

*** THE HON'BLE SRI JUSTICE U. DURGA PRASAD
RAO**

+Transfer Criminal Petition No.354 of 2014

%26.02.2015

Between:

Guntuku Vijay @ Vijay Kumar.
....Petitioner

AND

State of Telangana,
Rep. by S.H.O, P.S. Gajwel,
Medak District.
Respondent

....

! Counsel for Petitioner : Sri J.P. Srikanth

^ Counsel for Respondent : Public Prosecutor

< Gist:

> Head Note:

? Cases referred:

- 1) 1989 Cri.L.J. 563 (Calcutta)
- 2) 1994 Law Suit (Guj) 346
- 3) 1997 Cri.L.J 1401 (Calcutta)
- 4) 1984(2) Crimes 50

THE HON'BLE SRI JUSTICE U.DURGA PRASAD RAO

Transfer Criminal Petition No.354 of 2014

ORDER:

In this petition filed under Section 407 Cr.P.C, the

petitioner/ accused seeks to transfer Sessions Case No.432 of 2013 from the Court of VI Additional District and Sessions Judge, Siddipet wherein the trial is under way to the Court of Principal District Judge, at Sangareddy, Medak District.

2) The petitioner/accused is facing the charge under Sec.302 I.P.C on the accusation that suspecting the fidelity of his wife—Rajitha he killed her by inflicting injuries with an axe. The case is undergoing trial before the learned VI Additional District and Sessions Judge, Siddipet and PW.1 was examined. At this stage, the petitioner filed the present transfer application mainly casting aspersions on the attitude of the learned Presiding Officer which according to the petitioner/accused is biased towards him. In this context, he narrated certain instances in his transfer application. Precisely they are:

i) Though PW.1 did not specifically depose the contents of Ex.P.1 and 161 Cr.P.C statement, the Presiding Officer suggested the contents inspite of the objections raised by learned counsel for accused.

ii) During the cross-examination of PW.1, when important points which are favourable to the defence side are sought to be elicited through PW.1 by the defence counsel, the Presiding Officer interdicted and told PW.1 not necessary to answer and did not record the answers. Similarly, when the defence counsel sought to elicit the

events that took place prior to the marriage of the deceased and accused and the attitude of the deceased towards him and her relation with one Nalla Ravinder etc., the Presiding Officer suggested PW.1 not necessary to answer the questions and did not record the answers.

iii) When the defence counsel sought to prove the *alibi* plea through PW.1, Presiding Officer raised objection in high voice stating as if the accused was guilty of causing murder of his wife.

Apart from above, the petitioner/accused mentioned some other instances of Presiding Officer making unwarranted intrusion in trial. Thereby, he felt that fair trial may not be conducted and he may not be able to establish his defence. On this ground, he sought for transfer of the case. He relied upon the following decisions:

i) ***State of W.B vs. Gangadhar Dawn and others***^[1]

ii) ***Musa Mahammad Malek vs. State of Gujarat***^[2]

iii) ***In re: Smt. Tarulata Kala***^[3]

3) Heard both sides.

4) Learned Public Prosecutor opposed the transfer application.

5) The point for determination is:

“Whether there are merits in this petition to allow?”

6) **POINT**: During the course of hearing, it came to the notice of this Court that the petitioner/accused has filed the transfer application straightaway before the High Court without filing similar application before the Sessions Court in compliance with the proviso to sub-section(2) of Section 407 Cr.P.C. The said proviso reads thus:

“The High Court may act either on the report of the lower Court, or on the application of a party interested, or on its own initiative:

Provided that no application shall lie to the High Court for transferring a case from one Criminal Court to another Criminal Court in the same sessions division, unless an application for such transfer has been made to the Sessions Judge and rejected by him.”

a) When the maintainability of the transfer application before High Court in the light of the restriction imposed under the proviso is brought to the notice of the petitioner, it was argued that in view of Section 409(2) Cr.P.C, the Sessions Court cannot entertain a transfer application and transfer the case once the trial is commenced before the concerned Court and as in the instant case, trial was already commenced and the evidence of PW.1 was completed, the petitioner could not file the transfer application before the Sessions Court and hence he directly approached the High Court.

b) On a keen perusal of Sections 407, 408 and 409

Cr.P.C, I am afraid, his explanation is not correct. Sections 407, 408 and 409 Cr.P.C read thus:

Section 407 - Power of High Court to transfer cases and appeals

(1) Whenever it is made to appear to the High Court-

(a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto; or

(b) that some question of law of unusual difficulty is likely to arise; or

(c) that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice;

it may order--

(i) that any offence be inquired into or tried by any Court not qualified under sections 177 to 185 (both inclusive), but in other respects competent to inquire into or try such offence;

(ii) that any particular case, or appeal, or class of cases or appeals, be transferred from a criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction;

(iii) that any particular case be committed for trial to a Court of Session; or

(iv) that any particular case or appeal be transferred to and tried before itself.

