learned advocate to enable him to serve the accused properly. But In the present case although the learned trial Judge appointed one lawyer from the State panel to represent the said four undefended accused's he refused the prayer for adjournment made by such learned advocate for which the learned advocate had to retire from the case. It is submitted by Mr. Sengupta that in the present case four accused persons, out of 18 accused's remained unrepresented at the time of framing of charge. On the date of recording evidence when this was brought to the notice of the learned trial Judge, the learned Judge appointed one lawyer to represent those four accused persons, but he rejected the prayer for adjournment made by the said learned advocate. The learned trial Judge decided to proceed with the trial although the said four accused persons remained undefended.

13. In support of his contention Mr. Sengupta relies on a judgment of the Hon''ble Supreme Court reported in Sunil Kumar Pal Vs. Phota Sheikh and Others, . After going through the said judgment it appears that in the said case the accused persons were defended by the Public Prosecutor, who earlier had the brief with him. Accused's were also supported by the ruling party in the State and when the trial started the supporters of the party assembled in the Court compound and created a hostile atmosphere by shouting against the prosecution and in favour of the accused. Number of witnesses also turned hostile. It was further found that when the trial commenced the special Public Prosecutor, who was appointed only two days back, was granted only one days time to prepare the case. In such circumstances it was held by the Hon''ble Supreme Court that the trial could not be said to be fair and just so far as the prosecution was concerned. Accordingly the order of acquittal was set aside and retrial was directed by the Hon''ble Apex Court.

14. After going through the said judgment I find that the facts and circumstances of the said case is totally different from the present case and the said judgment does not have any manner of application in the present case.

15. Mr. Sengupta, learned advocate next relied upon a judgment reported in Suk Das Vs. Union Territory of Arunachal Pradesh, . In the said judgment it was held by the Hon''ble Supreme Court that free legal assistance at the State cost is a

fundamental right of a person accused of an offence. The exercise of such fundamental right is not conditional upon the accused applying for free legal assistance. The trial Magistrate or the Judge is under an obligation to inform the accused that if he is unable to engage a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. It was held that the conviction reached without informing the accused that they were entitled to free legal assistance, resulting the accused remaining unrepresented by a lawyer during trial, is clearly in violation of the fundamental right of the accused under Article 21 of the Constitution of India. Conviction was accordingly set aside.

16. Mr. Sengupta also refers to Rule 640 of Criminal Rules and Orders which runs as follows:

"Rule 640. (1) In all such cases, the panel pleader shall be appointed and shall be given a brief, similar to that given to the Public Prosecutor at least seven days before the date fixed for prosecution evidence.

(2) A copy of the heads of charge shall be supplied to the panel pleader free of charge and he shall have reasonable facilities to inspect on unstamped application all documents statements and articles which the prosecution proposes to use in evidence."

17. Referring to the aforesaid provision of Rule 640 it is submitted by Mr. Sengupta that the learned trial Judge acted in violation of the said Rule, when he rejected the prayer for adjournment made by the learned advocate who was appointed by the learned trial Judge to represent the four undefended accused persons.

18. Mr. Sengupta next relies upon a judgment of the Hon'ble Supreme Court reported in AIR 1968 SC 1343 (Bashira v. State of Uttar Pradesh). From a reading of the said judgment it appears that the conviction and sentence was held to be void because of an error in the procedure adopted in the trial, which was held in violation of Rule 37 of High Court Rules and Orders -- Allahabad High Court General Rules (Criminal). It was provided in the said Rule 37 that sufficient time should be granted to the defence counsel for preparation. It was further held in the said judgment that no hard and fast rule can be laid down as to the time which must elapse between the appointment of the counsel and the beginning of trial, but from the circumstance of each case the Court must ensure that the time granted to the counsel is sufficient to prepare for the defence. It also appears that in the said case the trial of the accused proceeded as soon as the counsel for the accused was appointed by the Court and two principal witnesses, one of whom was the sole eye witness, were examined and cross examined. Prayer on behalf of the accused to recall the eye witness for further cross examination on the ground that he could not be properly cross examined, was rejected and the accused was convicted. The Hon'ble Supreme Court in such circumstances set aside the order of conviction and sentence and directed fresh

trial of the accused after complying with the requirements of law.

19. Relying upon the aforesaid judgments of the Hon''ble Apex Court and in the facts and circumstances stated above, it is submitted by Mr. Sengupta that the petitioner reasonably apprehends that there cannot be any just and fair trial of the accused persons in the Court of learned Additional Sessions Judge, 3rd Court, Midnapore and the case should be transferred to some other Court having jurisdiction to try the offence.

