

(2010) 04 J&K CK 0013
In the Jammu And Kashmir High Court
Case No : Criminal T.A. No. 04 of 2010

Krishan Lal Jandial

APPELLANT

Vs

State of Jammu & Kashmir and Others

RESPONDENT

Date of Decision : 30-04-2010

Acts Referred:

Ranbir Penal Code, 1989 — Section 302, 34, 452

Citation : (2011) 3 Crimes 582 : (2010) 3 JKJ 68

Hon'ble Judges : Gh. Hasnain Massodi, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Gh. Hasnain Massodi, Judge

1. The petitioner is father of late Sanjay Jandial alleged to have been brutally murdered on 2.5.2009 at Chabotra Bazar, Udhampur in the broad

day light, by Shri Ankush Pandoh alias Munna and other three alleged arrayed as Respondents 2 to 5 to the present petition.

2. The occurrence led to registration of FIR No. 101 of 2009 at Police Station, Udhampur. The investigation was concluded as proved against the

respondents 2 to 5 and accordingly charge sheet alleging commission of offences punishable under sections 302,34,452,212,109 and 120-B RPC

read with sections 3/25 and 4/25 of the Arms Act was presented before the Court at Udhampur and later committed to Sessions Court,

Udhampur for trial. The respondents 2 to 5 / accused have been formally charged of the offences alleged in the charge sheet and a few witnesses

have been examined.

3. The petitioner seeks withdrawal of case titled 'State v. Ankush Pandoh and

Ors.' under sections 302,34,452,212s, 109 and 120B RPC read with sections 3/25 and 4/25 of the Arms Act from the files of Sessions Court Udhampur and its transfer to any other court of competent jurisdiction. The grounds for transfer of aforementioned case are that out of (sic) prosecution witnesses, five witnesses examined so far, have not supported the prosecution version despite the fact that all the witnesses were actually acquainted with the facts of the case. The prosecution witnesses examined so far with the exception of one witness, are said to have resiled from their earlier statement u/s 164-A and 161 of Code of Criminal Procedure at the time of investigation. Two of the prosecution witnesses, namely Sunil Khajuria and Raj Mathur are said to have resiled from their statements recorded on examination-in-chief, during their cross-examination and also from their statements recorded u/s 164-A, without prompting the Public Prosecutor to make an effort to subject the witnesses to cross-examination. The petitioner is aggrieved, that even the learned trial judge does not control the proceedings and ensure that true facts are brought on the file. It is pleaded that after one of the prosecution witness namely Surjeet Singh turned 'hostile' to the prosecution in the trial court, Shri Kewal Jandial, son of the petitioner and brother of the deceased contacted the witness on his cell phone No.8803203035 so as to know the circumstances in which witness had felt constrained to resile from his earlier statement; that Prosecution witness Surjeet Singh informed the said Kewal Jandial that he was threatened of dire consequences and threat was also extended to the lives of his children. The petitioner claims his son recorded the conversation and has placed on the file the Compact Disc (DC) wherein the conversation between the Prosecution witness Surjeet Singh and Kewal Jandial is recorded. The petitioner claims to have also made an application before the trial court voicing his reservation with regard to the fairness of the trial.

4. The Respondent-State has opted to stay neutral and not taken any stand on either side. Mr. A. H. Qazi, learned AAG has made a prayer that the matter may be disposed of on its own merits.

5. The Respondents 2 to 5, accused before the trial court though not initially arrayed as respondents to the present Criminal Transfer Application, were on 29-3-2010 impleaded as respondents 2 to 5 at their request as party

respondents.

6. The respondents 2 to 5 resist the application on the grounds that the Special Public Prosecutor was appointed by respondent no.1 at the request

of the petitioner and the petitioner after having got appointed a Special Public Prosecutor of his choice cannot be permitted to question his bona-

fides or competence, to prosecute the case. The present petition is said to be aimed at delaying the case before the trial court and prolonging

agony of the respondent/accused 2 to 5, who are behind the bars for last few months, The respondents have denied to have extended any threat to

the prosecution witness, Surjeet Singh or to have any role as regards deposition made by other prosecution witnesses. The respondents 2 to 5

have denied that any ground was available to the petitioner to ask for transfer of the case titled State v. Ankush Pandoh and ors. from the court of

Sessions Judge to any other court at Jammu or else in the province.

Heard and considered.

7. It is argued by the learned counsel for respondents 2 to 5 that the petition is not maintainable in as much as petitioner has no independent or

absolute right to either prosecute the criminal case (sessions trial) before the sessions court or to make any petition pertaining to trial of the case. It

is stated that in terms of section 266 of code of criminal procedure and the settled legal position, the public prosecutor has exclusive power and

authority to conduct the trial before the court of Sessions and the complainant or a lawyer appointed by the complainant can at the most assist the

public prosecutor. It is submitted that the present transfer application having not been preferred by the Public Prosecutor or the learned Advocate

General Public Prosecutor under the code, in criminal matters emanating from the criminal trial, the petition is liable to be held not maintainable and

dismissed on that ground alone.

8. The threshold arguments advanced by the learned counsel for the respondents 2 to 5 can not be accepted for the simple reason that the

complainant or for that matter any person interested in fairness and transparency of the criminal trial has right to invoke jurisdiction of this court u/s

526 of the criminal procedure code and seek transfer of criminal trial from the trial court to any other court of competent jurisdiction. Section 526

begins with the expression ""whenever it is made to appear to the High Court,

making intention, of the law makers clear that information conceived by Section 526(1) Clauses (a) to (e) may come to the High Court from any source the Trial Court or the person interested in impartiality and transparency of the trial. Sub-section (3), Section 526 Cr.P.C makes, scope of Section 526 Cr.P.C further free from any ambiguity by laying down that the High Court may act either on the report of the lower Court or on the application of party interested, or on its own initiative. Section 526 is not controlled by Section 266 of the Code. So viewed, not only the Public Prosecutor but the person at whose instance the police machinery was set into motion, may ask for transfer of criminal case from the trial Court to any other competent Court. In Himanshu Singh Sabharwal Vs. State of M.P. and Others, a criminal transfer application filed by son of the deceased seeking transfer of a criminal trial u/s 302 I.P.C. relating to alleged murder of his father was not only entertained by Supreme Court but allowed and the case pending in the court of Sessions Judge, Ujjain M.P. transferred to the Court of Sessions Judge Nagpur, Maharashtra.

9. The role envisioned by the Criminal Procedure Code as also the Evidence Act that regulates production, relevancy and admissibility of evidence before the Trial Court, for a trial Judge is neither that of neutral umpire nor a silent spectator. The Trial Judge is not to detach himself from the proceedings, allow himself to be pushed to sidelines and watch the battle between the prosecution and the defence during the trial from the fence as a mere spectator. It is the duty of the trial Judge not only to see that the parties before it adhere to the rule book but also to ensure that the course of justice is not polluted by unscrupulous witnesses and either of the parties resorting to arm twisting and manipulative tactics. The trial Judge has to understand that he has to decide the matter, do justice to the justice seekers on the basis of evidence that is brought on the file during the course of the trial. It is at this stage when evidence is recorded, that the trial Judge is to be vigilant and play pro-active role to ensure that what is brought on the file, is truth and nothing else. The trial Judge has to take all possible steps to ensure that the evidence is not falsified, truth is not kept back and neither of the parties is able to influence, intimidate or coerce the witnesses. A strong prosecution case may fail and justice elude the justice seekers and shocking and gruesome crimes go unpunished, if the trial

Court abdicates its role and allows muscle power and money power to play its part in falsifying the evidence. It is not, for no purpose that Sections 154, 155 and Section 165 of the Evidence Act have been brought on the statute book almost a century back. Section 154 empowers the Court to permit a person to 'put any question to the witness, summoned at his instance as may be put to the witness in cross examination by the adverse party. The powers given u/s 154 to the trial Court are not ordinary powers. The power is unbridled so as to prompt the Court to be unhesitant in granting permission to a party to cross examine his own witness, where such cross examination is necessary to elicit and extract truth from the witness. It needs no emphasis that a party cannot put a leading question to his witness but in terms of section 154 any such question (s) can be allowed to be put. The party in terms of section 155 may with the consent of the Court even take steps to impeach a witness called by such party. Section 165 of the Evidence Act arms the trial Judge with yet another wide and unbridled power. The trial Judge is empowered to ask any question, he may please, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant. It further provides that neither the parties nor their agents shall be entitled to make any objection to any such question or entitled to cross examine any witness upon any answer given in reply to any such question, except with the leave of the Court. Section 165 is again couched in wide terms so that the trial Judge is in a position to discourage, resist and defeat all efforts to manipulate the evidence or withhold the truth.

10. Section 342 of the Cr PC empowers the Court to put such question as the Court considers necessary at any stage of enquiry or trial or as the Court may consider necessary without previously warning the accused. Section 540 Cr PC clothes the trial Court with power to summon any person as witness or examine any person in attendance, though not summoned as a witness, or recall or re-examine any person already examined. It proceeds to cast a duty on the trial Court to summon and examine or recall or re-examine any person, if his evidence appears to it essential to the just decision of the case.

11. From the above scheme of things, it is convincingly established that the law envisions a participatory and pro active role for the trial Judge.

12. The role to be played by the Public Prosecutor is of equal importance for just decision of a criminal case. The Public Prosecutor is creation of

the statute and is under a statutory duty to conduct the prosecution before the Court of Sessions. The Public Prosecutor having regard to the duty

with which he is saddled, can ill-afford to be complacent about the mode and manner in which the trial proceeds. The Public Prosecutor is not to

prosecute the matter in a lifeless and lackadaisical manner but has to take all steps to ensure that the evidence is not manipulated and the witnesses

are not influenced and encouraged or compelled to withhold truth.

13. The Supreme Court in *Himanshu Singh Sabharwal v. State of Madhya Pradesh* reported as AIR 2008 Supreme Court, 1943 while

commenting upon the role of the Trial Judge has observed :-

8...(In) a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crimes being public wrongs in breach

and violation of public rights and duties, which affect the whole community as a community and harmful to the society in general. The concept of

fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and

prosecuting agencies. Interests of society is not to be treated completely with disdain and as persona non grata. Courts have always been

considered to have an over-riding duty to maintain public confidence in the administration of justice-often referred to as the duty to vindicate and

uphold the 'majesty of the law'. Due administration of justice has always been viewed as a continuous process, not confined to determination of the

particular case, protecting its ability to function as a Court of law in the future as in the case before it. If a criminal Court is to be an effective

instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the

trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and

administer justice with fairness and impartiality both to the parties and to the community it serves. Courts administering criminal justice can not turn

a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of

undermining the fair name and standing of the judges as impartial and

independent adjudicators.

9. The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the Courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. Whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly deal with. That would be turning Nelson's eyes to the needs of the society at large and the victims or their family members and relatives. Each one has an inbuilt right to be deal with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.

The Supreme Court further observed:

16. The Courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by a playing an active role in the evidence collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even, if the prosecutor is remiss in some ways, it can control the proceedings effectively so that ultimate objective i.e. truth is arrived at. This becomes more necessary where the Court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The Court cannot afford to be wishfully or pretend to be

blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act

fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and Courts could not also play into the hands of such

prosecuting agency showing indifference or adopting an attitude of total aloofness.

14. In the present case, both the learned trial Judge and the Public Prosecutor appear not to be effectively playing the role that is mapped out and

delineated in the legal frame work governing the trial before the Sessions Court and make use of legal tools available to meet situation that

confronts the trial court. Though the Investigating Officer appears to have taken pains to get the statements of all the witnesses recorded u/s 164-A

of the Code, yet the Public Prosecutor has not made effective use of previous statements recorded under Sections 161 and 164-A Cr. PC and

confronted the prosecution witness in a comprehensive manner with their earlier statements recorded before the Investigating Officer and the

Magistrate. An efficient use of the legal options available has not been made and permission of the Court u/s 154, to put such questions to the

witnesses who had resiled from their earlier statements before the Magistrate or the Investigating Officer under Sections 161 or 164-A of the

Code, that could be put by the defence in the cross-examination, has not been sought. The effort of the Public Prosecutor obviously, in such

circumstances must be to bring on record the facts and events that lead to the conclusion that the earlier statement before the Magistrate was free

from any element of coercion or undue influence.

15. The next ground urged in the petition as regards the prosecution witnesses being intimidated and threatened and tried to be either kept away

from the witness box or to withhold the truth, also appears to have some substance leading to reasonable apprehension in the mind of the petitioner

-- father of the deceased that fair trial may not be possible in the present circumstance. The petitioner has run placed on the file a compact Disc

CD having recorded conversation between the brother of the deceased and one of the prosecution witnesses namely PW Surinder Singh, whose

testimony was recorded on 19-2-2010 and who turned hostile. In the recorded conversation, PW Surjit Singh tacitly admitted that he was

threatened and the person who threatened him had come to his place of residence in Vehicle No. 8407. The petitioner while placing compact disc

on the file has run the risk of being hauled up for misleading the Court, in the event the contents of said CD are found to be fabricated and reliance

can be placed for the limited purpose of deciding petition.

16. In view of the grounds urged in the petition and for the reasons discussed, the petitioner has made out a case for indulgence u/s 526 Cr. PC

and transfer of the Criminal case titled ""State v. Ankush Pandoh and ors."" from the Sessions Court, Udhampur to any other Court of Competent

jurisdiction. The transfer of the case shall not cause any hardship to respondents 2 to 5, who are in custody and can be lodged at Central Jail,

Jammu. Furthermore, respondents 2 to 5 have engaged Senior Advocate from Jammu who has to visit Udhampur on each and every date of trial

and transfer of the case from Sessions Court, Udhampur to any other Court of Competent Jurisdiction at Jammu shall not create any problem for

respondents 2 to 5 in organising their defence as also to the Lawyer defending the case of the respondents. The transfer of the case may, on the

other hand, enhance accessibility of the respondents 2 to 5 to their counsel and also make it easier for the counsel to render legal assistance to the

respondents 2 to 5.

17. So viewed, the petition is allowed and the case titled ""State v. Ankush Pandoh and ors."" is withdrawn from the files of Sessions Judge,

Udhampur and transferred to the Principal Sessions Judge Court, Jammu. The Principal District and Sessions Judge, Jammu may try the case

himself or assign it for trial to any other competent court (Addl. Sessions Court) at Jammu. The Special Public Prosecutor, Udhampur and the

transferee Court be informed accordingly. Respondents 2 to 5 shall be produced before the Court of Ld. Sessions Judge, Jammu on 10.05.2010

on which date the case shall come up for trial. The Trial Court to send the record alongwith the case property to the transfer court in accordance

with the rules. The observations made while disposing of this petition shall not be taken note of by the trial court at any stage of the trial.