(2) The High Court may act either on the report of the lower Court, or on the application of a party interested, or on its own initiative:

Provided that no application shall lie to the High Court for transferring a case from one criminal Court to another criminal Court in the same sessions division, unless an application for such transfer has been made to the Sessions Judge and rejected by him.

(3) Every application for an order under sub-section (1) shall be made by motion, which shall, except when the applicant is the Advocate-General of the State, be supported by affidavit or affirmation.

(4) When such application is made by an accused person, the High Court may direct him to execute a bond, with or without sureties, for the payment of any compensation which the High Court may award under sub-section (7).

(5) Every accused person making such application shall give to the Public Prosecutor notice in writing of the application, together with a copy of the grounds on which it is made; and no order shall be made on the merits of the application unless at least twenty-four hours have elapsed between the giving of such notice and the hearing of the application.

(6) Where the application is for the transfer of a case of appeal from any subordinate Court, the High Court may, if it is satisfied that it is necessary so to do in the interests of justice, order that, pending the disposal of the application, the proceedings in the subordinate Court shall be stayed, on such terms as the High Court may think fit to impose:

Provided that such stay shall not affect the subordinate Court's power of remand under section 309.

(7) Where an application for an order under sub-section (1) is dismissed, the High Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding one thousand rupees as it may consider proper in the circumstances of the case.

(8) When the High Court orders under sub-section (1) that a case be transferred from any Court for trial before itself, it shall observe in such trial the same procedure which that Court would have observed if the case had not been so transferred.

(9) Nothing in this section shall be deemed to affect any order of Government under section 197.

Section 408 - Power of Sessions Judge to transfer cases and appeals

(1) Whenever it is made to appear to a Sessions Judge that an order under this sub-section is expedient for the ends of justice, he may order that any particular case be transferred from one Criminal Court to another Criminal Court in his sessions division.

(2) The Sessions Judge may act either on the report of the

lower Court, or on the application of a party interested or on his own initiative.

(3) The provisions of sub-sections (3), (4), (5), (6), (7) ,and (9) of section 407 shall apply in relation to an application to the Sessions Judge for an order under sub-section (1) as they apply in relation to an application to the High Court for an order under subsection (1) of section 407, except that sub-section (7) of that section shall so apply as if for the words "one thousand rupees" occurring therein, the words "two hundred and fifty rupees" were substituted.

Section 409 - Withdrawal of cases and appeals by Sessions Judges

(1) A Sessions Judge may withdraw any case or appeal from, or recall any case or appeal which he has made over to, any Assistant Sessions Judge or Chief Judicial Magistrate subordinate to him.

(2) At any time before the trial of the case or the hearing of the appeal has commenced before the Additional Sessions Judge, as Sessions Judge may recall any case or appeal which he has made over to any Additional Sessions Judge.

(3) Where a Sessions Judge withdraws or recalls a case or appeal under sub-section(1) or sub-section (2) he may either try the case in his own Court or hear the appeal himself, or make it over in accordance with the provisions of this Code to another Court for trial or hearing, as the case may be.

Under Section 407 Cr.P.C, power is conferred on High Court to transfer cases and appeals from one Court to another Court under the circumstances mentioned in the said section. Similar power is conferred on a Sessions Court by Section 408 Cr.P.C to transfer cases and appeals from one Court to another Court in the Sessions Division. The power to transfer conferred on High Court and Sessions Court under Sec.407 and 408 Cr.P.C. is the judicial power. Then Section 409 Cr.P.C is concerned, it is a well known fact that

under Section 194 Cr.P.C, an Additional Sessions Judge or Assistant Sessions Judge shall try the cases when they are made over by the Sessions Judge. They cannot independently take cognizance of the offences to try. The power to make over is conferred on the Sessions Judge under Section 194 Cr.P.C. This is the administrative power. It is in this context Section 409 Cr.P.C lays down that Sessions Judge who has the power to make over the cases can withdraw any case or appeal or recall any case or appeal which he has made over to any Assistant Sessions Judge or Chief Judicial Magistrate subordinate to him. Sub-section (2) of Section 409 Cr.P.C lays down that when a Sessions Judge made over any case or appeal to any Additional Sessions Judge, he can recall such case or appeal at any time before the trial of the case or the hearing of the appeal is commenced and not thereafter. Thus the powers under Sections 408 and 409 Cr.P.C are concerned, there is a distinction. Section 408 Cr.P.C is not governed by Section 409(2) Cr.P.C. This aspect has been clearly delineated by the Full Bench of Allahabad High Court in a renowned judgment reported in **Radhey Shyam and another vs. State of U.P.**^[4] In that case, the following reference was made by a Single Judge:

