

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPLICATION NO.92 OF 2015**

**MOHD. JAVED NOOR HASAN KHAN & ANR.)...APPLICANTS**

**V/s.**

**THE STATE OF MAHARASHTRA )...RESPONDENT**

None for the Applicant.

Mrs.Anamika Malhotra, APP for the Respondent – State.

PI.B.V.Parab, ATS / Maharashtra, present in court.

**CORAM : ABHAY M. THIPSAY, J.**

**DATE : 6<sup>th</sup> APRIL 2015.**

**P.C. :**

1            Since this application for transfer of the case was received from prison, an advocate was directed to be appointed under the Free Legal Aid Scheme, to prosecute the same. However, such appointed advocate is not present.

2           The transfer of the case is sought on the ground that the Presiding Officer has a bias against the applicants. One of the reasons on which this belief is entertained by the applicants, is that, the applicants are not being produced before the court, and that, the evidence is being recorded without the applicants being physically produced in the court. The applicants are permitted to remain present at the time of recording of evidence only by video conferencing. According to the applicants, this creates difficulty for them in understanding the proceedings. It also appears to be the grievance of the applicants that permitting them to remain present during the trial only by video conferencing, deprives the applicants of a proper opportunity to consult their advocates and discuss the matter with them.

3           The grievance of the applicants seems to be justified. There would be a lot of difference between the actual physical presence in the court when the recording of evidence is going on and the presence through video conferencing.

4           The only reason given for non-production of the applicants before the trial court and keeping them 'present' only through video conferencing, is that 'the police are not having adequate force to secure the production under safe and sure custody.'

5           This reason is not acceptable.

6           The applicants are facing trial in respect of offences which are triable by a Magistrate. It would be the duty of the State to ensure that the applicants are produced before the court on the date of hearing of the case, particularly when the evidence is to be recorded. Only the evidence of a formal nature can be permitted to be recorded through video conferencing and not vital and important evidence. There is no such difficulty which would justify the non-production of the applicants before the trial court during the recording of evidence. The applicants are lodged in a prison in Mumbai and the trial is also proceeding in a court at Mumbai.

7           I have gone through the report received from the learned Magistrate. The learned Magistrate ought not to have accepted the plea of the State to have the evidence recorded by video conferencing. The learned Magistrate ought not to have accepted the plea of the State that it finds it 'difficult to arrange for the production of the accused persons regularly.' The Magistrate ought not to have observed in his report that 'it would not be feasible on every date of hearing to secure their presence before the court.' By saying so, the learned Magistrate is underestimating the power and strength of the State machinery.

8           Though considering the fact that out of nine prosecution witnesses, seven have already been examined, I am not inclined to transfer the matter, particularly because, reliance can safely be placed on the statement of the learned Magistrate that he has no grudge or prejudice against the applicants and any other accused, I think it necessary to give directions to the police to ensure that the applicants and the other accused in the said

case are produced before the court on all the dates of hearing, as may be fixed by the Magistrate. This be brought to the notice of the Commissioner of Police, BrihanMumbai, who may make special arrangements, if necessary, to ensure the production of the applicants and the other accused in this case, before the Magistrate.

9            In his report, the learned Magistrate has mentioned that the applicants' application for seeking transfer of the case was rejected by this court by its order dated 29<sup>th</sup> January 2015 in Bail Application No.2655 of 2014. This statement is not correct. A reading of the order indicates that this court did not deal with the issue of the transfer at all. The learned Magistrate was expected to be more careful in submitting his report. This be brought to the notice of the learned Magistrate, who shall be asked to acknowledge the receipt of this order.

10           In the result, the application for transfer is rejected.

11           However, the police are directed to ensure that the applicants are physically produced before the learned Magistrate on all dates of hearing, as may be fixed by the Magistrate.

12           These directions be brought to the notice of the Commissioner of Police, BrihanMumbai, who may, if necessary, make special arrangement to ensure production of the applicants before the learned Magistrate on the dates of hearing.

13           The application is disposed of accordingly.

14           A copy of this order be sent to the applicants in prison.

**(ABHAY M. THIPSAY, J.)**