20. Mr. Sudipto Moitra, learned Additional Public Prosecutor appearing for the State referring to the order dated 7.3.2002 passed by the learned Sessions Judge, Midnapore, submits that on that date the case was transferred to the Court of learned Additional Sessions Judge, 3rd Court, Midnapore for disposal. On that date no objection was raised regarding supply of illegal copies of documents or non-representation of four accused persons. After the case was transferred, the learned trial Judge framed charges against 18 accused persons, including those four accused persons who claims to be unrepresented, on 2.4.2002. Even at that stage no objection was raised and in presence of the learned advocate the trial dated was fixed by the learned Judge on an from 22.4.2002. On 22.4.2002, which was fixed for recording evidence the petition dated 4.4.2002 filed by the four accused persons through the Jail Superintendent was placed before the learned trial Judge and it was submitted before the learned Judge that four accused persons are unrepresented. The learned trial Judge in view of provision of Section 304 Cr.PC appointed one Mr. G. Chowdhury from the defence panel to represent the four accused persons. Mr. G. Chowdhury, advocate also stated before the learned Judge that he was also engaged by the accused persons to defend them in another case Mr. G. Chowdhury after being appointed prayed for time, but such prayer was refused by the learned Judge. Mr. Moitra submits that earlier directions were given thrice by this Court directing the learned trial Judge to expedite trial and only for this reason the learned trial Judge was not inclined to shift or alter the trial date,

21. It is further contended by Mr. Moitra that although PW1 was examined on the said dated, i.e., on 22.4.2002, opportunity was given to Mr. G. Chowdhury, who appeared for four undefended accused persons, to cross examine the said witness on the next date. Out of total 18 accused persons other 14 accused persons were properly represented by their respective layers. But surprisingly all the said lawyers left the Court in a body and submitted before the learned trial Judge that their absence might be recorded in the order sheet.

22. Mr. Moitra submits that it will be evident from the order dated 22.4.2002 that after Mr. G. Chowdhury retired from the case one Mr. Dipankar Das, learned State defence lawyer gave his consent to conduct in case on behalf of the said four undefended accused persons.

23. On 22,4.2002 application was moved before the learned Sessions Judge u/s 409 Cr.PC on behalf of the accused persons and the learned Sessions Judge

granted stay of further proceeding in the Sessions Trial till 29.4.2002. So, Mr. Dipankar Das, learned lawyer appointed by the trial Judge to defend four undefended accused, got sufficient time during the period of stay granted by the Sessions Judge from 22.4.2002 to 30.4.2002 to prepare himself or the case. After the application u/s 409 Cr.PC was dismissed by the learned Sessions Judge on 30.4.2002, the records were received back by the learned Additional Sessions Judge on 2.5.2002. But surprisingly on 2.5.2002 when the matter was taken up by the learned trial Judge. Mr. Dipankar Das learned advocate appeared and submitted before the Court by filing a petition that after being appointed by the Court Mr. Das learned advocate went to the said four accused persons (undefended) for taking instruction, but they were so adamant and daring that they refused to co-operate with Sri Dipankar Das. In such circumstances Mr. Dipankar Das also intended to retire from the case as State defence lawyer. It is pointed out by Mr. Moitra that the very conduct of the said four accused persons makes it clear that their only intention is to drag the trial and to frustrate the same.

24. It is pointed out by Mr. Moitra that in the present case at every stage of the proceeding applications are being filed one after another by the accused persons. After such application is rejected by the trial Court, this Court is moved in revisional jurisdiction. After the revisional application is dismissed and the case is sent back to the trial Court, same thing is reported by another set of accused persons. Mr. Moitra submits that if such practice is allowed to continue, it will never be possible to conclude the trial in the trial Court. In the present case from the very initiation of the proceeding no objection was raised at any point of time, even at the stage of framing of charge, that the copies supplied to the accused persons were illegible. But only on the date when the matter was fixed for recording evidence a petition was filed by the learned advocate appearing on behalf of one set of accused persons that illegible copies have been supplied to the accused. In view of the provision of Section 304 Cr.PC counsel was appointed by the Court to defend the so-called undefended accused persons. But from the conduct of the said four accused persons it becomes clear that they refused to cooperate with the said learned advocate. From the order dated 2.5.2002 it appears that all the learned advocates appearing for different sets of accused persons were present inside the Court room at the time of examination of PWs 1 and 2, but they were reluctant to proceed with the case. All these things, according to Mr. Moitra, suggests that the only intention of the accused persons is to create a ground for transfer of the case and to drag the proceeding to frustrate the same.

