

(1984) 11 MP CK 0038

In the Madhya Pradesh High Court

Case No : Miscellaneous Criminal Case No. 1117 of 1984

Shambhoodayal

APPELLANT

Vs

State of M.P. and others

RESPONDENT

Date of Decision : 21-11-1984

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 407
Penal Code, 1860 (IPC) — Section 148, 149, 302, 303, 307

Citation : (1986) MPLJ 371

Hon'ble Judges : N.K. Singh, J

Bench : Single Bench

Advocate : M.M. Kaushik, for the Appellant; M.L. Modi, Add. Govt. Advocate for Respondent No. 1 and R. Saxena for Respondent Nos. 2 to 10, for the Respondent

Final Decision : Allowed

Judgement

N.K. Singh, J.

This is a petition u/s 407 of the Code of Criminal Procedure, 1973, seeking the transfer of Sessions Trial No. 101 of 1983 (State vs. Babulal and 8 others) from the Court of the Additional Sessions Judge Sheopur Kalan, District Morena, to any other Court of competent jurisdiction in the same district.

The facts, relevant for disposal of this transfer petition, are as follows:

S.O., P.S. Sheopur-kalan has put up a chargesheet against as many as 9 accused persons (Respondents Nos. 2 to 10) who are facing charges in the trial Court in respect of the alleged offences punishable under sections 148, 302, 303 and 307 read with section 149 of the Indian Penal Code in regard to the alleged violence said to have taken place on the morning of 12-2-1983 at village Premshar in P.S. Sheopur Kalan, resulting into as many as 7 injuries to petitioner Shambhoodayal and the murders of his father Bajranglal and uncle Prahlad. Prior to the present petition for transfer of the case, petitioner Shambhoodayal had earlier filed another similar petition (Cr. Mis. case No. 938/83), which was dismissed by a

Single Bench of this Court under the Order dated 28-3-1984, a photostat copy of which finds place in the record. Admittedly, the accused, named, Kesharilal and Ramnarayan, were earlier released on bail by the trial Court. The main grounds urged in the previous transfer-petition were to the effect that subsequent to their release on bail, the accused persons had sold part of their landed property for the amounts of Rs. 14,000/- and Rs. 40,000/-; that they were seen visiting the residence of the learned Additional Sessions Judge; that subsequent thereto they tried to force a settlement on petitioner Shambhoodayal and declared that if he did not do so, no harm would result to them by virtue of the trial, since they had won over the Judge. In the report filed by the learned Additional Sessions Judge in respect of the allegations, he vehemently denied the same as false. Relying on that report, as also the circumstances pertinent to the allegations, the Single Bench of this Court rejected the transfer petition under its order dated 28-3-1984.

The allegations made in the earlier transfer petition have been repeated in the present petition, but the learned counsel for the petitioner Shri M.M. Kaushik frankly conceded that they could not be gone into again in view of the dismissal of the earlier petition on merits. The fresh grounds urged in the present petition for transfer of the case are to the effect that; (1) while in course of the trial, petitioner Shambhoodayal appeared as a witness before the trial Court on 14-6-1984. Upon sighting him, the learned Additional Sessions Judge Shri S.K. Tripathi stated to the effect-

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(2) The learned Judge issued non-bailable warrants against Rampyari and Geeta Bai, respectively the mother and sister of the petitioner, cited as prosecution witnesses, who were produced in custody before the trial Court on 29-6-1984, but their application for release on bail was refused by the Judge and they were sent to jail for their production as witnesses on the date fixed in the case for recording the remaining evidence.

In view of the circumstances described above, a real apprehension had arisen in the mind of petitioner Shambhoodayal that a fair and impartial trial cannot be had in the case, in the court of Additional Sessions Judge, Sheopur Kalan, and, accordingly, he sought the transfer of the case to some other Court of competent jurisdiction.

It is not disputed that prior to the present transfer petition, petitioner Shambhoo Dayal has made two transfer petitions before the Sessions Judge and one before this Court, seeking the transfer of the case, on the grounds summarised above, all of which have been rejected. It having been conceded by the learned counsel for the petitioner that the grounds urged in the previous transfer petition are not reagitated, in view of the disposal of the earlier petition on merits, we are confined to the fresh grounds urged in the present petition, in support of the prayer for transfer of the case. They may be dealt with one after the other.

