

(2011) 11 RAJ CK 0059

In the Rajasthan High Court

Case No : Criminal Transfer Petition No. 31 of 2011

Madan Lal and Ors

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 23-11-2011

Acts Referred:

Arms Act, 1959 — Section 25, 27, 3, 5
Constitution of India, 1950 — Article 21
Criminal Procedure Code, 1973 (CrPC) — Section 273, 406, 407
Evidence Act, 1872 — Section 141, 142
Penal Code, 1860 (IPC) — Section 120B, 302, 323, 34, 341

Citation : (2012) 2 RLW 1130

Hon'ble Judges : R.S. Chauhan, J

Bench : Single Bench

Final Decision : Allowed

Judgement

R.S. Chauhan

1. Pitted against the might of a sitting MLA, having allegedly murdered his son, but still hoping for a fair trial, the petitioners have moved his court for transfer of their case from the court of Additional District and Sessions Judge, Kishangarh to any other court in District Ajmer. For this purpose the petitioners have challenged the order dated 17-09-2011 passed by the Sessions Judge, Ajmer whereby the learned Judge had dismissed their transfer petition.

2. Briefly the facts of the case are that the petitioner Nos. 1 to 5 and respondent Nos. 2 to 4 had allegedly killed Bhawar Singh, son of the sitting MLA from Kishangarh, Nathuram. For the alleged crime, they are facing a trial for offences under sections 364, 302, 120-B IPC and under sections 3/25, 5/25, and 27 of the Arms Act before the Additional District and Sessions Judge, Kishangarh.

3. The said case has generated much heat and dust in the area. According to the petitioners, when they attend the trial, they find a mob of 100-200 people waiting for them. The atmosphere is so surcharged that the petitioners and the

respondent Nos. 2 to 4 found it extremely difficult to hire the services of advocates from Kishangarh for defending themselves. Therefore, they had no other option but to hire the services of lawyers from Ajmer. Moreover, on 23-6-2011, the members of the complainant party had allegedly attacked the brother of accused Kailash Thakan, namely Mukesh Thakan. Regarding this incident, a FIR was registered at Police Station Rupangarh, district Ajmer, for offences under sections 323, 341, 379/34 IPC. Since the petitioners felt insecure, since they found it difficult to hire the services of good lawyers, since they feared that they may not be able to get a fair trial at Kishangarh, they moved an application before the Sessions Judge, Ajmer for transferring their case from Kishangarh to any court in District Ajmer. Although the learned Judge dismissed the said application vide order dated 7-7-2011, he did direct the police to ensure the petitioners' safety.

4. Subsequently, the charges were framed against the petitioners and against respondent Nos. 2 to 4 by the learned trial court. Since the accused persons had hired the services of lawyers from Ajmer, it was agreed between the prosecution and the defense, with the consent of the learned trial court, that the testimonies would be recorded after 12 o'clock in the afternoon. However, on 26-8-2011, when the first prosecution witness, namely Bhag Chand Jat was produced, according to the petitioners the testimony was recorded behind their backs at 12:10 AM. When their counsel reached the court at 12:40 PM, they realized, to their shock and dismay that the examination-in-chief was over. Moreover, the Special Public Prosecutor had asked leading questions from the witness. Therefore, different counsel for different accused persons moved three different applications for transfer of the case from the trial court to any other court. Since the testimony of Bhag Chand Jat (P. W. 1) had been recorded despite the protest of the accused persons, since leading questions were permitted to be asked, the petitioners pleaded that they had no confidence that the trial would be a fair one. Interestingly, the learned trial court also recommended that the case be transferred out of its court to any other court. Meanwhile, the witnesses, who had come to attend the trial, also moved applications for their own protection as they claimed that they were being threatened by the accused persons and their henchmen. Subsequently, the petitioners also moved an application for transferring their case before the learned Sessions Judge. However, vide order dated 17-9-2011, the learned judge dismissed the application. Hence, this transfer petition before this court.