“Whether a Sessions Judge has no power under Section 408 of the new Code of Criminal Procedure to transfer a part heard case or appeal from the court of an Additional Sessions Judge to some other competent court within his sessions division and the limitations imposed under

Section 409 Sub-clause (2) of the new Code are applicable in exercise of the power of transfer conferred under Section 408 of the new Code?”

The said reference was answered by the Full Bench.

It was observed thus:

Para 15: The power conferred by Section 408(1) Code of Criminal Procedure on the Sessions Judge to transfer a case from one Criminal Court to another Criminal Court in his Sessions Division if it is expedient for the ends of justice and a similar power conferred on the High Court by Section 407(1) Code of Criminal Procedure on an application of a party interested, is judicial and not administrative, as Sub-sections (3), (4), (5), (6), (7) and (9) of Section 407 Code of Criminal Procedure are applicable to both the Sessions Judge as well as the High Court. It is clear from the aforesaid Sub-sections that the transfer of a case from one Additional Sessions Judge to another Additional Sessions Judge in the same sessions division by the Sessions Judge as well as the High Court is not done administratively in connection with the distribution of business but judicially if it is expedient in the interest of justice after hearing the parties.

Para 16: The power conferred on the Sessions Judge under Section 408(1) Code of Criminal Procedure to transfer a case or an appeal pending in the Court of an Additional Sessions Judge to another Additional Sessions Judge in his sessions division whether its hearing has commenced or not, is thus an independent judicial power which is not subject to the bar imposed by Section 409(2) Code of Criminal Procedure on the administrative power of the Sessions Judge of recalling a case or an appeal from an Additional Sessions Judge after the trial of the case or hearing of the appeal has commenced.

Para 17: The proviso to Sub-section (2) of Section 407 Code of Criminal Procedure which bars an application to the High Court for the transfer of a part heard trial or an appeal from one Additional Sessions Judge to another

Additional Sessions Judge in the same sessions division unless such an application has been made to the Sessions Judge and rejected by him, is also not subject to the bar imposed on the power of the Sessions Judge by Section 409(2) Code of Criminal Procedure to recall a case from an Additional Sessions Judge after the trial of the case or the hearing of an appeal has commenced, which, as said earlier, is purely administrative whereas the power to transfer a part heard trial or an appeal from one Additional Sessions Judge to another Additional Sessions Judge in the same sessions division on an application of a party interested by the Sessions Judge and also by the High Court is judicial and is to be exercised if it is expedient for the ends of justice.”

Having observed thus, the Full Bench passed the following order:

“Para 21: For the reasons given above our answer to the question referred to us is that the Sessions Judge is empowered under Section 408 Code of Criminal Procedure to transfer a part heard case or appeal from a court of an Additional Sessions Judge to another competent Court within his sessions division if it is expedient in the interest of justice and the limitations imposed under Section 409(2) Code of Criminal Procedure are not applicable in exercise of the power of transfer conferred under Section 408 Code of Criminal Procedure.”

In the light of above decision, it is clear that Section 408 Cr.P.C stands apart from Section 409 Cr.P.C. Therefore, the petitioner has to invariably approach the Sessions Court for transfer of the case before approaching the High Court as provided in the proviso to Section 407(2) Cr.P.C. Since in the instant case, the said procedure is not followed, the present application is not maintainable. Hence, the petition is

liable to be dismissed. The decisions cited by the learned counsel have no application. In view of non-maintainability of the petition, in my view, the merits of the petition need not be discussed.

7) In the result, this Transfer Criminal Petition is dismissed.

As a sequel, miscellaneous petitions pending, if any, shall stand closed.

U.DURGA PRASAD RAO, J

Date: 26-02-2015

Note: L.R Copy to be marked: Yes / No
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- [\[1\]](#) 1989 Cri.L.J. 563 (Calcutta)
 - [\[2\]](#) 1994 Law Suit (Guj) 346
 - [\[3\]](#) 1997 Cri.L.J 1401 (Calcutta)
 - [\[4\]](#) 1984(2) Crimes 50