

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **TR.P.(CRL.) 5/2012 & CrI.M.A. 5166/2012 (stay)**

% **Reserved on: 24th, May, 2012**
Decided on: 29th May, 2012

AMAR SINGH YADAV

..... Petitioner

Through: **Mr. Ajay Burman, Mr. R.K. Sharma,
Mr. Aditya Shankar and Mr.
Ramandeep Bawa, Advocates.**

versus

**STATE THR. DELHI ADMINISTRATION
DELHI**

.... Respondent

Through: **Mr. Mukesh Gupta, APP for the State
with Inspector Akash Rawat, Crime
Branch.
Mr. Anurag Jain, Advocate for R-10.
Mr. T.A. Mir, Advocate for
Respondent No. 11.
Mr. Satyanarayan, Mr. Vashisth,
Advocates for Respondent No.12.**

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By this petition the Petitioner prays for setting aside of the order dated 17th April, 2012 passed by the learned Sessions Judge, Delhi dismissing the application of the petitioner seeking transfer of the trial and seeks transfer of trial in case FIR No. 356/2007 under Sections 302/120B IPC registered at PS Hauz Qazi to the Court of another learned Additional Sessions Judge.

2. The Petitioner before filing the present petition had filed an application under Section 406 Cr.P.C. before the learned Trial Court which application was heard by the learned Sessions Judge and dismissed vide the impugned order dated 17th April, 2012. In the application filed before the

learned Trial judge the grievance of the Petitioner was limited and primarily three grounds were mentioned for seeking transfer of trial to another Judge. Firstly it was stated that the Petitioner, who was examined as PW19 on 15th November, 2012 on account of his old age being 75 years and illiteracy, could not recollect the facts properly and thus could not depose the same resulting in being declared a hostile witness by the Public Prosecutor. Secondly, though the Petitioner appears on every date of hearing fixed before the court however, his presence was not marked in the proceeding sheets and thirdly, the learned Trial Court was putting unnecessary questions to the witnesses with the intention to misguide and confuse the witnesses so that the truth may not come out on the record and as such the Petitioner apprehends that the learned trial court was trying to save the accused persons. During the course of arguments before the learned Sessions Judge besides taking the pleas mentioned above the Petitioner also contended that since one of the accused persons was from a particular community to which community the learned Additional Sessions Judge trying the case also belonged, the Petitioner did not expect a fair trial. The learned Sessions Judge after hearing the parties came to the conclusion that there was no reasonable apprehension warranting transfer of the case and the allegations as set out were vague as they did not disclose as to which of the witnesses was threatened and on which date.

3. During the course of arguments before this Court learned counsel for the Petitioner besides pressing the grounds urged before the learned Sessions Judge has taken an additional ground that the accuseds in the present FIR were also accuseds in FIR No. 68/2008 under Sections 3 (1), 3 (2) and 3(4) of the Maharashtra Control Organized Crimes Act (in short 'MCOCA')

registered at PS Hauz Qazi and since the same learned Additional Sessions Judge has discharged the accuseds for offence under Section 3 of MCOCA the learned Additional Sessions Judge has pre-judged the issues and thus the Petitioner does not expect that the accused would be convicted in the abovementioned FIR. To buttress his arguments learned counsel for the Petitioner has taken me through the judgment discharging the accuseds under the MCOCA wherein the learned Additional Sessions Judge has held that the contention of the learned Special Public Prosecution that the murder of Vijay Singh Yadav was a case of contract killing is not substantiated. Reliance is placed on *Nem Chand v. State*, AIR 1953 Allahabad 99, *Ram Ratan and another v. State*, 1976 CrL. L.J.1799 and *Abdul Raoof Alias Raoof Abdul v. State of Gujarat*, (2002) 4 GLR 3252.

4. Learned APP for the State on the other hand contends that merely because the witnesses are now being examined expeditiously to ensure that the trial is concluded, the Petitioner is not satisfied. The present petition by the Petitioner is a deliberate exercise to avoid his cross-examination. Even assuming, the contentions raised by the learned counsel for the Petition to be correct that the learned Additional Sessions Judge is asking questions, it is the duty of the Court to actively take part in the trial and not sit like a silent spectator. There is no illegality in the impugned order passed by the learned Sessions Judge declining the transfer of investigation no interference by this Court is warranted.