It may be noted that part of the trial has already been held in the trial Court and as many as 10 witnesses, produced on behalf of the prosecution, have been examined and discharged. In regard to the allegation that while in course of the trial, on 14-6-1984, the learned Additional Sessions Judge had uttered the words attributed to him, described in para 3 above, upon sighting petitioner Shambhoo Dayal, who appeared in the Court as a prosecution witness, in response to the summons issued to him, I am not inclined to attach much weight to the same. The learned Additional Sessions Judge, in his report dated 12-8-1984, has vehemently denied the allegation as false and in this connection has drawn attention to the order sheet in the Sessions trial dated 14-6-1984, wherein while the presence of other witnesses present in the court has been noted, there is no mention of the presence of Shambhoo Dayal. There appears no reason why the learned Additional Sessions Judge should not have recorded his presence in the ordersheet, had he appeared in the court on that date. Further, despite the affidavits filed by petitioner Shambhoo Dayal and persons named, Bansharam and Banshilal, in support of the allegation, I am of the opinion that under normal circumstances, a senior and experienced Judge, of the standing of the Additional Sessions Judge, Sheopur Kalan, is not expected to utter words of the nature attributed to him in open Court in course of the trial. All the more so, when he knows that the petitioner is capable of making transfer applications as soon as any ground is available to him for the purpose. Thus, I am more inclined to rely on the report of the learned Additional Sessions Judge to the effect that no incident of the nature took place in his Court on 14-6-1984 and he did not utter the words attributed to him by the petitioner. Accordingly this ground is rejected as untenable for providing a basis for transfer of the case sought by the petitioner.

However, so far as the second ground urged in the transfer petition is concerned, after having gone through the record of the trial Court carefully and having given my anxious considerations to the proceedings so far, I am of the opinion that this ground deserves to be taken notice of. This ground relates to the way in which the prosecution witnesses, namely Smt. Rampyari and Ku. Geeta Bai were dealt with in course of the trial. Their names are mentioned in the list of witnesses annexed to the charge sheet. Though the learned trial Judge, in the report submitted by him, has stated that he was not aware of their relations with petitioner Shambhoo Dayal, it is pertinent to note that in the charge sheet, Rampyari had been described as the widow and Geeta Bai as the daughter of Bajranga alias Bajranglal, father of the petitioner. It is further clear that they did not appear in the trial Court despite of service of summons and theailable warrants upon them, whereupon, the learned Additional Sessions Judge directed the issue of non-ailable warrants for their production and, rightly so. However, on their initial production before the Court on 29-6-1984 they were not released on bail despite an application made on their behalf for the purpose. No doubt, the learned Additional Sessions Judge had a discretion in the matter and adjourned the case for the purpose of obtaining a reply from the Public

Prosecutor in respect of the bail application, the record of the trial Court brings out that the case was adjourned for the purpose to 30-6-1984, but the learned Additional Sessions Judge fell ill and proceeded on leave, whereupon the case was taken up on 4-7-1984, on his resumption.

In the meanwhile, it appears that petitioner Shambhoo Dayal had filed another petition for the transfer of the case before the Sessions Judge, Morena. The learned Sessions Judge stayed the proceedings and the stay order was received in the Court of Additional Sessions Judge, Sheopur Kalan on 30-6-1984, when the Judge was on leave. The order sheet dated 4-7-1984 discloses that this resulted in further detention of the lady witnesses in jail custody. It also brings out that in view of the stay of the proceedings by the Sessions Judge, the learned trial Judge refused to pass any orders in respect of the bail applied for by Rampyari and Geeta Bai and directed their production before the Sessions Judge, Morena, on 9-7-1984, the date of hearing fixed in the Sessions Court. On the other hand, on the next date, i.e., 5-7-1984, when the prosecution witnesses, namely Sitaram Singh and Karan Singh, presented themselves in the Court, they were discharged. I am of the opinion that despite the stay order made in the case by the Sessions Judge, it was likewise open for the learned Additional Sessions Judge, either to discharge the lady witnesses, namely, Rampyari and Geeta Bai, who were in custody on 4-7-1984, or to direct their release on furnishing bonds for further appearance, with or without surety. This was all the more desirable in view of the witnesses in detention being ladies.

It is well settled that despite a transfer application having been made or proposed to be filed in the case, the Court does not become incompetent to make ancillary orders not affecting the merits of the case. In this connection, reference may be invited to the cases *Sahib Dino and others vs. Emperor* (AIR 1927 Sind 148 (DB)), *Haji Bagridi and others vs. King Emperor* (AIR 1928 All. 268 (DB)) and *Bhagwandas Goel and Sons vs. Uleechalla E. Hanumanthian Chetty* (AIR 1956 Mad. 166 (DB)). No doubt, these cases relate to the position before coming into force of the present Code of Criminal Procedure, 1973. u/s 526(8) old Code of 1898, the Court, from which the transfer was applied for, was required to adjourn the case for enabling the party to apply for transfer to the superior Court, but under the present section 407 of the Code of Criminal Procedure, 1973, there is no such compulsion, laid down under the law. However, as yet, the case law cited above is to the effect that the Court from which the transfer was applied for, was still free to deal with the ancillary matters, not affecting the merits of the case. It can, therefore, be readily inferred that under the present law when there is no compulsion to adjourn the proceedings, the Court, from which the transfer is applied for, is equally free to deal with such ancillary matters, not affecting the merits of the case, despite stay order made by the superior Court.

May be, that the learned Additional Sessions Judge did not intend or mean to cause any harassment to the petitioner by the detention of his mother and sister

in jail custody, who were, no doubt, guilty of non-appearance before the Court despite of service of processes on them. However, I am of the opinion that when such a discretion was open to the learned Additional Sessions Judge, it would have been better for him to have exercised his discretion in favour of the lady witnesses who remained in detention for a fairly long period, which to my mind, was uncalled for, in the circumstances of the case, and particularly after the receipt of the stay order in the case. I am of the further opinion that the course of action, adopted by the learned Additional Sessions Judge, in course of the trial, can be considered as sufficient to raise a reasonable apprehension in the mind of the petitioner that he may not get a fair and impartial trial in the Court below. In *Chander Kuer and Others Vs. Emperor*, where the Magistrate threatened the defence witness and on time being sought by the accused to move High Court for the transfer the Magistrate issued warrant of arrest against other witnesses, it was held that such action had caused apprehension in the mind of the accused that the Magistrate was prejudiced and was entitled to have the case transferred from the Court.

In the case of *Nasih Singh vs. J.S. Puri* (1969 CriL.J. 236 P&H), it has been held that in dealing with an application for transfer, the Court has to consider not merely the question whether there has been any real bias in the mind of the Presiding Judge against the applicant, but also the further question whether incidents may not have happened which, though they may be susceptible of explanation and may have happened without there being any real bias in the mind of the Judge, are nevertheless, such as are calculated to create in the mind of the applicant a justifiable apprehension that he or she would not have an impartial trial.

In the case of *Gurcharan Das Chadha Vs. State of Rajasthan*, the Supreme Court has observed that a case is transferred if there is a reasonable apprehension on the part of a party to a case that justice will not be done, a petitioner is not required to demonstrate that justice will inevitably fail. He is entitled to a transfer if he shows circumstances from which it can be inferred that he entertains an apprehension and that is reasonable in the circumstances alleged. That it is one of the principles of the administration of justice that justice should not only be done but it should be seen to be done.

In view of the circumstances of this case, discussed above, I am of the opinion that this transfer petition deserves to be allowed. It is, accordingly, ordered that the part heard S.T. No. 101/83 (*State vs. Babulal and others*), pending before the Additional Sessions Judge, Sheopur Kalan, is withdrawn from the Court of Additional Sessions Judge, Sheopur Kalan and transferred to the Sessions Judge, Morena; for disposal according to law. It is presumed that while holding the trial, the learned Sessions Judge will take due notice of section 326 of the code of Criminal Procedure 1973, as amended by the Amendment Act of 1978.

The accused/respondents, who are in jail custody, are directed to be produced and those on bail directed to appear before the Sessions Judge, Morena, on

30-11-1984 for further proceedings in the case. The record of the Sessions Trial shall be sent on forthwith to the Sessions Judge. Morena.