5. Mr. Biri Singh, Senior counsel for the petitioners has raised the following contentions before this court: firstly, the case involves the murder of a son of the sitting MLA from Kishangarh. Therefore, the complainant is using his political muscles and money power to ensure that the petitioners are convicted by any means.

6. Secondly, the learned trial court is playing a partisan role in the trial. The partiality of the learned trial court is obvious from the following facts: vide order

dated 6-8-2011, the learned trial court had itself given an opportunity to some of the accused persons, namely Shahzad, Sikandar, and Mohd. Ameen to hire the services of counsel of their own choice as they were not willing to be represented by counsel appointed by the Legal Aid. However, on the next date, i.e. on 26-8-2011, without first confirming whether these three accused persons had, indeed, appointed their respective counsel or not, the learned trial court proceeded to record the testimony of Bhag Chand Jat (P. W. 1). Moreover, since the counsel for the other accused persons had not reached the court, when the testimony commenced, the accused persons protested before the court and requested the court to wait for their counsel before commencing the recording of the evidence. However, the learned trial court did not pay any heed to their request. Furthermore, although later on Mr. Dharmendra Chauhan, Advocate had filed his power on behalf of the accused Shahzad and Mohd. Ameen, no one had appeared that day as a counsel for Sikandar. Thus, he went unrepresented. Yet, the testimony was recorded. Further, although it was agreed between the parties and with the consent of the court, that the testimonies were going to be recorded after 12 o'clock in the afternoon, the court did not wait for the counsel for the accused persons. It proceeded to record the testimony in the absence of the counsel that, too, in violation of section 273 Cr. P. C. To add insult to injury, the learned trial court permitted the Special Public Prosecutor to ask leading questions from the prosecution witness—a thing unheard of, and, in fact, prohibited by section 142 of the Evidence Act. Hence, the learned trial court conducted the trial in violation of the law prescribed by the Code and by the Evidence Act. This has been done by the court in order to favour the Complainant, the sitting MLA. Hence, the petitioners have a reasonable apprehension that they will not be given a fair trial at Kishangarh.

7. While attacking the impugned order dated 17-9- 2011, the learned Senior Counsel has pleaded that the order is a non-speaking one. Thus, it suffers from the virus of non-application of mind. According to the learned Senior Counsel, although the petitioners had raised the contentions mentioned above, yet the learned Judge has failed to give a judicial finding with regard to the said contentions. Instead, the learned Judge has sermonized as to how the prosecution and the defense and the court are expected to respect each other. Thus, the order does not address itself to the contentions raised by the petitioners. Lastly, justice should not only be done with the petitioners, but should also appear to be done. If justice were not done, then it would undermine the faith of the people in the criminal delivery system. Hence, the impugned order deserves to be interfered with.

8. On the other hand, Mr. N. C. Chaudhary, the learned Special Public Prosecutor, has raised the following counter-contentions before this court: firstly, the petitioners are desperately trying to delay the trial. Their application for transfer of the case is merely a ploy to delay the trial. In order to buttress this plea the learned counsel has drawn the attention of this court to the order-sheets dated 5-8-2011 and 6-8-2011. According to him, from the beginning of the trial Mr. D.

D. Verma, Advocate was representing all the accused persons. But with a view to delay the trial, on 5-8-2011, Shahzad, and Sikandar claimed that they did not have a lawyer to represent them. Therefore, on 5-8-2011, the trial had to be adjourned. On 6-8-2011, although four witnesses were present, even then the trial was adjourned on the ground that three accused persons had yet to appoint their counsel. Since the trial was being delayed unnecessarily, therefore, the learned trial court was justified in recording the testimony of Bhag Chand Jat (P. W. 1) on 26-8-2011.

9. Secondly, the petitioners are trying to delay the trial with a view to have sufficient time to pressurize the witnesses to change their stand. In fact, the witnesses have already filed applications for seeking protection from the accused petitioners. In order to buttress this contention, the learned Special Public Prosecutor has submitted copies of the application moved by the witnesses seeking police protection before this Court.

10. Thirdly, in the application filed by the petitioners before the learned Judge, they did not plead that they had a reasonable apprehension that they would be deprived of a fair trial. Hence, the said plea cannot be raised by them before this court.

11. Fourthly, the Special Public Prosecutor did not ask a single leading question to the witness. Therefore, the stand taken by the petitioners is highly misplaced.

12. Fifthly, no understanding had been reached between the parties, with the consent of the court, that the testimonies would be recorded after 12 o'clock in the afternoon. Thus, the stand taken by the petitioner is unsustainable.

13. Sixthly, the accused persons cannot choose the place of the trial. It is the choice of the complainant and of the prosecution. In order to buttress this contention, the learned Special Public Prosecutor has relied upon the case of Maneka Sanjay Gandhi and Another Vs. Rani Jethmalani,

14. In rejoinder, Mr. Biri Singh has vehemently denied that the petitioners are trying to delay the trial. Referring to the order-sheet dated 5-8-2011, the learned Senior counsel has pleaded that in fact, the case was adjourned as one of the accused persons, namely Mohd. Ameen was not produced in the court by the jail authorities. Therefore, the court had ordered that "it should be clearly written in the J.C. warrant that the prisoner has not been produced in the court". Further, the court had ordered that "the Superintendent, Central Jail Ajmer should be informed that due to non-production of the prisoner, the trial could not proceed".

15. Secondly, on 6-8-2011, three of the accused persons had yet to appoint their lawyers. Since it is the right of an accused to be represented by a counsel of his choice, the learned trial court was justified in granting them time to appoint their lawyers. Moreover, according to him, the petitioners have no objection if the trial were directed to be continued on day to day basis.

16. Thirdly, the learned Special Public Prosecutor is unjustified in claiming that

the petitioners did not plead before the learned judge that they do not have hopes of getting a fair trial from the learned trial court. In fact, such a plea was, indeed, raised before the learned Judge. The learned Senior counsel has drawn the attention of this court to the transfer application (Annexure 1) filed by the petitioners before the learned Judge. Since the plea was raised before the learned Judge, it could be raised before this court.

17. Fourthly, the reply filed by the Special Public Prosecutor itself admits that an understanding was reached between the parties, with the consent of the learned trial court, that the testimonies would be recorded after 12 o'clock. However, on 26-8-2011, the trial court proceeded to record the testimony in spite of the requests of the accused persons and despite their protests. Such an act on the part of the learned trial court reveals its partiality towards the complainant.

18. Heard the learned counsel for the parties, examined the impugned order, and perused the case law cited at the Bar.

19. Descended from the principles of Natural Justice, safeguarded by Article 21 of the Constitution of India, the right to a fair trial is a fundamental right under the Constitution of India. As the archangel of the people's fundamental and civil rights, the judiciary is legally bound to protect and promote the right to a fair trial. Fair trial is not only for the accused, but it is also for the victim. Hence, the court has to balance the right to a fair trial of both the accused and of the complainant, or of the prosecution which represents the State. After all, the people have to have faith in the criminal delivery system. The hallmark of the criminal judicial system is that justice should not only be done, but must also appear to be done. If a trial does not appear to have done justice either to the accused, or to the victim, the people would lose faith in the judicial process. Lord Denning, M.R. had opined in the case of *Metropolitan Properties Co. Ltd v Lannon* (1968) 3 All ER 304 (CA) that, "Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: 'The Judge was biased.'" It is trite to state that judiciary runs on the wheels of faith of the people. Without their faith, the judiciary would collapse like a house of cards. With no faith in the laws, or in the legal system, the people would turn to rule of the jungle to settle their scores. Such anarchy would destroy both the Rule of Law and democracy. Our nation can ill afford such a scenario.

In the case of *Sri Jayendra Saraswathy Swamigal (II), Jayendra Saraswathy Swamigal, Tamil Nadu Vs. State of Tamil Nadu and Others*, the Apex Court opined that "If there is a reasonable apprehension on the part of a party to a case that justice may not be done, he may seek transfer of the case. The apprehension entertained by the party must be a reasonable one and the case cannot be transferred on a mere allegation that there is apprehension that justice will not be done." Thus, the issue before this court is whether the petitioners are justified in claiming that they have a reasonable apprehension that justice may not be done with them?

There are certain admitted facts in this case. Firstly, the petitioners and respondent Nos. 2 to 4 are facing a trial for the alleged murder of the son of the sitting MLA of Kishangarh. Secondly, due to the surcharged atmosphere the petitioners could not find a single lawyer in Kishangarh to defend themselves. In fact, the petitioners had to hire the services of lawyers from Ajmer to fight their battle. Thirdly, the petitioners fear for their lives as the people are hostile towards them. Fourthly, the brother of one of the accused persons was allegedly assaulted by people belonging to the complainant party; a FIR was filed with regard to the said incident, as mentioned above. Fifthly, even earlier the petitioners had sought transfer of their case from Kishangarh on the ground of adverse atmosphere and on the ground of their safety. Although the learned Judge had dismissed their application, but he did direct that police protection be given to the petitioners. Thus, even the learned Judge had appreciated the fact that the petitioners' lives may be in danger. Sixthly, even the witnesses have sought police protection by filing applications before the learned trial court. Seventhly, even the learned trial court had recommended that the case be transferred to any other court.

These facts make it abundantly clear that the present case is not an ordinary case of murder. Considering the above facts, the learned trial court should have been more cautious in its approach. When politically powerful persons are involved, when there is a possibility of muscle power being used, when there is some chance of money power being used, the courts ought to be on their guard. Nothing should be done by the Judicial Officer which would create an impression that the court is partial towards a particular party in the case. For, the fundamental law of a trial is that justice should not only be done, but must appear to be done. To do an act which undermines the faith of the people in the judicial system is to harm the Rule of Law.

Recording of evidence is not a ritual; it is a solemn duty to be performed by the learned trial court. The entire edifice of the case depends on the recording of the evidence. Considering the importance of the recording of evidence both the Criminal Procedure Code and the Evidence Act deal with this aspect of the trial.

Section 273 Cr. P. C. is as under:

Evidence to be taken in presence of accused-Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader.

Explanation-In this section, "accused" "includes a person in relation to whom a proceeding under Chapter VIII has been commenced under this Code.

20. Of course it is true the said provision does allow the trial court to record the evidence if the accused is present, or to record the evidence in front of his counsel in case the accused were absent. However, considering the fact that the accused may be an illiterate person, or a person not well versed with the

intricacies of the law, ordinarily the evidence should be recorded by the trial court in the presence of the counsel of the accused. For, if the examination-in-chief were done against the tenor of the law, the defense counsel would be in a position to raise an objection, whereas the accused may not be in a position to do so. Moreover, if the evidence were recorded in the presence of the defense counsel, the accused has the feeling that justice has been done to him. No matter what the verdict of the trial is, the accused has faith in the criminal delivery system. Most importantly, by recording the evidence in the presence of the defense counsel, the people's faith in the judicial system is strengthened. Thus, in order to safeguard the interest of the accused, in order to ensure fair trial, in order to keep the faith of the people, it is imperative that the evidence be recorded in front of the counsel for the accused.

21. However, in the present case, this fundamental principle was given a go bye. It is immaterial whether there was an understanding between the parties that the evidence would be recorded in the afternoon or not. What is material is that the evidence should have been recorded in the presence of the defense counsel. Interestingly, on 6-8-2011, the learned trial court had given an opportunity to three accused persons to appoint counsel on their behalf. Although on 26-8-2011, Mr. Dharmendra Chauhan had filed his power on behalf of Shahzad and Mohd. Ameen, but there is no evidence available on record to show that Sikandar had appointed his lawyer by that date. Before recording the testimony of Bhag Chand Jat (P. W. 1), the learned trial court was duty bound to ensure that all the accused persons were, indeed, represented by their respective lawyers. But the learned trial court failed to do so. Thus, it violated a fundamental right of the accused Sikandar (petitioner No. 3 before this court).

22. Moreover, since the counsel from Ajmer were conducting the trial on behalf of the other accused persons, the learned trial court should have waited for them to appear before it. This is specially so, once the accused persons had requested the court to do so. To ignore their pleas, is to unnecessarily create the impression that the court is being partial in favour of the prosecution or the complainant. Such an attitude of the court again undermines the faith of the people in the judicial process.

23. Section 141 of the Evidence Act defines "Leading questions" as meaning "Any question suggesting the answer which the person putting it wishes or expects to receive, is called a leading question."

Section 142 of the Evidence Act is as follows:

When they must not be asked—Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.

The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

24. In the present case, the learned Senior counsel has contended that leading questions were asked and that too behind the back of the defense counsel. This assertion has been denied by the Special Public Prosecutor. However, a bare perusal of the testimony of Bhag Chand Jat (P. W. 1) clearly reveals that he was asked the following questions:

Question: Were you involved in any identification parade?

Answer: Yes, I was. In the Ajmer jail I had recognized Shahzad and Sikandar. After that I had come back home.

Question: Was it recorded that you had identified the accused persons?

Answer: Yes, it was reduced into writing. I was asked to sign it.

Question: Was the identification parade proceeding reduced into writing?

Answer: Yes, it was reduced into writing. It is Ex. P. 4 in which A to B are my signature. Ex.P. 5 (is another identification parade memo) on which A to B are my signature. The persons, who were sitting in the car, at the time of the incident, are present in the court.

(English translation of the testimony in Hindi)

25. These questions do qualify as leading questions. The Special Public Prosecutor should not have been permitted to ask these questions in examination-in-chief. Asking of such leading question is not only against the tenor of Section 142 of the Evidence Act, but also violates the right to a fair trial when such questions are permitted to be asked in the absence of the defense counsel. Had the counsel been there, they would have had the opportunity to object to such leading question. But the learned trial court did not wait for their appearance. Instead it carried out the recording of the evidence in the absence of the defense counsel. Naturally, the course adopted by the learned trial court was in violation of the law. When the court violates the law, the petitioners have a reasonable cause for their apprehension that justice is not being done to them. Hence, their apprehension that they would be denied a fair trial is well justified.

26. The impugned order dated 17-9-2011 is rather curious, to say the least. A bare perusal of the order clearly reveals that the petitioners had raised two pleas before the learned Judge: firstly, that the evidence was recorded behind the backs of the defense counsel. Moreover, leading questions were permitted to be asked by the learned trial court. Secondly, for these two reasons, the petitioners do not have a faith in the impartiality of the learned trial court. They are likely to be denied the right of fair trial. Despite these contentions being raised, the learned Judge has circumvented the entire issue before the court. Instead, the learned Judge has given a sermon on the duties of the parties, on the relationship between the litigant and the court. It has expressed its diamond hope that the parties would have faith in the impartiality of the court and would conduct themselves with dignity and good faith. To say the least, if the legal

contentions are ignored, if the legal issues are unsolved, the order would tantamount to a non-speaking order. The learned Judge is not expected to preach, but to express his judicial opinion about the legal issues raised before him. Considering the fact that even the earlier order dated 7-7-011 was passed by the same Judge, the learned Judge should have been more sensitive to the facts and circumstances of the case, to the pleas of the petitioners. Moreover, since the learned trial court itself had suggested that the case be transferred from its court to any other court, there is no valid reason for not doing so.

27. The learned Judge has ignored the requirement of law for a reasoned decision. A reasoned order is required for the four reasons: (1) to clarify your own thoughts; (2) to explain your decision to the parties; (3) to communicate the reasons for the decision to the public; and (4) to provide reasons for an appeal court to consider.

28. In the case of State of West Bengal Vs. Atul Krishna Shaw and Another, the Apex Court had opined that, " Giving of reasons is an essential element of administration of justice. A right to reason is, therefore, an indispensable part of sound system of judicial review. Reasoned decision is not only for the purpose of showing that the citizen is receiving justice, but also a valid discipline for the Tribunal itself. Therefore, statement of reasons is one of the essentials of justice."

29. In the case of Assistant Commission, Commercial Tax Department, Works Contract and Leasing, Kota v Shukla and Brothers (2010) 4 SCC 785 the Hon''ble Supreme Court had elaborately dealt with the need for a reasoned order. It opined as under:

Despite heavy quantum of cases in courts, in our view, it would neither be permissible nor possible to state as a principle of law, that while exercising power of judicial review on administrative action and more particularly judgment of courts in appeal before the higher court, providing of reasons can never be dispensed with. The doctrine of audi alteram partem has three basic essentials. Firstly, a person against whom an order is required to be passed or whose rights are likely to be affected adversely must be granted an opportunity of being heard. Secondly, the authority concerned should provide a fair and transparent procedure and lastly, the authority concerned must apply its mind and dispose of the matter by a reasoned or speaking order. This has been uniformly applied by courts in India and abroad.

29. It further observed as under:

A litigant who approaches the court with any grievance in accordance with law is entitled to know the reasons for grant or rejection of his prayer. Reasons are the soul of orders. Non- recording of reasons could lead to dual infirmities; firstly, it may cause prejudice to the affected party and secondly, more particularly, hamper the proper administration of justice. These principles are not only applicable to administrative or executive actions, but they apply with equal force and, in fact, with a greater degree of precision to judicial pronouncements. A

judgment without reasons causes prejudice to the person against whom it is pronounced, as that litigant is unable to know the ground which weighed with the court in rejecting his claim and also causes impediments in his taking adequate and appropriate grounds before the higher court in the event of challenge to that judgment.

30. The Hon''ble Supreme Court further held as under:

The principle of natural justice has twin ingredients; firstly, the person who is likely to be adversely affected by the action of the authorities should be given notice to show cause thereof and granted an opportunity of hearing and secondly, the orders so passed by the authorities should give reason for arriving at any conclusion showing proper application of mind. Violation of either of them could in the given facts and circumstances of the case, vitiate the order itself.

31. The Apex Court concluded as under:

Reason is the very life of law. When the reason of a law once ceases, the law itself generally ceases (Wharton's Law Lexicon). Such is the significance of reasoning in any rule of law. Giving reasons furthers the cause of justice as well as avoids uncertainty. As a matter of fact it helps in the observance of law of precedent. Absence of reasons on the contrary essentially introduces an element of uncertainty, dissatisfaction and give entirely different dimensions to the questions of law raised before the higher/appellate courts. In our view, the court should provide its own grounds and reasons for rejecting claim/prayer of a party whether at the very threshold i.e. at admission stage or after regular hearing, howsoever concise they may be.

We would reiterate the principle that when reasons are announced and can be weighed, the public can have assurance that process of correction is in place and working. It is the requirement of law that correction process of judgments should not only appear to be implemented but also seem to have been properly implemented. Reasons for an order would ensure and enhance public confidence and would provide due satisfaction to the consumer of justice under our justice dispensation system. It may not be very correct in law to say, that there is a qualified duty imposed upon the courts to record reasons.

32. These solemn principles, established by the Hon''ble Supreme Court, should not have been ignored by the learned Judge. To do so, is not only to violate the principles of natural justice, but is also to annihilate the requirement of Art. 21 of the Constitution of India. A sacred duty cannot be performed profanely.

33. No hard and fast rule can be laid down for transferring a case. For each case would depend on its own unique facts and circumstances. But an examination of some of the cases decided by the Hon''ble Supreme Court would reveal the judicial thought on this burning issue: in the case of G.X. Francis and Others Vs. Banke Bihari Singh and Another, the Apex Court felt that where public confidence in the fairness of the trial is likely to be seriously undermined under the

circumstances of the case, transfer petition could be allowed.

34. In the case of Maneka Sanjay Gandhi and Another Vs. Rani Jethmalani, the Hon"ble Supreme Court gave certain illustrations as to when a case may be transferred. Initially it observed that "the assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of the parties or easy availability of legal service or like trivial grievances. Something more substantial, more compelling, more imperiling from the point of view of public justice and its attendant environment is necessitous if the court is to exercise its power of transfer.

35. The Apex Court then gave certain examples when a case should be transferred: i) if the accused person, for any particular reason is virtually deprived of the facility of competent legal service, an essential aid to fair trial fails. If in a certain court the whole Bar, for reasons of hostility or otherwise, refuses to defend an accused person-an extraordinary situation difficult to imagine, having regard to the ethics of the profession-it may well be put forward as a ground which merits the Court's attention. ii) Turbulent conditions putting the accused's life in danger or creating chaos inside the court hall may jettison public justice. If this vice is peculiar to a particular place and is persistent, the transfer of the case from that place may become necessary. Likewise, if there is general consternation or atmosphere of tension or raging masses of people in the entire region taking sides and polluting the climate, vitiating the necessary neutrality to hold a detached judicial trial, the situation may be said to have deteriorated to such an extent as to warrant transfer. Of course, these examples are merely illustrative and are not exhaustive in their scope.

36. In the case of Abdul Nazar Madani Vs. State of Tamil Nadu and Another, the Apex Court observed as under:

The purpose of the criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. When it is shown that public confidence in the fairness of a trial would be seriously undermined, any party can seek the transfer of a case within the State u/s 407 and anywhere in the country u/s 406 CrPC. The apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary, based upon conjectures and surmises. If it appears that the dispensation of criminal justice is not possible impartially and objectively and without any bias, before any court or even at any place, the appropriate court may transfer the case to another court where it feels that holding of fair and proper trial is conducive.

37. Both in the cases of Satish Jaggi Vs. State of Chhattisgarh and Others, and in the case of Surendra Pratap Singh Vs. State of U.P. and Others, the Apex Court was of the opinion that the cases should be transferred on the ground that justice should not only be done, but should also appear to be done with the parties. In fact, the case of Surendra Pratap Singh (supra) was a case involving a

sitting MLA. Considering the fact that one of the accused persons was a sitting MLA, the court directed the case to be transferred in light of the principle quoted above.

38. The present case is certainly covered by the illustrations given by the Hon"ble Supreme Court mentioned above: the accused have found it difficult to engage the services of the lawyers from Kishangarh; the atmosphere in and around the court is surcharged; both the accused and the witnesses claim that they feel threatened by the opposite party; doubts have been raised about the impartiality of the learned trial court. Thus, in order to ensure that justice seems to be done, in order to ensure that the public faith in the impartiality of the court and in the judicial process is not undermined, it is imperative that the case be transferred from Kishangarh to Ajmer.

39. During the course of arguments a new ground has emerged for transferring the case, namely the threat faced both by the accused and by the witnesses. As mentioned above, the brother of one of the accused person was attacked about which a FIR has already been registered. On the other hand, the Special Public Prosecutor has submitted the applications filed by the witnesses claiming that they are being threatened by the accused persons and their henchmen. Hence, the need for protection of both the sides.

40. Witness protection has recently engaged the attention of the judiciary. Bentham, the famous English political philosopher, had opined that witness is the eyes and ears of Justice. Without the free and fearless testimony of a witness, a court is handicapped. It is the witness who resurrects the incident; it is the witness who narrates the details of the alleged offence; it is the witness who unravels the diabolical mind of the accused to the court; it is the witness who reveals "the truth". Since the endeavor of the court is to discover "the truth", the witness is the medium through which the court reaches "the truth" about the case. If the witness is frightened, is under duress, or is under temptation, his testimony is likely to be opaque, likely to be false, likely to be custom-tailored in favour of a particular party who has frightened or tempted him. "The truth" is likely to be lost; Justice is likely to be buried.

41. In the case of National Human Rights Commission v State of Gujarat & Ors. (2009) 6 SCC 767 (herein after referred to as "the NHRC (II)") the Hon"ble Supreme Court had observed as under:

The importance of witnesses in a criminal trial does not need any reiteration. It is an established fact that witnesses form the key ingredient in a criminal trial and it is the testimonies of these very witnesses, which establish the guilt of the accused. It is, therefore, imperative that for justice to be done, the protection of witnesses and victims becomes essential, as it is the reliance on their testimony and complaints that the actual perpetrators of heinous crimes during the communal violence can be brought to book.

42. It had further observed as under:

In most of the cases, witnesses are the victims of the crime. Most vulnerable amongst them are women and children. Under the existing system they are mere pawns in a criminal trial and there is very little concern for protecting their real interests. The protection is necessary so that there is no miscarriage of justice; but protection is also necessary to restore in them, a sense of human dignity. Since the protection of a witness is of paramount importance it is imperative that if and when any witness seeks protection so that he or she can depose freely in court, the same has to be provided.

43. Yet despite the directions of the Apex Court, given in the case of *NHRC v State of Gujarat* (2008) 16 SCC 497, to the Central and the State Governments to enact a law for witnesses protection, no action has been taken by either of the two governments. Therefore, the Apex Court, in *NHRC (II)* (supra), laid down certain guidelines, which are as under:

For ensuring of a sense of confidence in the mind of the victims and their relatives, and to ensure that witnesses depose freely and fearlessly before the court, following steps shall be taken: (a) ensuring safe passage for the witnesses to and from the court precincts, (b) providing security to the witnesses in their place of residence wherever considered necessary, and (c) relocation of the witnesses to another State wherever such a step is necessary.

44. In the present case, the witnesses had asked for protection. The learned trial court had written to the concerned police officer to provide protection to the witnesses. But from the record submitted by the learned counsel, it is unclear whether the witnesses have been provided protection or not. Therefore, by way of abundant caution, this court directs the DIG, Ajmer to ensure that the eyewitnesses in this case are immediately provided police protection. The police protection shall include a guard at the residence of the eyewitness and shall include bringing the eyewitness, to and fro, from the court under heavy police protection. However, in case any other witness were to request for police protection, then the same protection, as mentioned above, shall be provided to him/her. If the relatives of the accused persons also require police protection, then the same shall be provided to them as well, in the terms deem fit by the DIG, Ajmer. In case any harm is caused to a witness in this case, the responsibility shall be squarely of the DIG, Ajmer.

45. The criminal delivery system is afflicted by a poor rate of conviction. One of the major causes is that witnesses turn hostile during the trial. They turn hostile either because they are threatened, or they are tempted. In order to stop this trend, the Law Commission of India has recommended the enactment of law for the protection of witnesses. Such laws do exist in other countries, such as USA, Canada, England and Ukraine. In the USA, the United States Federal Witness Protection Program is administered by the United States Department of Justice and is operated by the States Marshals Service. The program is designed to protect the threatened witness not only before and during the trial, but also after the trial is over. Even some of the States of America, such as California, Illinois

etc. have similar witness protection program. Some of the states in our country have also toyed with the idea of creating such a program. Perhaps the State of Rajasthan should take a lead in this arena. It is hoped that both the Legislature and the Executive of the State would rise to the occasion and would address one of the major problems adversely affecting the performance of the criminal delivery system.

46. For the reasons stated above, the transfer petition is, hereby, allowed. The order dated 17-9-2011 passed by the learned Judge is, hereby, quashed and set aside. The Sessions Case No. 23/2011 pending before the Additional District and Sessions Judge, Kishangarh is, hereby, transferred to the Additional District and Sessions Judge (Fast Track) No. 1, Ajmer. The learned Fast Track Court is directed to proceed with the trial on a daily basis and to complete the trial within a period of one year from the date of the receipt of case file from the court of Additional District and Sessions Judge, Kishangarh. The parties are directed to cooperate with the learned trial court.

47. The Deputy Registrar (Judicial) is directed to send a copy of this judgment to the DIG, Ajmer for compliance of this judgment. The Deputy Registrar (Judicial) is also directed to send a copy of this judgment to the Chief Secretary, Government of Rajasthan and to the Director General of Police for their perusal and, if possible, for necessary action as mentioned above. The Director General of Police is directed to issue the guidelines, incorporating the guidelines laid down by the Apex Court, as mentioned above, within a period of two months. The compliance of the same shall be reported to this Court.