
(1985) 12 KL CK 0015
In the High Court Of Kerala

Thomas V. Pulikkal and Another

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 20-12-1985

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 406, 407
Penal Code, 1860 (IPC) — Section 120B, 201, 34, 467, 468

Citation : (1986) CriLJ 1709

Hon'ble Judges : S. Padmanabhan, J

Bench : Single Bench

Judgement

S. Padmanabhan, J.—These are two applications u/s 407 of the Cr. P.C. for transfer of two criminal cases - C.C. 19 of 1983 and C.C. 4 of 1984, now pending before the Special Court (Mark List Cases), to any other competent court. The prayer was seriously opposed by the Director of Public Prosecution. Petitioners are the first accused in the respective cases and they are brothers. Second accused in both the cases is common and he is the father of the first accused in both the cases. There was another case before the same court - C.C. 11 of 1983 - in which also second accused was the same person and first accused was another son of his. All these cases are for offences punishable under Sections 120B, 467, 468, 471 and 201 read with Section 34 of the Indian Penal Code in relation to tampering of mark lists and securing admission in professional colleges. It is said that there are ten other cases also of the same nature in which second accused and other members of his family are involved.

2. C.C. 11 of 1983 has been disposed of by the Magistrate convicting and sentencing the accused. A series of petition for transfer of the cases followed the judgment. All of them, just like these two petitions, are based on (1) encomiums given in the judgments to a witness, P.W. 10, who is common to other cases also and (2) certain language used in the judgment against the second accused who is also common in all the cases. P.W. 10 was described in the judgment as a "Shining Star", a man of truth and a man who could not be persuaded by the police or whoever may be, to swerve from the path of truth. It was also stated

that he has come to give evidence after admonition given by the church and there is no reason to disbelieve him. In the sentencing portion of the judgment the second accused was referred to as a very high and influential person who can move both the heaven and the earth and as an unmitigated villain who had abused the prowess provided by money, fame and status in order to prowl for a predegree certificate. It was also stated referring to both the accused :

It was the Kamamoha streak in them that kept them locked together in this insane struggle. The tendency to do crimes on the same lines will persist in their minds unless the Cosmis Leader imbibes lessons in the silence of their hearts. But where is this silence, when human lives are passing on and on, filth over filth and God is discarded in glass cases? The only alternative, therefore, is to put the erring ones in prison houses where the silence of the heart could open for the Divine. And that was what happened when Oscar was put in prison.

3. Both the petitions alleged that P.W. 10 appears as witness in these two cases also and the evidence to be given by him is also identical. Hence they fear that acceptance of his evidence has become a foregone conclusion and the trial will be only an empty formality. So also they have stated in the petitions that the opinion entertained by the Magistrate against the second accused is sure to be reflected in the decisions in these cases also.

4. Second accused is a Doctor having considerable experience in the profession as the Director of a well-known hospital in the city of Ernakulam. He moved CrI. M.C. 351/84 : (reported in Dr. P.A. Varghese Vs. State of Kerala and Others, before this Court under 5,407 of the Cr. P.C. to transfer these two cases (C.C. 19 of 1983 and C.C. 4 of 1984) on identical allegations. That case was disposed of by the decision in Dr. P.A. Varghese Vs. State of Kerala and Others, dismissing the same Sukumaran, J. observed in the judgment:

