

(2008) 04 CAL CK 0045
In the Calcutta High Court
Case No : C.R.R. No. 728 of 2008

Dr. Anima Ghosh

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 11-04-2008

Acts Referred:

Arms Act, 1959 — Section 25, 27, 35
Criminal Procedure Code, 1973 (CrPC) — Section 275, 276, 278, 407, 482
Evidence Act, 1872 — Section 114, 80
Penal Code, 1860 (IPC) — Section 120B, 201, 302, 304, 323

Citation : (2008) 2 CHN 1038

Hon'ble Judges : Ashim Kumar Roy, J

Bench : Single Bench

Advocate : Joymalya Bagchi and Rupa Bandyopadhyay, for the Appellant;
Swapan Kumar Mullick, for the Respondent

Final Decision : Dismissed

Judgement

Ashim Kumar Roy, J.—In the instant application u/s 407 read with Section 482 of the Code of Criminal Procedure, the petitioner who happened to be the wife of the deceased Dr. Jayanta Kumar Ghosh seeks transfer of Sessions Serial No. 75 of 2006, now pending before the Learned Additional Sessions Judge, Fast Track, 1st Court, at Kandi, Murshidabad, arising out of Burwan Police Station Case No. 29 of 2006, u/s 302/364/120B/34/201 of the Indian Penal Code and u/s 25/27/35 of the Arms Act.

At the time of final hearing of this application inspite of repeated calls none appeared on behalf of the accused/opposite party No. 2 to 8. The affidavit of service filed in Court be kept with the records. However, Mr. Swapan Kumar Mullick, the learned advocate appearing on behalf of the State was duly present in Court.

2. Mr. Joymalya Bagchi, the learned advocate appearing with Ms. Rupa Bandyopadhyay submitted before this Court that the petitioner reasonably

apprehending that no fair and impartial trial is expected from the particular court where the aforesaid trial is now pending, moved this application for transfer inasmuch as the Learned Judge had expressed undue sympathy in favour of the accused persons and also conducted himself in a bias manner. He further submitted that the Learned Trial Judge has not correctly recorded the evidence of the Investigating Officer and also refused to record in the evidence the very vital facts deposed by the Investigating Officer of the case. The Learned Judge on his own accord suggested the defence Lawyer what he should ask the Investigating Officer of the case in his cross-examination with reference to the evidence of the Learned Magistrate P.W. 29 who recorded the confessional statement of the accused persons. He further submitted that the Learned Judge in the capacity of Additional District and Sessions Judge, Fast Track, 1st Court, Kandi, Murshidabad conducted total eight trials, out of which in seven trials he delivered Judgement granting acquittal to the accused persons and all the Judgements are of perfunctory nature and speak of complete non-application of judicial mind. Mr. Bagchi further submitted that the particular Learned Judge as the Additional Sessions Judge, In-charge, Kandi, Murshidabad granted bail to three accused persons in connection with Khargram Police Station Case No. 53 of 2007 u/s 363/366/372A/120B of the Indian Penal Code and a Division Bench of this Hon"ble High Court by an order passed in connection with C.R.M. No. 10138 of 2007 set aside the said order of granting bail and passed an adverse comments against him. It is further submitted that the particular Learned Judge as Additional Sessions Judge, Fast Track Court - I, Tamluk, Purba Midinipur by a judgement delivered in connection with Sessions Trial No. 4 (1) 2005 acquitted six accused persons of a charge u/s 447/323/325/379/304/34 of the Indian Penal Code and this Hon"ble High Court set aside the said order of acquittal and remanded back the case for re-trial. Accordingly, Mr. Bagchi submitted for the sake of a fair and impartial trial it would be expedient in the interest of justice the aforesaid trial be transferred from the Court of the Additional Sessions Judge, Fast Track, 1st Court, Kandi, Murshidabad to any other Sessions Court in the same Sessions Division.

3. On the other hand, Mr. Swapan Kumar Mullick vehemently opposed the prayer of transfer made on behalf of the petitioner. Mr. Mullick submitted that the petitioner except making some bald allegations has not been able to show any iota of materials suggesting that the evidence of the Investigating Officer was recorded incorrectly. There is also no contemporaneous record that the Learned Judge suggested the defence lawyer as to how the Investigating Officer should be cross-examined with reference to evidence of the P.W. 29. He further submitted although it is alleged that while the Learned Magistrate was examined as P.W. 29 the Learned Trial Judge suggested the defence Counsel on what point the Investigating officer to be cross-examined with reference to the evidence of P.W. 29 but at no earlier point of time any objection was brought into the records. According to Mr. Mullick that the other grounds on which the petitioner is seeking transfer of the case are wholly perverse and without any substance and

the same do not justify transfer of the Sessions Trial in question.

4. I have carefully considered the rival submissions made on behalf of the respective parties and perused the materials on record.

