

Ladda

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION No. 468 of 2015

Mehendi Qasim Sheikh and Anr ..Applicants.

Versus

The State of Maharashtra ..Respondent.

Ms Apeksha Vora, Advocate for the Applicants.

Mrs P.P. Bhosale, APP for the State.

CORAM : A.R. JOSHI, J

DATE : 27th August, 2015.

P.C. :

- 1) Heard learned appointed Counsel for the applicant original accused in Sessions Case No. 290/2011.
- 2) Initially, present application was filed as a Criminal Revision Application No. 350 of 2015. However, this Court vide order dated 31st July, 2015 directed the present application to be registered as an application under section 407 of Cr.P.C. Said order was passed by this Court (Coram M.L. Tahaliyani, J). Thereafter, the present application was required to be numbered as Criminal Application No. 468 of 2015. Earlier on hearing the learned appointed Counsel, an ad-interim relief was granted by this Court on 31st July, 2015 directing the trial Court

not to proceed further with the matter.

3) The present application for transfer is mainly on the ground that the concerned trial Court is bias and the Trial Court not following due procedure of law during the trial. The arguments were heard at length on the earlier date i.e. 25th August, 2015 and when the matter was taken up for dictating the order, the learned appointed Counsel prayed for time to get instructions from the family members of the applicant no.1 whether to withdraw the application and / or to proceed further in the matter pending before the Sessions Court. However, today it is submitted by the learned Counsel that she has no instructions to withdraw the present application and as such the present order is passed after hearing the submissions.

4) Initially, in November, 2010, CR No. 197 of 2010 was lodged against the present applicant no.1 for the offences punishable under different Sections of IPC and mainly for offence under section 376 of IPC. Even the applicant is also charged for the offence under Section 14 of the Foreigners Act, 1946. As per the report of the P.I. Bagwe, the applicant is a Bangladeshi Citizen. The allegations against the present applicant were that he had committed forcible sexual intercourse and molested seven girls of one family. Out of said seven girls, six are the minor girls. Further allegations were that for a

period of four to five years at different places and at different times such incidents of forcible sexual intercourse took place. Various applications were made during the trial by the applicant no.1 for grant of bail but without any success. Presently, the applicant no.1 is in custody and apparently represented by appointed Counsel. Surprisingly said Counsel is present applicant no.2 in this transfer application. This aspect is dealt in detail in the later part of this order.

5) The trial started in the year 2012 after framing of the charge in the year 2011. Apparently, the trial lingered for three years and presently the trial is at the fag end and it is so mentioned by the Police Inspector, one Santosh Bagwe, who has filed an affidavit in the present application objecting for the transfer of the case to another Court. Said PI. Bagwe is the Officer attached to the Crime Branch, D.C.B. C.I.D., Unit-I, Mumbai.

6) In the affidavit, it is further disclosed that initially the present applicant had engaged his own advocate one Mr Wahab Khan. However, subsequently, said Advocate withdrew his appearance and then another Advocate Mr V.D.More under the Legal Aid Scheme and one more Advocate Mr Jadhwar was appointed as Amicus Curiae. Thereafter, again in March, 2013 the present applicant no.1 filed an application for appointment

of his earlier Advocate Mr Wahab Khan. However, this request was denied by said Advocate. But he offered to assist the trial Court as Amicus Curiae. As such, Mr Wahab Khan was appointed as Amicus Curiae. The record of the trial Court shows that earlier said appointed Amicus Curiae Mr Jadhwar was replaced by said Advocate Wahab Khan. Thereafter, again the applicant filed an application for engaging a private advocate, but as the applicant no.1 failed to engage advocate, the trial Court appointed the present learned Counsel Ms Apeksha Vora to act as Amicus Curiae for the Court. On this also on or about 3rd December, 2013 the applicant prayed before the learned trial Court that again he wanted to engage a private lawyer and did not want this Amicus Curiae which was appointed by the Court. Thereafter, again on or about 26th February, 2014 an application was filed by Amicus Curiae before the trial Court mentioning that the present applicant no.2 wanted to withdraw herself from the matter. It is also further mentioned in the affidavit filed by the Police Inspector Shri Santosh Bagwe that said application was opposed by the learned APP stating that the present applicant no.1 /original accused is purposely delaying the proceedings. However, thereafter it so happened that the learned Amicus Curiae was then requested by the accused to be his private advocate and as such she continued to defend as an advocate for and on behalf

of the present applicant no.1. At present, this Court does not deem it necessary to opine on the propriety of appointing Amicus Curiae before Trial Court, in a pending Sessions Trial.