While considering the question whether there is any reasonable basis for the apprehension stated to be entertained by the accused, a variety of factors would have to be considered. The petitioner herein is a professional man, a medical graduate, with considerable experience in his profession as the Director of a well-known hospital of the city. His frame of mind, his experience in life, and the position he occupies in society may all be reckoned while considering the scope for an apprehension which a man of his mental make up would have in the given circumstances. There cannot be any doubt that he stands on a pedestal entirely different from that of a man uninitiated into the intricacies of the worldly affairs or the functioning of various institutions including judicial institutions. May be, many are born with prejudices arising out of connection with one's own family, one's own community, social strata and even of nationality. Such prejudices are, to a large extent, neutralised by the impact of other influences. The discipline of law does play a very vital role in drastically reducing, if not entirely extinguishing, such prejudice. A judicial officer of long experience, sheds his prejudices arising out of socio-environmental factors. A person of the petitioner's status and position would be alive to this refreshing feature of the judicial

institutions of this country. It cannot therefore be expected that the petitioner would entertain a reasonable apprehension about the Magistrate for the only reason that the same Magistrate has to try other cases against him. If a Magistrate enters a finding against an accused who had already been tried and convicted by him in a previous case and on an earlier occasion, the conviction can certainly be appealed against, if circumstances justify the same. That being so, the accused cannot stultify the trial of other cases pending against him and before the same Magistrate for the only reason that some of the witnesses are common and that the allegations constituting the offences have a broad similarity. The reference to the petitioner as an "influential person" and describing him as having the "prowess provided by money, fame and status", is justified in the light of the evidence adduced in the case, and cannot indicate a prejudiced mind in the Magistrate. A discussion on sentencing policy could justifiably stimulate a judicial mind to thoughts on theories of crime and facets of penology. That circumstance, is therefore, no ground for postulating a reasonable apprehension in the mind of the accused about there being any prejudice on the part of the Magistrate in the trial of the either case. The style reflected in a judgment will necessarily have the impress of the judicial personality. In some cases the style may be elegant; and in some, ostentatious; and in yet others "familiar but not coarse". The style of the judgment, however, cannot be imagined as constituting the foundation for a reasonable apprehension in the mind of the accused.

5. SLP 622 of 1985 filed against that decision was dismissed by the Supreme Court on 9-4-1985. It is true that CrI. M.C. 351 of 1984 which resulted in Dr. P.A. Varghese Vs. State of Kerala and Others, and SLP 622 of 1985 dismissed by the Supreme Court were filed by the 2nd accused (father) alone. But both the father and sons filed T.P. (Cr.) Nos. 18, 19, 20, 37 and 38 of 1985 before the Supreme Court u/s 406 of the Cr. P.C. for the transfer of the cases outside the State of Kerala. These petitions were dismissed on 19-8-1985. On behalf of the State it was contended that even though Dr. P.A. Varghese Vs. State of Kerala and Others, may not involve any question of res judicata or issue estoppel the reasonings and the decision must have persuasive effect while disposing of these two cases. So also the Director of Public Prosecutions stated that when the Supreme Court has dismissed the transfer petitions filed by the father and sons on identical grounds the matter must be taken as concluded.

6. The argument of the counsel for the petitioners that Dr. P.A. Varghese Vs. State of Kerala and Others, was decided solely on the basis of the mental make up of the second respondent and the same cannot be applied in the case of the petitioners is devoid of merit. That was only one of the aspects considered in that decision and that was in relation to the reasonable apprehension that is likely to be entertained by him. The opinion expressed by the Magistrate about the 2nd respondent and P.W. 10 was also considered in that judgment and found insufficient to support the plea of bias or reasonable apprehension. At the time of arguments the counsel for the petitioners made it clear that whatever is stated in

the petitions there is no allegation of bias against the Magistrate and the only contention is that of reasonable apprehension based on the opinion expressed by the Magistrate and the consequent possibility of an unconscious bias. The correctness of the opinions expressed by the Magistrate for accepting the evidence of P.W. 10 as well as the correctness of the opinions expressed about the second accused in exercising the sentencing discretion were also not the subject matter of challenge before me. In fact on the basis of the evidence on record in these cases it cannot be said that the Magistrate went beyond the evidence or traversed the limits of sobriety, moderation or reserve.