5. In my opinion, simply because the order of granting bail passed by the Learned Judge has been set aside and an adverse comments has been made against him by this Hon'ble High Court and an order of acquittal which has been passed by the Learned Judge has been reversed by this Hon'ble High Court do not justify any apprehension that no impartial and fair trial is expected from the said Court. I am of the further opinion that simply because out of eight trials the Learned Judge passed order of acquittal in seven cases is also no ground justifying any apprehension that there would be no fair and impartial trial. The allegation that the Learned Judge in open Court expressed his sympathy in favour of the accused persons and conducted himself in a bias manner is without any foundation. Nothing has been disclosed in the instant transfer application as to when and how such alleged sympathy for the accused persons was expressed by the Learned Judge. There is no contemporaneous record as regards to such allegations nor there was anything on record under such circumstances any objection was raised in the Court below either on behalf of the prosecution or on behalf of the defacto-complainant.

6. So far as the allegation that the evidence of the Investigating Officer has not been recorded correctly and the Learned Judge recorded his deposition in his own way changing the tenor of such testimony is not supported by any contemporaneous record. The said particular witness namely the Investigating Officer of the case never made any complaint in the Trial Court that his statement has not been correctly recorded nor any objection was raised by the Learned Public Prosecutor. The Section 276 of the Code of Criminal Procedure prescribed as to how the evidence of the witness in a Sessions Trial be recorded. Whereas Section 278 of the Code of Criminal Procedure prescribed the procedure to be followed after the recording of evidence of any witness is completed. The provisions of Sections 276 and 278 of the Code of Criminal Procedure are quoted below:

Sections 276 and 278 of the Code of Criminal Procedure.

276. (1) In all trials before a Court of Session, the evidence of each witness shall, as his examination proceeds, be taken down in writing either by the presiding Judge himself or by his dictation in open Court or, under his direction and superintendence, by an officer of the Court appointed by him in this behalf.

(2) Such evidence shall ordinarily be taken down in the form of a narrative, but the presiding Judge may, in his discretion, take down, or cause to be taken down, any part of such evidence in the form of question and answer.

(3) The evidence so taken down shall be signed by the presiding Judge and shall form part of the record.

278. (1) As the evidence of each witness taken u/s 275 or Section 276 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader and shall, if necessary, be corrected.

(2) If the witness denies the correctness of any part of the evidence when the same is read over to him, the Magistrate or presiding Judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness and shall add such remarks as he thinks necessary.

(3) If the record of the evidence is in a language different from that in which it has been given and the witness does not understand that language, the record shall be interpreted to him in the language in which it was given, or in a language which he understands.

7. Thus it appears from the aforesaid provisions that the evidence of each witness recorded in writing, be signed by the Presiding Judge and as the recording of evidence of each witness is completed the same shall be read over to the witness in presence of the accused and in the event the witness denies the correctness of any part of the evidence when the same is read over to him, the Presiding Judge instead of correcting the evidence may make a memorandum thereon of the objection made to the Court by the witness and make his remarks. However, in the instant case although it has been alleged that the evidence of the Investigating Officer has not been recorded correctly, there is nothing on record to show that when after completion of recording of evidence, the same was read over to the said witness, he denied the correctness of the same. On the contrary the Investigating Officer signed on the record of his depositions admitting that his testimony has been truly and correctly recorded by the Court. As such I am unable to accept the allegations made on behalf of the petitioner that the deposition of the Investigating Officer was not correctly recorded by the Presiding Judge. According to the provisions of Section 80 of the Evidence Act any document purporting to be a record or memorandum of evidence or any part of the evidence given by a witness in a judicial proceeding and purporting to be signed by any Judge or Magistrate, the Court shall presume that the document is genuine and any statement as to the circumstances under which it was taken, as purporting to be made by the person signing it, are true and that such evidence, statement or confession was duly taken. Moreover, in terms of the provisions of Section 114(e) of the Evidence Act all judicial acts be presumed as have been regularly performed.

In the case of Bhagwan Singh Vs. The State of Punjab, , the Apex Court held;

Where the certificate of committing Magistrate endorsed on the deposition sheets, states that the deposition was read out to the witness and the witness admitted it to be correct the Court is bound to accept it as correct u/s 80 unless it is proved to be untrue.

8. In this connection it would be very pertinent to quote what have been

observed by the Apex Court in the case of Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. and Others, , where the Apex Court held as follows:

...that statements of fact as to what transpired at the hearing, recorded in the judgment of the Court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in the Court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judge who has made the record. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. It is not open to the appellants to contend before this Court to the contrary.

9. Thus, I am of the opinion that the petitioner has failed to make out any case for transfer and accordingly this criminal revisional application fails and stands dismissed.

Urgent xerox certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible.