
(1985) 01 KL CK 0006
In the High Court Of Kerala

Dr. P.A. Varghese

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 14-01-1985

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 11, 406, 407
Penal Code, 1860 (IPC) — Section 120B, 201, 34, 420, 467

Citation : (1985) CriLJ 861

Hon'ble Judges : K. Sukumaran, J

Bench : Single Bench

Judgement

K. Sukumaran, J.—This is an application u/s 407 of the Code of Criminal Procedure for transfer of two criminal cases -- C.C. 19/1983 and C.C.4/1984, now before the Special Court (Mark list cases), to any other Court of a Chief Judicial Magistrate or any Assistant Sessions Court. The application was opposed by the Director of Public Prosecution.

2. A copy of the application had been forwarded to the Learned Magistrate for his remarks, which were furnished by communication dt. 17-10-1984, and were made available for perusal by counsel for the petitioner as desired by him. The allegations levelled in the petition for transfer have been denied by the Special Court. Notwithstanding such denial, the Magistrate took care to point out that he would never stand against the desire of the petitioner.

3, The prayer of the petitioner for transfer has to be considered seriously and anxiously, having regard to the relevant considerations to be borne in mind when an application of the nature is filed before this Court.

4. Counsel who appeared on behalf of the petitioner, commendably enough, did not suggest any act of impropriety or indiscretion on the part of the Magistrate. Emphasis was rightly placed on the possibility of there being a reasonable apprehension by the accused in relation to the future conduct of the cases before the Magistrate. Arguments were therefore found to be very subtle, and in a refined form, without in the least detracting from their forcefulness. Arguments

on behalf of the Director of Public Prosecution were equally well balanced and indicative of the anxiety to uphold the prestige and dignity of the judicial institutions, without in any manner discounting the necessity in appropriate cases to allay any reasonable apprehension of an accused about his having a fair deal before a Court of law. Arguments adopting such a highly objective style, and which simultaneously expressed unfeigned appreciation of judicial institutions and officers manning them and reflecting the agitation and anxiety of a citizen arrayed as an accused and the extreme necessity to remove trace of apprehension on his part about his suffering a prejudice, have been highly helpful in resolving the conflict of the divergent approaches. I record my appreciation for the assistance so rendered by well balanced arguments of counsel appearing on either side.

5. The brief and pertinent facts leading to the present application may now be indicated. It was the ambition of some of the brightest and the best among the students that led to, what turned out to be an epoch making and sensational litigation before this Court in the year 1982. Understandably, the frustration of the really deserving students when they were rejected in the selection process for admission to the prestigious professional courses, drove them to a litigative fight before this Court. Some, at any rate, of the petitioners were successful in securing admission in the resultant situation which emerged after the decision in these cases. The judgment dt. 23-1-1981 in D.P. 5590/1981 and connected cases (counsel for the petitioner herein championed the cause in that decision) directed a deep probe into the functioning of the University in relation to the preparation of the mark lists and the admission of persons who had resorted to illegal and unfair means. It is the investigation that was undertaken by the State in pursuance of the above judgment that led to the registration of many crimes in that area. It was felt necessary in the circumstances to have a Special Court as envisaged in the proviso to Section 11 of the Cr.P.C. for the above purpose. The "Special Court for Mark list cases" manned by an experienced Chief Judicial Magistrate came into being thereafter.

6. The learned District of Public Prosecution submitted that though, on earlier occasions, some applications had been filed before this Court for transfer of cases from the Special Court, this Court had rejected all of them. I am not, however, attaching any dominant or conclusive effect on that circumstance. The question has to be considered with reference to the facts of the particular case in which the motion for transfer is made. It is therefore necessary to closely scrutinise the material facts and circumstances on which the prayer for transfer is founded.

