

(1991) 03 SHI CK 0007

In the High Court Of Himachal Pradesh

Case No : Criminal M.P. (M) No. 20 of 1991

Smt. Kamlesh Tyagi and Another

APPELLANT

Vs

State of H.P. and Others

RESPONDENT

Date of Decision : 18-03-1991

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 406, 407
Penal Code, 1860 (IPC) — Section 120B, 201, 302, 306, 34

Citation : (1992) 2 ShimLC 17

Hon'ble Judges : D.P. Sood, J

Bench : Single Bench

Advocate : H.S. Mann and Bimal Gupta, for the Appellant; M.S. Chandel, Asstt. A.G. and O.P. Sharma, for the Respondent

Judgement

D.P. Sood, J.—Smt. Kamlesh Tyagi and her nephew Sanjiv Kumar have applied for the transfer of Criminal Case No. 203/1 of 1990, pending in the Court of the learned Additional Sessions Judge, Bilaspur, to the Court of Sessions Judge, Nahan or to that of Solan.

2. Rajesh Kumar son of Respondent No. 5, Jiwan Lal Sharma, the then Additional District Attorney, Bilaspur, Himachal Pradesh, was allegedly murdered, consequent where to both the Petitioners were arrested pursuant to the registration of a criminal case vide F.I.R. No. 56 of 1990 at police-station Sadar, Bilaspur, Himachal Pradesh, for the commission of an offence under Sections 302/120-B/201/34, I.P.C. on the basis of a complaint lodged by one Rajiv Rawat. The complainant is the neighbour of Respondent No. 5 As per the report, the complainant heard Rajesh Kumar deceased crying (MAR DIA--MAR DIA) whereupon he rushed to the house of the deceased and found him injured and saw a person aged about 20 to 21 years of age(particulars of whom stand mentioned in the report) and chased that person who showed him a knife and out of fear, the complainant came back to the place of occurrence where other people were also standing. On seeing Rajesh lying dead, he went to the

electricity complaint room Changer Sector and telephonically lodged a report, referred to above. After routine investigation, a charge sheet stands submitted against the Petitioners, Lekh Raj Gupta and one Anil Gupta (Respondent No. 6).

3. The present petition has been made by the Petitioners for the transfer of the aforesaid criminal case on a string of grounds, such as, absence of congenial atmosphere for a fair and impartial trial, non-availability of legal service and substantial prejudice which have been set out to validate the prayer.

4. Under the first head the allegations pertain to, firstly, the conduct of the general public on May 26, 1990; secondly, conduct of police with respect to the treatment meted out to the Petitioners and their family members on the aforesaid date and subsequent thereto and thirdly, conduct of Jiwan Lal, Respondent No. 5, the father of the deceased.

5. The precise averments made by the Petitioners are, that:

(i) on 26 May, 1990 the moment they were brought out of the Court of the learned Chief Judicial Magistrate, Bilaspur, who remanded them till 8-6-1990, the agitated mob consisting of local residents gheraod them and at the behest of Respondents No. 2 and 3, the police accompanying paraded them in the streets and even lanes of Bilaspur Township;

(ii) that the "parokars" of the Petitioners hail from Delhi and they have to attend the proceedings and look after the trial for which purpose they visit Bilaspur but on their visits, they are not only subjected to hostile and abusive attitude of the complainant party and the local residents of Bilaspur but had also been refused accommodation in the local lodging houses/hotels etc.;

(iii) that demonstrations were held not only in Bilaspur but throughout the State and even the lawyers of the entire State of Himachal Pradesh observed one day token strike consequent to the occurrence;

(iv) that four minor daughters of Petitioner No. 1 Smt. Kamlesh Tyagi, namely, Kumari Chanchal aged 16 years, Kumari Ujjawal aged 13 years, Kumari Kanchan aged 11 years and Km. Veepti aged 9 years were illegally detained in the police station and tortured there at the behest of fifth Respondent which fact is alleged to be corroborated by the telegrams sent by the Superintendent of Police, Bilaspur. to immediate boss of Shri Salig Ram Tyagi, husband of Petitioner No. 1, posted at Kaza at the material time;

(v) the eldest daughter Kumari Chanchal was forced to make a statement u/s 161 Code of Criminal Procedure.;

(vi) that on 9-8-1990, the husband of Petitioner No. 1 was killed due to taking of poison on the instigation by one Anil Gupta, Respondent No. 6, and one woman accompanying him but the police neither registered a case nor properly investigated the same;

(vii) that the 5th Respondent being the Additional District Attorney attached to

the trial Court wields great influence not only on the executive administrative machinery but also on the police and thus Petitioners and their family members were and are subjected to indignity, inhumane treatment at his behest. Not only this, he also on the guise of being on leave, supervised the investigation of the instant case and aided the police in padding up as also collection of evidence in the form of circumstantial evidence with a view to falsely implicate the Petitioners in the instant case;

(viii) that on the visits of Petitioner No. 2 to Bilaspur on 31-8-1990 and 17-9-1990, some unknown persons and a peon of the prosecution agency shadowed her at all places wherever she went in Bilaspur Township and got threatening by the said persons regarding which a complaint dated 20-9-1990 was filed before the trial Court with a copy to the Superintendent of Police, Bilaspur and this fact has not properly been investigated;

(ix) that even after 26-5-1990, Petitioner No. 2 Sanjiv Kumar is being produced before the trial Court in handcuffs whereas other co-accused is not handcuffed. Further application of Petitioner for removing his handcuffs is pending before the trial Court uptill now which shows the indifferent attitude adopted by the judicial authority;

(x) that even after the submission of challan in the Court, the attitude of the local police, prosecuting agency as also the administration continues to be surcharged against the Petitioners to such an extent that they are not given adjournment dates convenient to them.

6. All these instances have been detailed by the Petitioners to support their submissions with respect to the absence of congenial atmosphere for a fair and impartial trial. Further averment made by the Petitioner is that occurrence being a sensational one pertaining to the blind murder of the son of the Additional District Attorney attached to the trial Court, no legal lawyer worth the name either from Bar Association Bilaspur nor from any other place in Himachal Pradesh is willing to appear on behalf of the Petitioners.

7. On the contrary the contentions of the complainant are that:

(i) the Petitioners are adopting delaying tactics and they are making every efforts to prolong the case. There is no danger to the lives of the Petitioners and it was absolutely false to say that the parokars of the Petitioners were being harassed;

(ii) that a senior and experienced lawyer Shri H.S. Mann still appearing on behalf of the Petitioners, was engaged by them even at the very inception of the investigation of the instant case and he sought interviews with the Petitioners in the Open Air Jail on 21-6-1990 and 26-6-1990, though challan was put up on 7-8-1990.

8. The other allegations have also been refuted on the ground that the facts have been twisted to create grounds for the transfer of the case. Ultimately it is contended that there is no ground to transfer the case from the trial Court at

Bilaspur.

9. Affidavits, counter-affidavits and rejoinder affidavits have been filed in the case.

10. I have heard the learned Counsel for the Petitioners Shri H.S. Mann, the learned Assistant Advocate General, Sh. M.S. Chandel, appearing on behalf of the complainant, and have also gone through the record of the case.

11. It is well settled that assurance of a fair trial is the first imperative of the dispensation of justice. 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 it is reasonable in the circumstances alleged. 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. What is "reasonable apprehension" has to be decided in each case with reference to its own peculiar incidents and the surrounding circumstances. In determining whether the Applicant has a "reasonable apprehension", it is the duty of the Court by placing itself in the position of the accused to consider the attending facts and circumstances. Abstract reasonableness cannot, normally speaking, be the standard in such cases. Thus I have to test the Petitioners' grounds on this touch-stone bearing in mind the rule that normally the complainant has a right to choose any Court having jurisdiction and the accused cannot dictate where the case against him should be tried. Even so, the process of justice should not harass the parties and from that angle the facts and circumstances emerging from the record, are to be weighed by this Court.

