

(1989) 04 CAL CK 0060
In the Calcutta High Court
Case No : C.R. No. 641 and 720 of 1989

The State of West Bengal

APPELLANT

Vs

Mir Mohammad Omar @ Omar and Others

RESPONDENT

Date of Decision : 27-04-1989

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 278, 313

Citation : 93 CWN 731

Hon'ble Judges : Mukul Gopal Mukherji, J; Manabendra Nath Roy, J

Bench : Division Bench

Advocate : N.N. Gooptu, N.A. Chaudhuri and R.N. Basu, for the Appellant; Durga Pada Dutt, Sekhar Kumar Basu, Satadal Karmakar and Ananda Mohan Bose, for the Respondent

Final Decision : Allowed

Judgement

Mukul Gopal Mukherjee, J.—The State of West Bengal in this composite revisional application has impugned order no. 137 dated 21/3/89 and order no. 139 dated 30/3/89 as passed by the learned Judge, City Sessions Court, 13th Bench, Calcutta in Sessions Trial No.1 of November, 1987 (Sessions case No. 5/87). The State of West Bengal also prayed for a transfer of the Sessions case to some other Bench of the City Sessions Court since the learned Judge while refusing the prayer of the State of West Bengal in effecting correction of certain mistakes in the recording of evidence of P. W. 34 Sub Inspector S. S. Prasad and in not framing proper questions in the examination of the accused Mir Mohammad Omar alias Md. Omar u/s 313 Cr.P.C. has given out a stubborn attitude which speaks of a closed mind and the State apprehends that it shall not get a fair trial and proper justice from the said Court. In the other revisional application filed by Sm. Anushila Devi who claims herself to be a sister of the deceased Mahesh Kumar Agarwal and as a party interested, she seeks transfer of the case from the 13th Bench to some other Bench in the City Sessions Division on the apprehension that there would not be a fair trial in the case since the learned

judge has acted with bias. Earlier she filed an application before the Chief Judge, City Sessions Court but then the Chief Judge expressed the view that he had no authority to effect transfer of this case. When the matter was placed before us for hearing we were given to understand by the learned Advocate General that a correction slip was filed by the Investigating Officer, P.W.34 in presence of the Special Public Prosecutor to effect certain corrections in the deposition of the P.W.34 after he was examined on several dates. We did not find on a perusal of the records, the correction slip but it seemed clear enough that on the basis of the said correction slip submitted, many corrections were effected though in respect of some of the suggested corrections, the learned Judge allowed the deposition to remain as it is and refused to effect any correction whatsoever. In that context we called for an explanation from the learned Judge.

2. The learned Judge in his explanation dated 25/4/89 stated as follows :-

" The correction slip as referred to has not been properly filed. It is not signed by anybody. The case No. or the Court No. has not been mentioned in it. Nor any petition has been filed by the prosecution along with such concerned correction slip. Even the copy of the same has not been served upon the defence advocates. Still then as many as 16 typographical mistakes have already been corrected out of 25 mistakes as per correction slip. Other mistakes are not typographical mistakes and in the name of correction the evidence already recorded cannot be changed. Soother mistakes have not been corrected.

If any point is left out in the evidence, prosecution could have made a prayer. for re-examination of the witnesses prior to the evidence on prosecution side was declared closed.

Unsigned correction slip in 3 loose sheets could not be sent earlier as the case record was forwarded in hurry and the said correction slip is now enclosed herewith."

3. We are afraid that the proper procedure as envisaged in Section 278 of the Code of Criminal Procedure has not been followed in context. If the witness denies the correctness of any part, of the the same is read over to him, the Presiding Judge, may. instead of ing the evidence, make a memorandum thereon of the objection made to it by the witness and shall add such remarks as he thinks necessary. As the evidence of each witness is taken and is completed, the law is that it shall be read over to him in presence of the accused or of his lawyer and shall, if necessary, be corrected. Unfortunately, in the present case the learned Judge accepted the correctionlip, acted upon it and corrected the obvious mistakes in 16 cases out of the total 25 instances which were pointed out to him for rectification of the mistakes. The learned Judge has not given any hearing to either of the parties in the context of the correction slip and made up his mind ""other mistakes are not typigraphical mistakes and in the name of correction, the evidence already recorded cannot be changed." Hence he did not think it necessary that other mistakes need be corrected. This however, shows a closed

mind on the part of the learned Judge. The learned Judge himself in his explanation has suggested that the prosecution ought to have made prayer for re-examination of the witness prior to the evidence on prosecution side being declared closed. That was however not so done by the prosecution, precisely because the prosecution hoped that the correction should be effected on the basis of the correction slip as submitted by the Investigating Officer, P.W.34 himself. We may point out in this context that the proper procedure has also not been adhered to by the learned Special Public Prosecutor also in this context. However, in the fitness of things we would give the prosecution an opportunity to file an appropriate application before the Court below for re-examination of P.W.34 and the Court below should decide upon the question on merits.