5. Learned APP for the State has placed on record list of dates in the form of a Status Report showing the progress in the trial. According to the learned APP, the case was transferred by at least 5 Additional Sessions Judges on personal grounds. Though the charge sheet was filed on 22nd

February, 2008, the charges were framed against the accused on 16.9.2010 as the matter was being repeatedly transferred by one after another judge. The learned Additional Sessions Judge, who framed the charge examined 13 witnesses from 15.11.2010 to 23.4.2011 when an anonymous complaint was filed against the learned Additional Sessions Judge. Though both the sides stated before the learned Sessions Judge that the matter be continued before the same judge, still the learned Additional Sessions Judge thought it fit to transfer the case with following observations.

“ After that anonymous complaint and in view of the happenings in the case there is every likelihood that the complainant or the accused persons can get the feeling that judge is biased towards him. In such circumstances it would not be appropriate for me to try this case. Therefore, request that this case be transferred to some other competent jurisdiction.”

6. The case file was received on 20th July 2011 by the present Additional Sessions Judge who completed the cross-examinations of the pending witnesses and continued with the evidence. Thus, from 25th August, 2011 to 13th April, 2012 cross-examination of the already examined witnesses was done and 10 more witnesses were also examined till the Petitioner PW19, the father of the deceased moved an application for transfer of the case.

7. I have heard learned counsel for the parties.

8. On 30th April, 2012 when this matter came up for hearing, learned counsel for the Petitioner sought time to file the additional affidavit along with the documents as before this court a fresh ground was being urged i.e. the discharge of the accused for offence under Section 3 of MCOCA. On

10th May, 2012 this Court summoned the Trial Court Record. A perusal of the order sheet of the learned Trial Court reveals that the trial of this case had been transferred by at least five Judges for personal reasons and against one learned Additional Sessions Judge, anonymous letters were sent to the Hon'ble Chief Justice of India questioning the integrity of the said Judge. Though before the learned Sessions Judge, learned counsels for both the complainant and the accused stated that they had no objection to the said Judge conducting the trial, however, the learned Additional Sessions Judge thereafter recused from the matter. In view of the recusal by the Judges one after another, the trial was virtually at a stand still when the predecessor of the present Judge against whom anonymous letters were sent, framed the charge and started recording the evidence. The present learned Additional Sessions Judge took over the matter on 20th July, 2011 since then nearly 10 more witnesses have been examined and the cross-examination of the earlier examined witnesses conducted. Thus, the Petitioner has objection against both the judges who have proceeded in the matter.

9. Initially the Petitioner filed an application before the learned trial court for transfer on three grounds only as enumerated above and during the course of hearing also urged the ground that the learned Judge belongs to a particular community to which one of the accused belongs and thus the matter be transferred. Before this Court the Petitioner has set up a totally new case that since the accused have been discharged under Section 3 of MCOCA the learned Trial Court has pre-judged the issue and thus they do not expect a fair trial. It may be noted that the offence under Section 3 of MCOCA is totally an independent offence and based on previous charge sheet filed against the accused. The ingredients of the offence under Section

3 of the MCOCA are entirely different and the learned Additional Sessions Judge having dealt elaborately on the role of each accused came to the conclusion that an offence under Section 3 MOCCOA was not made out as it was difficult to draw an inference that some of the accused were running an organized crime syndicate. Though in the FIR, number of FIRs of the some of the accused were relied upon however, their charge sheet were not filed and thus on the basis of two charge sheets the learned Additional Sessions Judge held that no charge under the provisions of MCOCA was made out. Be that as it may, the present petition is not a challenge to the order of discharge of the accused for offence punishable under section 3 of MCOCA. The contention is that by passing the said order, the learned trial Court has pre-judged the present trial. If this contention is accepted then probably no trial can be conducted or concluded by a Judge who has framed a charge in that particular case because every Judge forms a prima facie opinion while framing the charge that there is strong suspicion of the accused having committed the offence.