12. As per the prosecution, deceased Rajesh Sharma had illicit relations with Kumari Chanchal, daughter of Petitioner No. 1 and sister of Petitioner No. 2. Said Rajesh Sharma was all alone in his quarter on the day of occurrence which took place during the broad-day-light at 10 45 a.m. Admittedly, the occurrence was a sensational one which was later on flashed in the Punjab Kesari (Hindi Edition) of May 31, 1990. Undisputably as per record, the Court of the learned Chief Judicial Magistrate is located in the mini-Secretariat Bilaspur where other executive offices like that of the office of the Deputy Commissioner, A.D.M, S.D.M. and that of the Superintendent of Police are also located. This blind murder is admitted to have attracted angry mob on the following day of the arrest of the Petitioners when they were produced in the Court of the Chief Judicial Magistrate for the purpose of remand. Also as per the averments of the Petitioners they were gheraoed outside the Court and after the passing of the remand order by the concerned judicial officer. The complainant do admit that they tried to control the crowd with the help of a small number of policemen present at the spot but on seeing their hostile attitude Respondents No. 2 and 3 also came to the spot and attempted to pacify the crowd in order to avoid any injury being inflicted to the Petitioners. Thus seeing the hostile attitude the complainant acted with great

sagacity and wisdom and instead of taking the Petitioners in the jeep to the police station, took them on foot. Later the atmosphere in and outside the Court became normal and peaceful and the "parokars" of the Petitioners had not only visited Bilaspur more than 15 times to attend the Court but also their relations and Counsels also interviewed the Petitioners 31 times as is corroborated by the entries in the interview register and also entries in the visitor's register of Open Air Jail, Bilaspur. The record further shows that said parokars stayed in Kisan Bhawan several times and in Sainik Rest House, once, as per records so produced and nothing indifferent had happened to either of them. The allegations further depict that the parokars of the Petitioner were harassed at the behest of 5th Respondent who wields influence in the entire Bilaspur Township. In case he is after harassing the parokars, he can continue his alleged activities in that district also where the case may be transferred This is law and order problem and the Petitioners or their parokars can very well approach the higher police authorities and the executive authorities or even the high-ups requesting for their safety and to make arrangements that they (parokars) are not harassed. The Petitioners can also approach the learned Sessions Judge to see that the said (parokars) are not harassed in any way when they come to the Court on the date fixed.

13 At this stage it would be pertinent to detail that the Petitioners moved petition No. 407 of the Code of Criminal Procedure for seeking transfer of the trial of the instant case earlier in this Court, on 5th of July, 1990, (registered as Cr. P M. (M) No. 517 of 1990, decided on July 23, 1990), from the trial Court to the Court of the learned Sessions Judge, Solan, Himachal Pradesh, with a specific allegation made therein that "(he parents of the Petitioner No. 1 came to Bilaspur from Delhi in order to do pervi of the case but they were not allowed to enter the city and out of fear they came back". The said transfer petition was dismissed as not pressed at that stage with liberty to file a proper application at an appropriate stage Thereafter the Petitioner moved another transfer petition, No. Transfer Petition (Crl) No. 164 of 1990, u/s 406 of the Code of Criminal Procedure in the Supreme Court of India praying for the transfer of the criminal proceedings pending in the trial Court to the Court of competent jurisdiction in the near vicinity of Delhi, that is, out side the State of Himachal Pradesh specifically alleging that "the people in Himachal Pradesh are hostile towards the Petitioners which fact was evident from the circumstances that demonstrations against the Petitioners were held throughout the State and even lawyers throughout the State observed a one day token strike, "as one of the grounds amongst others. The aforesaid allegations of the parents of Petitioner No. 1 even if admitted to have visited Bilaspur, as detailed in the transfer petition earlier moved in the High Court, had not at all been made a ground of transfer either in the aforesaid petition nor it finds mention in the instant petition. Rather in the petition before the Supreme Court the grounds amongst others were that "the lives of Petitioner No. 1 and her children are in danger and the local police and the fifth Respondent has openly threatened the Petitioners that wherever their case is transferred