7) It is a factual position that the charge was framed in October, 2011 and thereafter till date about 34 witnesses have been examined. Under this factual position, the learned Counsel for the applicant stated that the Trial Court, which is seized of the sessions case, is not allowing the cross-examination of witnesses in a particular manner.

8) The learned Counsel drew attention of this Court towards the order passed by this Court dated 3rd December, 2014 in earlier Criminal Revision Application No. 405/2014 (Coram M.L. Tahaliyani,J). By the said order, the directions were given to the trial Court to recall PW nos. 2, 4, 6 and 25 and the cross-examination of these witnesses on behalf of the accused was allowed. Said Criminal Revision Application was accordingly disposed of.

9) Now, in fact, the present application as per the title show that it is preferred by the two applicants. Applicant no.1 is the original accused who is facing the trial in Sessions Case No. 290 of 2011 and in fact applicant no.2 is the learned Counsel Ms Apeksha Vora who is representing the said accused in the Sessions Court and also who has argued the present

application for transfer. When this absolutely abnormal procedure is brought to the notice of the learned Counsel as to what had prompted her to be applicant no.2 for transfer of the sessions case, she stated that even she is also aggrieved person for not allowing to conduct the cross-examination of the witnesses in the manner she was taking the cross-examination and even the trial court was objecting her each and every such question in the cross-examination. Though it is the answer given by the learned Counsel, apparently there is no cause for the Counsel to be a party herself in such application for transfer. Needless to mention that the learned Counsel was always to bear in mind the boundary line between the rights of her clients and the personal rights of the Counsel. In fact, the role adopted by the Counsel as an applicant no.2 in the present application is in fact unforeseen. However, still the present application is being taken as application under section 407 of Cr.P.C. and preferred by the accused facing the trial in Sessions Case No. 290 of 2011. Without further commenting on this strange circumstance as to the defence Counsel who herself is posing as applicant no.2, suffice it to say that there is no ground made out in the application for transfer of the criminal case. Needless to mention that the learned Sessions Court can deal with the matter appropriately in accordance with law by taking note of the order of this Court while allowing recall of

the witnesses Nos. 2, 4, 6 and 25 for their further cross-examination.

10) Needless to mention that if at all any question in the cross-examination is not required to be put and objected by the trial Court definitely within the procedure prescribed under the law, the trial Court has such power to curtail the cross-examination with appropriate order. However, exercise of such power by the trial Court during the continuance of a Sessions Case, cannot be a sole ground for transfer of the pending sessions case to another Court and mainly when 34 witnesses are already examined in a matter having serious allegations against applicant no.1.

11) During the arguments, learned counsel placed much reliance on the authority reported in **2015 (3) Crimes 161 (All.) Amit Vs. State of Uttar Pradesh and ors.** In fact, on the facts of the present matter at hand, i.e. the transfer application, it can be said that the ratio of the cited authority cannot be taken shelter of. In the said authority before the Allahabad High Court, the Sessions Case for offence under sections 302, 307 and other offences was to be transferred to another Court and the application was made before the Sessions Judge on the ground of personal bias of the Presiding Officer. The Sessions Judge dismissed the said application even without calling the

comments of the Presiding Officer taking a view that the allegations were patently absurd and were improbable and deserves to be rejected. Under those facts, it was held by the Allahabad High Court that the transfer application ought to have been decided after inviting the comments of the Presiding Officer.

12) In the considered view of this Court, each and every matter of transfer is required to be dealt with on the backdrop of its own facts and in that event this Court is dealing with the present matter in the light of the factual position detailed earlier.

13) In the result, there is nothing to entertain the present application. Same is accordingly dismissed with a direction to the learned Sessions Court to deal with the pending session case expeditiously in accordance with law.

14) The oral request on behalf of applicant no.1/accused for continuation of the stay to the proceeding before the trial Court on the ground that the applicants wants to challenge the present order before the Hon'ble Apex Court, is rejected.

15) Office to communicate this order to the concerned Sessions Court immediately.

(A.R. JOSHI, J.)