10. In *G.X. Francis and others vs. Banke Bihari Singh and another*, AIR 1958 SC 309 it was held:

“8. Among the grounds of transfer are certain allegations made against the learned trying Magistrate. It seems that a complaint was made against the complainant by certain Christians at Jashpurnagar early in 1955 in Criminal Case No. 5 of 1955 for desecrating a Christian church there. The first court convicted him but released him under Section 562 of the Criminal Procedure Code. The complainant appealed and the appeal was heard by the Magistrate who is trying the present matter, Shri K.T. Damle. He disbelieved the prosecution evidence and, relying on the defence evidence, acquitted the complainant on November 6, 1956, in Criminal Appeal No. 1 of 1956. It is said

that this indicates bias or, at any rate, creates a reasonable apprehension of bias in the minds of the accused. We are unable to draw any such inference nor do we think that an apprehension based on such a ground is reasonable. We discourage such accusations and would be extremely slow to allow a transfer on such a ground. We do not think it necessary to call upon the learned Magistrate for an explanation because we reject this ground outright.”

11. The reliance of the learned counsel for the Petitioner on *Nem Chand* (Supra) and *Ram Ratan* (Supra) is misconceived. It may be noted that the parameters of evidence required in a case under MCOCA and for an offence of murder are entirely different. Even assuming, the learned Trial Court while discharging the accused for offence under Section 3 MCOCA held that the murder of the petitioner’s son was not a case of contract killing that does not mean that the learned trial Court has pre-judged the issue. In a case of murder if other evidence is available then the evidence of money trail takes a back seat and need not be proved in each case. Similarly in *Abdul Raoof* (Supra), the High Court of Gujarat was dealing with the two-Sessions trial where the evidence was common and facts were identical. Thus, I find no merit in the contention of the learned counsel for the Petitioner.

12. Transfer of a case cannot be granted for a mere apprehension of litigant. It is the duty of the court to ensure that every applicant get fair justice and while considering the case for transfer the yardstick to be applied is the interest of justice. Merely because a Judge while examining the witnesses and proceeding with the trial participates in it and does not sit as a silent spectator, it cannot be said that he has overawed the witnesses. Not one incident has been demonstrated by the Petitioner to show that questioning by the learned trial court has interfered in the judicial process.

As regard the Petitioner himself being examined as PW19 it is only stated that because of his age he did not recollect the facts, thus could not state the complete facts resulting in him being declared a hostile witness. In *Zahira Habibulla H. Sheikh and another vs. State of Gujarat and others*, 2004 (4) SCC 158 it was held:

“35. This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crimes being public wrongs in breach and violation of public rights and duties, which affect the whole community as a community and harmful to the society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interests of society is not to be treated completely with disdain and as persona non grata. Courts have always been considered to have an over-riding duty to maintain public confidence in the administration of justice - often referred to as the duty to vindicate and uphold the 'majesty of the law'. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a Court of law in the future as in the case before it. If a criminal Court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the Judges as impartial and independent adjudicators.”

13. The Hon'ble Supreme Court in *Maneka Sanjay Gandhi vs. Rani Jethmalani*, AIR 1979 SC 468 has held:

“2. 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 a party or easy availability of legal services or like minigrievances. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment, is necessitous if the Court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. We have to test the petitioner's grounds on this touch-stone bearing in mind the rule that normally the complainant has the 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 court may weigh the circumstances.”

14. Further in *Gurcharan Das Chadha vs. State of Rajasthan*, AIR 1966 SC 1418 the Hon'ble Supreme Court has laid down the test of reasonable apprehension:

“13.....The law with regard to transfer of cases is well-settled. 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. However, a mere allegation that there is apprehension that justice will not be done in a given case does not suffice. The Court has further to see whether the apprehension is reasonable or not. To judge of the reasonableness of the apprehension the state of the mind of the

person who entertains the apprehension is no doubt relevant but that is not all. The apprehension must not only be entertained but must appear to the Court to be a reasonable apprehension.

15. The transfer of a case from one court to another on mere presumptions and possible apprehensions is clearly an abuse of the process. Transfer of a case indirectly casts doubt on the competence and integrity of the Judge from whom the case is sought to be transferred. If the contention of the Petitioner is accepted that the trial be transferred because the Judge belongs to a particular community to which one of the accuseds belongs then every Judge in this Country would be incompetent to hear a number of cases. Further all accused are in judicial custody. Their right to a speedy trial cannot be violated at the instance of the Petitioner, the father of the deceased, who has grievance against the judges, who proceed with the trial expeditiously.

16. Petition and application are accordingly dismissed. Trial Court record be sent back forthwith.

(MUKTA GUPTA)
JUDGE

MAY 29, 2012
‘vn’