4. On the other issue as regards the proper questions being" not put in his examination u/s 313 Cr.P.C, to accused Mtr Mohammad Omar,, we advert to the petition filed by the learned Special Public Prosecutor on 21.3.89. We have heard at length Mr. Durga Pada Dutta, the learned Advocate appearing on behalf of the accused opposite parties who frankly conceded that point nos. 1, 2, 3, 4, 5 could be allowed. But objections were raised with regard to point no.6 and 7 when it was suggested by the prosecution that, a question should have been put regarding seizure of hair on 5/11/86 and of forwarding the same to the F. S. L. for comparison with the scale hair of deceased Mahesh Kumar Agwarwal and the report of the F. S.L. It was suggested in point no. 7 that a question should be put regarding presence of accused Omar near the crossing of B. B. Ganguly St. and C. R. Avenue at about J. 15 a.m. on 5/11/86, when the I.O's testimony was not very clear on the point. The Supreme Court in *Sharad v. State of Maharashtra*, reported in AIR 1984 SC 1622 in paragraphs 142, 144 and 198 of the said judgment has clearly enunciated the principle that if a particular circumstance which emanates from the evidence is not put to the accused in course of his examination u/s 313 Cr.P.C, the same cannot be used against him. Hence if vital portions of evidence which have come out in the trial are left over and not put to the accused in his examination u/s 313 Cr.P.C, such facts as elicited in evidence being not put to the accused, would be deemed not to be existing at all for the purpose of reckoning in evidence. We would have allowed ordinarily the application filed on 21/3/89 with regard to points nos. 1 to 5 and would have left the question on point nos. 6 and 7 to the trial Judge on the basis of the concession made by Mr. Dutta, the learned Advocate for the accused opposite parties and also on the basis of our own opinion on this aspect of the case but then since we direct the trial court to hold the re-examination of P.W.34 on a proper application being filed by the prosecution in this regard, we would expunge not only the examination u/s 313 Cr.P.C, which is already on record in respect of accused Mir. Mohammad Omar but also in respect of the other accused persons and direct the court below to proceed afresh in the matter after the recording of evidence including the re-examination of P.W.34 is complete and we would direct the court below further to hear out the submissions, of the prosecution as well as the defence regarding framing of proper questions u/s 313

Cr.P.C.

5. The other question that we are called upon to decide is as to whether we would-direct the transfer of the case from the 13th Bench to some other Bench of the City Sessions Court. 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 the transfer made and not hypersensitivity or relative -convenience of a party or easy availability of legal services or like mini. grievances. "Something more substantial, more compelling, more imperilling, from the point of view of the public justice and its attendant environment is necessitous if the court is to exercise its power of transfer", as was pointed out in the case of *Mrs. Maneka Sanjay Gandhi & Anr. v. Miss Rani Jethmalani*, reported in AIR 1979 SC 468. We have to test the 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 though the principles of justice should not harass the parties and from that angle, the Court may weigh circumstances. Here it is not only the sister of the victim who pressed for a transfer but it is also the State of West Bengal which prays for a transfer on the ground that the Court below proceeded with a closed mind, acted arbitrarily, did not follow the law and the correct procedure and despite the mistake being pointed out to it, was stubbornly adamant in not considering the submissions made on behalf of the State when the mistakes were pointed out to it. The learned Judge Mr. S. C. Basu was going to retire ordinarily from 1st of May, 1989 but then he has prayed for an extension of one month on the basis of his Matriculation certificate and the Government of West Bengal Judicial department by Memo No. 7792 dated 12/4/89 has granted him an extension till the afternoon of 31/5/89 on which date he is to attain his superannuation. The entire trial has been held from the beginning by some other Judge but the present incumbent Mr. S. C. Basu has recorded the evidence of four witnesses including the I. O. It is not such a case where he has watched the demeanour of the entire set of witnesses as produced by the prosecution and we would be depriving the parties of an opportunity to have a judgment from a particular trial Judge who has seen the entire gamut of evidence. On behalf of the accused opposite parties it was suggested with reference to a decision of the Supreme Court in AIR 1966 SC 1418 *Guru Charan Das Chandha v. State of Rajasthan*, that on mere apprehension that justice would not be done is not sufficient, the apprehension must appear to the court to be reasonable. We are aware that mistake from a bonafide view of law is not a good ground for transfer, (SC W.N.P.838 *Ashirbad Muchi v. Maju Muchin*). The apprehension must be reasonable and justified by the facts and circumstances and it is not each and every apprehension that should form the basis a transfer (*Thomas v. Pulikcat*), 1986 CrL.J. 1709. We are also apprehensive that the entire trial may not be finished with the delivery of the judgment before 31/5/89 and unless an immediate successor to the learned Judge is given by the High Court, the ends of justice would suffer. The learned Advocate General brought to our notice the fact

that the learned Judge threatened the prosecution" that in case the State of West Bengal moved this Court in its revisional jurisdiction against the orders as passed by him or for transfer, he would treat the bail petition of the accused "favourably and it betrayed a partisan attitude on the part of the learned Judge. Even though the apprehension may not be correct and it was perhaps a threat, that was not certainly a proper judicial approach manifested by the learned Judge. Taking an overall view of the "situation, we think that the ends of justice demand that the case should be transferred to some other Bench and we leave the matter to the learned Chief Judge, City Sessions Court. Let the case now be placed with its entire records before the learned Chief Judge, City Sessions Court who will effect the transfer of this case to his own court or to some other Bench, regard being had to the congestion of the different benches but then it is only desired that the trial should be held as expeditiously as possible. In the result both the applications stand allowed. We, however, give the liberty to the learned Trial Judge to consider the application for bail, if any, filed by the accused in case the trial is protracted. We make it clear that the learned Chief Judge, City Sessions Court may also keep this matter on his file if he deems it fit and proper. Let the records be sent down to the learned Chief Judge, City Sessions Court through a Special messenger.

Manabendra Nath Roy, J.

I agree.