25. Mr. Moitra submits that for transfer of the case there must be genuine apprehension that there is no chance of getting just and fair trial. In support of his contention Mr. Moitra relies on a judgment of Hon'ble Apex Court reported in 2000 SCC 1293 (R. Balakrishna Pillai v. State of Kerala). In the said case the transfer was sought for "on the ground that one of the Judges of the Bench was appointed and had worked as an advocate to assist Justice K. Sukumaram

Commission to inquire into malpractices in the execution of the rectification work in the Hydroelectric project and as such the petitioner was not likely to get justice if the appeal was decided by the said Bench. Such Prayer was turned down and it was held by the Hon"ble Supreme Court as follows:

"However, a mere allegation that there is apprehension that justice will not be done in a given case is not sufficient. Before transferring the case, the Court has to find out whether the apprehension appears to be reasonable. To judge the reasonableness of the apprehension, the state of mind of the person who entertains the apprehension is no doubt relevant but that is not all. The apprehension must appear to the Court to be reasonable, genuine and justifiable. In the present-day scenario, if these types of applications are entertained, the entire judicial atmosphere would be polluted with such frivolous petitions for various reasons."

26. In the next judgment relied upon by Mr. Moitra 2000 SC 1048-Abdul Nazar Madani v. State of Tamil Nadu and Anr.) same principle was laid down by the Hon"ble Supreme Court that apprehension of not getting a fair trial is required to be reasonable, genuine and not imaginary based on conjectures and surmises.

27. Relying upon the aforesaid two judgments it is submitted by Mr. Moitra that in the present case there is no reasonable and genuine apprehension of the accused persons of not getting a fair trial. A Sessions Trial cannot be transferred simply on the ground that prayer for adjournment was refused by the learned trial Judge. In the present case even assuming that the learned Sessions had committed a wrong in not allowing the prayer for adjournment of the learned advocate of the four undefended accused persons as per Rule 640 of Criminal Rules and Orders, the said four accused persons are not prejudiced in any way because their first counsel G. Chowdhury was given opportunity to cross examine the PW1 on the next date. But only because of this reason all the learned advocates appearing on behalf of different sets of accused left the Court in a body and expressed their desire not to proceed with the case. The learned counsel Mr. Dipankar Das, who was engaged subsequently after the first counsel retired from the case, also got sufficient time, from 22.4.2002 to 30.4.2002 to prepare himself for the case because of the stay order granted by the learned Sessions Judge. But the said four accused persons were so adamant and daring that they refused to co-operate with the learned advocate Mr. Dipankar Das who was engaged by the Court to defend them. Mr. Moitra submits that the conduct of the said accused persons suggests that their main intention was not to get any legal assistance at the cost of the State, but to drag the proceeding and to create grounds for transfer of the Sessions trial.

28. I have heard the learned advocates of the respective parties. I have also perused the orders passed by the learned trial Judge, After considering all the aspects of the matter I find sufficient merit in the submissions made by the learned Additional Public Prosecutor. From the very initiation of the proceeding the accused persons left no stone unturned to drag the proceeding by adopting

different tactics. Applications were filed on after another. Sometime alleging supply of illegal copies, some time for supply of translated copies of documents and lastly on the ground that four accused persons are remaining undefended and refusal of prayer for adjournment. From the conduct of the said four accused persons, who are said to be undefended, it becomes very much clear that they are not at all interested in getting any legal assistance from their learned advocate Sri Dipankar Das as they refused to co-operate with Mr. Das in this case when Mr. Das went to them for taking instruction. I also fail to understand why the other learned advocates, who were engaged to defend the other 14 accused persons, refrained from participating in the proceeding. Considering all these aspects I am of the view that the only intention of the accused persons is to drag the proceeding. Such practice, in my considered view, should never be encouraged by this Court. If a sessions case is transferred simply on the ground that the prayer for adjournment is refused by the learned Judge or on the ground of supply of illegible copies, then in each and every case prayers for transfer will be made on such grounds.

29. In the present application u/s 407 Cr.PC none of the petitioners are said to be undefended all the petitioners are duly represented by their lawyers in the trial Court. The four accused persons, who are said to be undefended, are not the petitioners in the present application. When the other 14 accused persons are duly represented by their lawyers, I fail to understand why they went out of the Court in a body expressing their unwillingness to participate in the trial. It is the duty of every advocate, who accepts the brief in a criminal case, to attend the trial from day to day and he will be committing a breach of his professional duty if he fails to attend the Court during such trial.

30. In view of the discussions made above the present application u/s 407 Cr.PC fails and the same is dismissed.

31. The interim order earlier granted by this Court stands vacated.

32. I hope that good sense will prevail upon the learned advocates who are engaged by the accused persons and being the officers of the Court they will extend their hands of cooperation to the learned trial Judge and assist him to conclude the trial.

33. It is also made clear that if the learned advocates decide to participate in the proceeding, the learned trial Judge shall give them sufficient opportunity to cross-examine the witnesses who have already been examined in chief.

34. Application for vacating interim order filed on behalf of the State being CRAN 595/2002 is accordingly disposed of.

18.6.02

35. On the prayer of the learned advocate of the respective parties, let an urgent xerox certified copy of the order be given to the learned advocate of the respective parties at an early date, if applied for.