7. Practical difficulties in constituting another Special Court for trial of mark list cases were also referred to. Counsel for the petitioner rightly pointed out that the practical difficulties are not at all unsurmountable. Either the Government, in consultation with the High Court, will have to constitute Special Court for that purpose ; or the case could be dealt with by one of the Sessions Judges or

Assistant Sessions Judges. That apart, administrative difficulties and possible inconvenience to officials and counsel in charge of the case, attending to the case if and when one among the very many cases before the Mark list Court is transferred to another Court shall not stand in the way of a transfer, if the transfer is actually justified by the fact situation of the case. The principles to be borne in mind while considering an application for transfer u/s 406 which corresponds to Section 533 of the Cr.P.C. are well settled by now. Virtually every facet of this question has been illumined by judicial decisions including those of the Supreme Court. It is unnecessary to burden this order with a compendious citation of decided cases on the point. It is sufficient to indicate that elaborate discussions and elucidation of principles have been given, in particular, in the decisions of the Supreme Court, in P.C. Gulati Vs. Lajya Ram Kapur and Others, and Gurcharan Das Chadha Vs. State of Rajasthan, .

8. The petitioner herein is an accused in three of the mark list cases, C.C.11/1983, C.C.19/1983 and C.C.4/1984, he being the second accused in all the cases. The sons of the petitioners Antony, Thomas and Louis are the first accused in the three cases, C.C. 11 & 19 of 1983 and C.C.4/1984 respectively. Offences punishable Under Sections 120B, 467, 468, 471, 420 and 201 read along with Section 34 of the Penal Code are disclosed by the final reports. Bereft of details, unnecessary for the purpose of the present petition, the gist of offences consists in the accused having conspired and brought into existence false mark lists by means of forgery. Charges based on similar allegations are said to be framed against the petitioner and the other accused in three cases.

9. The learned Magistrate has disposed of C.C.11/1983 by his judgment dt. 18th April, 1984. The accused stand convicted for the various offences referred to in the judgment. Appeals are now pending against the aforesaid judgment.

10. The present petition was filed on 3-5- 1984 at a time when the execution of the sentences had stood suspended by the order of the Magistrate.

11. The petitioner, after going through the judgment feels that the learned Magistrate is "highly biased and prejudiced". The reasons for such feeling are : (1) the same points are involved in the remaining two cases and (2) some witnesses who had given evidence in C.C.11/1983 figure as witnesses for the prosecution in the remaining cases. Apart from these general statements, emphasis is laid on two specific circumstances ; (a) the manner in which the evidence of P.W. 10 had been discussed by the Magistrate, (b) the observations in the sentencing part of the judgment.

12. The petitioner apprehends prejudice from the references to him in the judgment as "a very high and influential person who can move both the heaven and the earth" and the like. In the "sentencing part of the judgment", according to the petitioner, the learned Magistrate had referred to him as an unmitigated villain" who had abused "the prowess provided by money, fame and status" in order to "prowl for a pre-Degree certificate".

The following passage occurring in that portion of the judgment was also pointed out as indicative of an inflexible and prejudiced mind of the Magistrate :

It was the Kama-Moha streak in them (the accused with particular reference to me) that kept them locked together in this insane struggle. The tendency to do crimes on the same lines will persist in their minds unless the Cosmis Leader imbibes lessons in the silence of their hearts. But where is this silence, when human lives are passing on and on, filth over filth and God is discarded in glass cases. The only alternative, therefore, is to put the erring ones in prison houses where the silence of the heart could open for the Divine. And that was what happened when Oscar was put in prison.

13. While considering the question whether there is any reasonable basis for the apprehension stated to be entertained by the accused, a variety of factors would have to be considered. The petitioner herein is a professional man, a medical graduate, with considerable experience in his profession as the Director of a well known hospital of the city. His frame of mind, his experience in life, and the position he occupies in society may all be reckoned while considering the scope for an apprehension which a man of his mental make up would have in the given circumstance. There cannot be any doubt that he stands on a pedestal entirely different from that of a man uninitiated into the intricacies of the worldly affairs or the functioning of various institutions including judicial institutions.

14. May be, many are born with prejudices, prejudices arising out of connection with one's own family, one's own community, social status and even of nationality. Such prejudices are, to a large extent, neutralised by the impact of other influences, the discipline of law does play a very vital role in drastically reducing, if not entirely extinguishing, such prejudices. A judicial officer of long experience, sheds his prejudices arising out of socio-environmental factors. A person of the petitioner's status and position would be alive to this refreshing feature of the judicial institutions of this country. It cannot therefore be expected that the petitioner would entertain a reasonable apprehension about the Magistrate for the only reason that the same Magistrate has to try other cases against him.

15. Situations are not uncommon where the same accused figure in a number of cases and before the same Court. Such situations do arise in the State in respect of specialised Courts such as the one to deal with counterfeiting cases for the whole of the State. And it is not uncommon that in many such cases, the same witnesses figure against the same accused. Court it be said that for the mere reason that the accused and the witnesses are common, a Court could try only one among the many, charged against the accused? Counsel for the petitioner did not pitch his arguments that high.

16. Having regard to the system which obtains in our country, the accused can legitimately seek relief against an erroneous judgment, having regard to the pyramidal judicial institutions. If a Magistrate enters a finding against an accused

who had already been tried and convicted by him in a previous case and on an earlier occasion, the conviction can certainly be" appealed against, if circumstances justify the same. That being so, the accused cannot stultify the trial of other cases pending against him and before the same Magistrate for the only reason that some of the witnesses are common and that the allegations constituting the offences have a broad similarity.

17. The decision in *Nem Chand Vs. The State*, on which counsel for the petitioner relied, cannot be treated as laying down an inflexible proposition. The view expressed has to be understood in the factual background where the affidavit filed in opposition to the application was, according to the Court, "completely useless". The Court noted that "once it is transferred it will be convenient for all the parties ". It was further found that the evidence and considerations of facts and law are going to be similar to or identical with the evidence and considerations of facts in a case already decided by the Magistrate. However, in the present matter, the facts constituting the offence in the remaining cases are different ; many of the witnesses on crucial aspects are also different. The facts pleaded and materials furnished by the petitioner do not establish such similarity either with the evidence, or with the consideration of fact and law. In the above background, the Allahabad decision cannot have any application to the present case.

18. The specific complaints contained in the petition may now be examined.

19. The reference to the evidence of P.W. 10 by the Magistrate as a "shining star" and about "the unruffled manner and the reserved and resigned attitude with which he gave evidence" as referred to by the learned Magistrate cannot be read in isolation. There is a general reference to his evidence in para 5. In the context of the appreciation of evidence of P.Ws. 6 and 7, the Court adverts to the evidence of P.W. 10. Para 15 also refers to his evidence while dealing with the circumstance relating to the questioning of P.Ws. 6 and 10. His name also figures in the discussion in para 16 where the plea of the accused is considered and in para 17 where the plea of the 2nd accused in particular is discussed. The evidence of P.W. 10 had necessarily to be considered in the light of the stand taken by the defence and the evidence admitted by the defence by examining D. W. 1 and producing the Ext.D4 (a note dt. 15-12-1983 of D.W. 1 intended to contradict the evidence of P.W. 10). Paras 18 and 19 of the judgment are devoted for a discussion of the related facts and evidence. Paragraphs 24 and 25 contain detailed discussion on P.W. 10 and D.W. 1, particularly in relation to Ext.P9 (nominal roll of Pre-Degree for 1975 April/May).

20. The learned Magistrate has referred to the evidence of D.W. 1 himself when D.W. 1 speaks about P.W. 10. that is contained at page 60 of the judgment and reads :

Now he says that P.W. 10 as he knows him is a man of truth and a man who could not be persuaded by the Police or whoever may be, to swerve from the

path of truth. He added that he is confident that P.W. 10 will speak only the truth. And in fact he said to the second accused this fact.

21. The evidence of P.W. 10 as regards the subject matter of the conversation he had with D.W. 1 has been extracted at page 62. It is thereafter that towards the conclusion of that para, the Court recapitulated in that context the evidence of D.W. 10 that P.W. 10 was a man of truth and would not have swerved from the path of truth. It is indisputable that P.W. 10 is having a Doctorate and a Priest. The manner in which he gave evidence is a matter of impression which the learned Magistrate was fully justified in having, as the witness was examined before him, only a few months before the judgment was pronounced.

22. It is also useful in this context to bear in mind that in para 25 at page 75, the evidence of P.W. 10 is fully discussed in the following terms :

Now we will come to the evidence of P.W. 10. P.W. 10 knows that great institution of the second accused at Ernakulam -- Medical Trust hospital -- which he happened to see on his way through that place. He had attested Exts. P14 and P18 as verified by his assistant. Further he has attested Exts. P21 and P23. After attesting all these documents he placed all of them on his table. The second accused came there to get these documents and these were handed over to the second accused. He will ascertain in cross-examination that he personally knows that these documents were received by the second accused from him. He is not personally acquainted with the second accused. Then it was brought out that P.W. 10 is unable to swear the names of other guardians, who also got such attested copies from P.W. 10. But P.W. 10 has his answer that in majority of cases the students themselves will come and the guardians come only very rarely. Then it was also the version of P.W. 10 in cross that when the second accused came to receive the documents there was no opportunity to talk between them. But in re-examination P.W. 10 had given his convincing reason to remember this fact. After attesting these documents he was about to proceed to his lunch in a hurry and it was at that time the second accused came there for getting this attested copies. I do not see any reason to disbelieve the version of this P.W. 10, who has no grudge or enmity towards the accused or any interest in the success of this prosecution case. I have already mentioned that he was a Father in the Ecclesiastical sense, and a Doctor and a Principal, and his credit and character is further proved by the defence witness, D.W. 1. P.W. 10 flatly denied the defence suggestion about the two versions in Ext. D4 which he has purported to have been made to D.W. 1, On the other hand, according to P.W. 10, the purpose of the visit of D.W. 1 was to persuade him to meet the Advocate of second accused, which he flatly denied. Even otherwise it is quite unlikely for P.W. 10 to speak anything about the nominal roll to D. W. 1, since the nominal roll is in the custody of P.W. 7 and maintained under him. Further the evidence of P. Ws. 7 and 10 read together will also reveal that the documents brought before P.W. 7 were verified by P.W. 7 and attested by P.W. 10 on that verification. If the second accused had taken those documents from P.W. 10, there is nothing

unusual in that conduct for the simple reason that a father who is conducting a high institution like the Medical Trust hospital may be over anxious to get his son also educated in medicine and for that purpose seeing all the concerned documents properly attested.

The reference to P.W. 10 as a "shining star", in the above circumstances, cannot reasonably generate an apprehension in the mind of the accused about any possible prejudice in the trial of the subsequent cases. I have refrained from making comment on P.W. 10, lest it should even remotely influence the appreciation of evidence of P.W. 10 in the appeal now pending consideration before the appellate Court.

23. The apprehension expressed as arising out of a reference to the petitioner himself is equally baseless. It is conceded by counsel for the petitioner that the learned Magistrate has not referred to the petitioner as "an unmitigated villain", as is alleged in para 12 of the petition. There was therefore no derogatory reference to the petitioner. The reference to the petitioner as an "influential person" and describing him as having the "prowess provided by money, fame and status", is justified in the light of the evidence adduced in the case, and cannot indicate a prejudiced mind in the Magistrate.

24. The appreciation of evidence of P.W. 1 cannot also justifiably create such a reasonable apprehension. Here again it is necessary to add that it is not within the province of this Court to re-appreciate his evidence, for that is within the exclusive province of the appellate Court. It is sufficient for the purpose of the petition, to hold that a reference to P.W. 1 in the judgment, cannot have the effect alleged by the petitioner.

25. The words "to prowl for a Pre-degree" employed with reference to the petitioner were also complained. The word "prowl" can mean traversing of places in search of prey. A reference to an attempt "to prowl for a Pre-degree certificate", in that context cannot create any reasonable apprehension for the petitioner.

26. It must also be remembered in this context that the general observations extracted in para 13 of the petition, which among others, contains about the "Kama-Moha streak" in the accused and the effect imprisonment had on Oscar Wilde -- (which may remind one of the sentences "the cage doth some birds good" occurring in "A Pest in Prison" in Edmund Gosse's book "Gossip in a Library") - occur in the portion of the judgment dealing with sentencing. These observations thus occur only after a finding of conviction had been entered. A discussion on sentencing policy could justifiably stimulate a judicial mind to thoughts on theories of crime and facets of penology. One such case in which judicial thinking was expressed on sentencing policy in recent times in R v. Thomas (1983) 3 All ER 756. Text books and other contemporaneous publications including the classic work of Glenville on Crimes, have discussed this problem from the historical and sociological perspectives. Some interesting thoughts on

that aspect are contained in 80 CWN (Journal portion) and also in 85 CWN 65. That circumstance is therefore, no ground for postulating a reasonable apprehension in the mind of the accused about there being any prejudice on the part of the Magistrate in the trial of the other cases.