throughout the State of Himachal Pradesh, they would be wiped out." In the instant petition, the prayer is for the transfer of the case from the trial Court to the Court of the learned Sessions Judge, Nahan or at Solan within the jurisdiction of Himachal Pradesh. The above said grounds, endangering lives of the Petitioners or their children or threatening referred to above by the fifth Respondent, does not find mentioned in the instant petition. At the cost of repetition, that parokars of the Petitioners frequently visited Bilaspur Township, stayed in Kisan Bhawan or in Sainik Rest House and interviewed Petitioner No. 2 in Open Air Jail for 31 times without approaching the high-ups in the State or the executive authorities to make arrangements for their security, belies the stand taken by the Petitioners and this ground cannot be considered to have raised a reasonable apprehension in the mind of the Petitioners which can be deemed to be a sufficient ground for transfer of the case.

14. It also emerges from the admission of the complainant that there was no other person to look after the minor children of Petitioner No. 1 who had been arrested in the instant case and on account of this reason they were kept in the care and company of a lady constable No. 364 at her residence till their custody was handed over to their father. The recording of voluntary statement u/s 161, Code of Criminal Procedure of Ku. Chanchal in the aforesaid circumstances is also admitted to have been recorded by the police. The said minor has not been implicated in the crime even though the murder had taken place because of her. No other instance of the hostility of general masses of Bilaspur other than what happened on 26-5-1990, the following day of murder, has been alleged. There might be a general feeling on the part of the Petitioners that local residents of Bilaspur were hostile towards them but it is not sufficient. Further requirement is that there persons were interfering directly or indirectly with the course of justice. As such these circumstances do not in any way entail the transfer of the case.

15. With respect to the conduct of the police, the record shows that minor children were taken into custody due to their safety and security measure particularly in view of the admitted mob-mentality existing in Bilaspur Township immediately after the occurrence. Had they not been done so, the hostile attitude of the general masses might have resulted in some untowards happening with the children As regards the suicide committed by Shri S.R. Tyagi, husband of Petitioner No. 4 , record reveals that criminal case u/s 306, I.P.C. stands registered on the basis of letter (Annexure R-IV) vide F.I.R. No. 84 of 1990 (Annexure R-VI) and the investigation in the matter has been and is being conducted by the police; Petitioner No. 1 has been cited as a witness besides Petitioner's parokars, Balram Singh and Man Singh Sagar and their statements were recorded u/s 161, Code of Criminal Procedure

16 It would not be out of place to take into consideration that in the application u/s 439. Code of Criminal Procedure for grant of bail moved on behalf of the Petitioners through their Counsel Shri H.S. Mann, (registered as 167/4 of 1990,

dated 21-6-1990, decided on July 2, 1990 by the learned Chief Judicial Magistrate, Bilaspur, H.P. Exercising the powers of Sessions Judge) the allegations with respect to the highhandedness of the investigating agency to the effect that under the threat, the statement of Ku. Chanchal aforesaid had been got recorded in order to show the motive for the commission of the offence, and, therefore, the Petitioners alleged that they would be moving separately to the higher authorities for handing over the investigation to some senior officer of the Crime Branch but this step does not seem to have been taken till the completion of the investigation. Thus cumulatively the police cannot be deemed to have a biased approach towards the Petitioners in any manner.

17. As regards the conduct of 5th Respondent, who is holding a Class II Post, as Additional District Attorney, suffice it to state that as per record, he being on leave was informed of the murder of his son at his native village Dabrog in District Mandi on the day of occurrence, where he had gone in connection with the "chabarkh" of his aunt a day prior to the occurrence, whereafter he came to Bilaspur Town. According to his averments made in the affidavit, on reaching Bilaspur he made arrangements for taking away the dead-body of his son to the village for cremation and remained there on 26th and 27th May, 1990 and thereafter proceeded to Hardwar with the latter's ashes and after immersing them into the Ganges on 29th May, 1990. returned on the 30th May, 1990. In the natural course, his statement that he was under depression and frustration because of this unbearable and untimely death of his son in the prime of his life cannot be disbelieved. Bilaspur Town is on the way while proceeding from Hardwar to his native village. The case diary of 30th May, 1990 does show that his statement u/s 161, Code of Criminal Procedure was recorded by the police thereafter he left for his native village, stayed there continuously and resumed his duties on 1st August, 1990. His statement on oath cannot be lightly brushed aside. Further, it cannot be believed that a Class II Officer is wielding so much influence not only over the prosecution agency but also on police and executive, heads of State that he manoeuvred the collection of evidence against the Petitioners. Record shows that challan was presented on 7-8-1990, that is, much earlier, to the resumption of duties by the fifth Respondent. Thus, in the circumstances, this ground is also not available to the Petitioners for seeking transfer of the case.