7. While disposing of cases, to the extent necessary and justified by the evidence, courts may have to express opinions about witnesses or parties. If the expressions of these opinions are justified by the evidence and circumstances and if such expressions are necessary for a fair and proper disposal of the case no question of bias could be inferred. In such a situation a party may not be justified in saying that he is having an apprehension that he may not get justice in another case. A Judicial Officer may have to dispose of cases in which accused and witnesses may be common. Each case will be decided on the merits and demerits of the evidence and circumstances. By their training and experience Judicial Officers are the proper persons disciplined by law and capable of getting themselves extinguished of the conscious or unconscious prejudices, if any, entertained on account of moral convictions while disposing of cases. Especially when the parties made it clear before me at the time of arguments that they have no complaint of any bias being entertained by the Magistrate, there is no question of any reasonable apprehension justifying a move for transfer. Expression of opinion justified by the evidence and absolutely necessary for the proper disposal of a case is part of the judicial process.

That cannot disentitle or debar a Judicial Officer from trying and deciding cases in which the same accused or witnesses are involved. It is true that every accused is entitled to fairness of trial, Justice should not only be done but it should also appear to be done. A reasonable apprehension entertained by an accused that he may not get a fair deal also may equally affect the fairness of trial. But it is not each and every apprehension that an accused is likely to entertain that should form the basis of a transfer. The apprehension must be reasonable and justified by the facts and circumstances. An apprehension entertained by an accused that in the nature of the evidence he is likely to be convicted by the particular Magistrate on account of his sense of justice and morality cannot form the basis of a reasonable apprehension justifying a transfer. If a Judicial Officer who has expressed an opinion in a particular case is debarred from trying similar cases the functioning of the judiciary may some times become difficult. With due respect I am unable to subscribe to the contra view expressed in *Ram Ratan and Another Vs. State*, ; *Govind Sharan Aggarwal v. Pt. Hardeo Sharma Trivedi*, (1983) 2 SCC 268 presents a case where the justifiable reason for transfer was the rather very extra-ordinary course that seemed to have been adopted by the Judge in some previous case.

8. Whether an apprehension alleged to be entertained by an accused is reasonable and proper and whether it will affect fair trial are matters which must depend on the facts and circumstances of each case. It is not every apprehension that should form the basis of transfer. It is true that the mere fact that a special Court has been constituted for the trial of mark list cases cannot stand as an impediment in ordering transfer in genuine cases. Irrespective of that question the prayer for transfer has to be considered and decided on the merits just like a case being tried by an ordinary court. In case a transfer becomes necessary in the ends of justice and if the trial has to be by a special Court alone it is not an impossibility to have another special Court constituted.

9. But in these cases I am not satisfied that there is any reasonable basis for any apprehension that there may not be fair trial.

With due respect I am in full agreement with the views expressed in Dr. P.A. Varghese Vs. State of Kerala and Others, Admittedly on identical allegations the petitioners and their father approached the Supreme Court in T.P. (Cr.) 18 to 20 and 37 and 38. True these petitions were u/s 406 of the Cr. P.C. empowering the Supreme Court to transfer cases from one High Court to another or from a Criminal Court subordinate to one High Court to another Criminal Court of equal or superior jurisdiction subordinate to another High Court and the prayers were to transfer the cases outside the State. It is equally true that over and above denying grounds justifying transfer of the cases from the special Court, the State also contended that u/s 406 the Supreme Court cannot transfer the case within the State from one Court to another, that there is no other corresponding special Court and that the question of transfer within the State is concluded by Dr. P.A. Varghese Vs. State of Kerala and Others, and the dismissal of the SLP from it. But all the transfer petitions were dismissed by the Supreme Court though without specifying the grounds of dismissal. If the Supreme Court was satisfied of the genuineness of the grounds for transfer from the special Court nothing prevented these petitions being allowed. The dismissal of the SLP further concludes the matter even though it was by the second respondent alone.

On a careful consideration of the entire facts and circumstances I am not satisfied of any reasonable grounds for transferring the cases. Both the petitions are dismissed.