27. Counsel for the petitioner submitted with some stress that the philosophical content and the strong literary flavour in the passage referred to above would also tend to create an apprehension in the mind of the petitioner. I am unable to uphold such a contention. Way back in 1919, the English Law Journal adverted to the fact that "literary allusions are not wholly unwelcome in legal proceedings." (See 23 CWN 141-2). The learned Magistrate has referred to "Kama-Moha ; but then Krishna Iyer, J. referred to "Karuna" of the law in the judgment in State of Kerala Vs. Kumari T.P. Roshana and Another, a case relating to admission to medical colleges, Poti J. extracted a Sanskrit sloka :

| Vernacular omitted. - Ed. |

(not the fire's furious heat nor the Hammer's heavy beat Does cause me the pain. But that equalisation with Gunja's grain.)

in the judgment in D. P. No. 2914 of 1976 while deciding a case of a pharmacist when complaint was made about an unjustified equation of posts. Khalid J. quoted from Ramayana" in Kunhikannan v. Kaliiani 1972 Ker LT 619.

29. Sir Edward Coke's judgment in Magdalene College case 1558 All ER 236 at 245 is one of the earliest judgments, where one could find a Latin post quoted :

Fuit haec sapientia quondam, Publica privatis secernens, sacra profanis.

Darling J. quoted Butler's lines in *Wise v. Dunning*. (1902) 1 K.B. 167 at p. 178. Tennyson was quoted in *Verrall v. Gt. Yarmouth Borough Council* (1980) 1 All ER 839 at Pp. 844-45. Lord Hailsham quoted from "Compleat Angler" in *National Carriers Ltd. v. Panalpina (Northern) Ltd.* (1981) 1 All ER 161. Moliere was referred to in *Swain v. Law Society* (1981) 3 All ER 797 and Milton in *Home Office v. Harman* (1982) 1 All ER 532 at P. 543. Denaldson M.R. extracted from the Churchill's speech in *R v. Boundary Commission* (1983) 1 All ER 1099 at P. 1102. Denning M.R. quoted from Lewis Carroll ("Through the Looking Glass") in *George Mitchell v. Finney Lock Seeds* (1983) 1 All ER 108 at p. 111. The judgment in *Rank Film v. Video Centre*. (1980) 2 All ER 273 (again by Lord Denning) started with the lines.

It is, it is a glorious thing, to be a Pirate King.

(The case dealt with was a Video Piracy case). Very recently Bhaskaran Nambiar J., in *K. Mohammad Ahmed Vs. State of Kerala and Others*, , (Citizenship Act case), quoted the lines :

Breathes there the man with soul so dead who never to himself hath said, This is my own, my native land :

Even in the east, poetry has appeared in judgments, as for example in the case concerning customs, *Forbes v. Traders Finance Corpn. Ltd.* (1971) 45 A.L.J.R. 668 at p. 674, where the lines of the English poet, Crabbe, were extracted :

Beneath yon cliff they stand, To show the freighted pinnace where to land ;

To load the ready steed with guilty haste; To fly in terror o'er the pathless waste;

To some Judges like Lord Chief Justice Coleridge :

Literature was a means of intellectual recreation....

29. The style reflected in a judgment will necessarily have the impress of the judicial personality. In some cases the style may be elegant ; and in some, ostentatious ; and in yet others "familiar but not coarse". The style of the judgment, however, cannot be imagined as constituting the foundation for a reasonable apprehension in the mind of the accused.

30. After anxiously considering the contentions of the petitioner, and carefully going through the 111 page judgment of the learned Magistrate, for the limited purpose of considering these contentions, I am satisfied that the petitioner cannot have any reasonable grievance in the matter. In that view, the petition is dismissed.