18. From the discussion of the entire facts and circumstances above in the present case, I am far from satisfied that the atmosphere even now either in the Bilaspur Court or outside is surcharged against the Petitioners giving rise to a reasonable apprehension in their mind that they would not get impartial justice.

19. Regarding the factum of non-availability of lawyers from the entire State, muchless, Bilaspur Township, suffice it to state that the Petitioners had from the very inception engaged Sh. H.S. Mann, a senior experienced lawyer of Chandigarh, who even during the investigation of the case had interviewed the Petitioners on June 21 and 26, 1990. This allegation as also that of harassment

caused to the parokars and to the family members of the Petitioners and with respect to the influence of the 5th Respondent, had been made the grounds of transfer in the earlier application too but were not pressed. The record further reveals that one Shri M.M. Mangla, Advocate from Ambala represented all the Petitioners including their co-accused Lekh Raj on one hearing but later on the Petitioners had been represented throughout by Sh. H.S. Mann and other accused by Sh. M.M. Mangla and also by Sh. Anil Kaushik, Advocate. The petition lacks detail as to whether the Counsels said to have been approached by the parokars of the Petitioners are practising on criminal side or civil side and if so on what date(s) and for what purpose, (that is, to say, whether to assist the senior lawyer already engaged by them or to conduct their case independently). Reasons declining the brief may be with respect to fee or independent work etc. and it might vary with each individual lawyer. Rather in view of the allegations made in the transfer petition before the Supreme Court of India, referred to above, it appears that the Petitioners or their parokars being outsiders to the State of Himachal Pradesh, had no faith in any one of the lawyers throughout the State of Himachal Pradesh. This ground was contrary to the one urged in the earlier application for transfer of the case before this Court. Thus this ground is also not available to the Petitioners.

20. The powers of the High Court u/s 407, Code of Criminal Procedure are to be examined with caution. Even often recourse to this provision is taken with a view to delay a particular case or harass the opponents and not for the reason that the Applicant has some reasonable apprehension that he would not get justice from a particular Court. By a subsequent affidavit filed by Petitioner No. (sic), it has been attempted to be shown that even the trial Court is biased as the application filed by Petitioner No. 2 on 5-10-1990 for removal of his handcuffs has not been decided till date A report from the Additional Sessions Judge, Bilaspur, was called vide order dated 7-3-1991 on some points, detailed in this affidavit of Petitioner No. 1. The record reveals that Petitioner No. 2 was brought in handcuffs in pursuance of the orders dated 19-7-1990. passed by the learned Judicial Magistrate 1st Class which was not appealed against. The aforesaid application was opposed and the same was adjourned to 4-1-1991 alongwith the application for further orders for reply and consideration It also discloses that the proceedings in its entirety before the trial Court were earlier stayed by order of the Hon'ble Supreme Court dated 9th November, 1990 and were vacated on 7th January, 1991 and thereafter proceedings were stayed by this Court vide order dated 15th January, 1991 in the instant petition Thus trial Court was precluded from proceeding with all matters connected with the main case Even these facts appear to have been suppressed by the Petitioners disentitling them from the reliefs asked for on this ground as well.

21. The cumulative effect of the entire discussion, thus, impels me to decline the transfer of the instant case without making a least reflection on the merits of the case. The stay of the proceedings vide this Court order dated 15th January, 1991 is vacated. The trial Court shall proceed with the sessions trial in accordance with

law. The parties are directed to appear before the learned Additional Sessions Judge, Bilaspur on March 21, 1991.