

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.46220 of 2016

Arising Out of PS.Case No. -218 Year- 2014 Thana -MOTIHARI TOWN District-
EASTCHAMPARAN(MOTIHARI)

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Ram Babu Prasad, Son of late Rajendra Prasad, resident of Panch Mandir Chowk,
Visasti Patti, P.S. Motihari Town, District East Champaran.

.... Petitioner/s

Versus

1. The State of Bihar
2. Shambhu Prasad
3. Suresh Prasad

Both sons of Baiju Prasad, resident of Mohalla Amlapatti, Dharamsamaj Road, P.
S. Town, District East Champaran

.... Opposite Party/s

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Appearance :

For the Petitioner/s	:	Mr. Ajay Thakur, With Mr. Nitesh Kumar, Advocates
For the Opposite Party/s	:	Mr. Uma Kant Shukla, Sr. Advocate With Mr. Sangeet Deokuliar
For the State	:	Smt. Sucheta Yadav, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

ORAL JUDGMENT

Date: 13-12-2016

The petitioner is the Informant of Motihari Town P.

S. Case No. 218 of 2014 registered for the offences punishable under Sections 302 read with 120B of the Indian Penal Code and Section 27 of the Arms Act. At a trial being Sessions Trial No. 611 of 2015, arising out of said FIR, the Opposite parties No. 2 and 3 stand charged of the offence punishable under the aforesaid Sections of the Indian Penal Code and the Arms Act. After closure of the evidence and completion of arguments, the said case has been fixed for judgment, by the Court of learned 14th Additional Sessions Judge, East Champaran, Motihari.

2. The petitioner has filed the present application



under Section 407 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the **Code**), seeking transfer of the said Sessions Trial No. 611 of 2015 from the Court of learned 14th Additional Sessions Judge, East Champaran, Motihari to any other Court of equal jurisdiction under the judgeship of East Champaran, Motihari, on the plea that the petitioner has reasonable apprehension that the petitioner will not get justice by the said trial Court.

3. In order to appreciate the core issue involved in the present case, it would be apt to briefly take note of certain essential and relevant facts.

4. The petitioner lodged a written report with the Town police Station, Motihari with an allegation that on 27.04.2014 at 11.30 at night, he was returning from a marriage party. Ahead of him was Amit Kumar (deceased) in a motorcycle and he was behind him in another motorcycle with his nephew. In the meantime, six persons in two motorcycles came out from the nearby lane and ordered to open fire whereafter Shambhu Prasad (Respondent No.2) and his son Rohit Kumar (Respondent No.3) started indiscriminate firing on the deceased as a result of which the deceased fell down, whereafter, all the accused persons started fleeing in their



motorcycles. On cry having been raised, one Bishwanath Prasad and his sons signalled the accused persons to flee, whereafter they closed their door. Shambhu Prasad and his son Rohit Kumar, before leaving the site confirmed as to whether the deceased was dead or not. Seizure of a sum of Rs. 45 lacs belonging to Shambhu Prasad for which he had considered the deceased to responsible and used to threaten him, has been described in the written report, as the motive behind killing of the deceased.

5. Upon completion of investigation, the police on 25.07.2014 submitted charge-sheet against Opposite parties No. 2 and 3 and continued further investigation. On the basis of the said charge-sheet, the learned Chief Judicial Magistrate, East Champaran, Motihari took cognizance of the offence and committed the case to the Court of Sessions, whereafter; on being transferred, the case came in the Court of learned 14th Additional Sessions Judge, Motihari, giving rise to Sessions Trial No. 611 of 2015. As has been noted, after submission of the charge-sheet against Opposite parties No. 2 and 3, the police had continued investigation. Subsequently, the police submitted another charge-sheet on 15.09.2015 against one Mukesh Kumar Yadav as the author of the crime. It is the case of the petitioner



that Mukesh Kumar Yadav is being tried separately and, therefore, the details of trial on the basis of the second charge-sheet have not been discussed in the present application seeking transfer of the case.

6. It is the case of the petitioner that at the trial, which commenced on the basis of the earlier charge-sheet(Charge-sheet No. 134 of 2012) all the prosecution witnesses were examined including the doctor and the Investigating Officer, except one Chandan alias Victor, who had gone outside.

7. It is the case of the petitioner that further investigation by the police after submission of the charge-sheet against Opposite parties No. 2 and 3 was conducted under the influence of the Opposite parties No. 2 and 3 with a view to create evidence that they were not present at the spot and to negative the entire case of the prosecution said further investigation has been done by another Investigating Officer.

Be it noted that the investigation into the case which had continued after submission of charge-sheet against Opposite parties No. 2 and 3 was being conducted by another Investigating Officer, Ajay Kumar, who submitted supplementary charge-sheet against said Mukesh Kumar Yadav.



8. It is the further case of the petitioner that though Mukesh Kumar Yadav was facing another trial on the basis of subsequent charge-sheet No. 462 of 2015, in the present trial, the trial Court was virtually insisting to examine such witnesses, who were listed witnesses in the supplementary charge-sheet, which was filed against Mukesh Kumar Yadav.

9. The prosecution, according to the petitioner, did not want to examine those witnesses cited in the second or supplementary charge-sheet. The learned Public Prosecutor conducting the case of the prosecution had filed a petition on 29.08.2016 to the effect that prosecution did not want to examine prosecution witnesses listed in supplementary charge-sheet, claims the petitioner.

10. Learned trial Court by an order, dated 20.04.2016 had, however, rejected the said petition filed by the prosecution and directed the prosecution to examine those witnesses also, who had been mentioned in the supplementary charge-sheet, which was filed against Mukesh Kumar Yadav, who was facing a separate trial arising out of the same F.I.R. The petitioner challenged the said order, dated 20.04.2016 before this Court through Criminal Misc. No. 23340 of 2016 (Ram Babu Prasad Vs. State of Bihar and ors). This Court by an



order, dated 05.08.2016 passed in the said case set aside the order, dated 20.04.2016, holding that the Court could not direct the prosecution to produce witnesses other than those whom the prosecution intended to produce. This Court further held, by the order, dated 05.08.2016, that the trial Court was not competent to reject the petition of the prosecution showing disinclination from examining certain witnesses as prosecution witnesses.

11. The Investigating Officer, who had submitted first charge-sheet being Charge-sheet No. 134 of 2015, which had given rise to Sessions Trial No. 611 of 2015 namely, Dharamjeet Mahto was examined as P.W. 18 at the said trial. Fact remains that the Investigating Officer continued investigation Mr. Ajay Kumar filed his attendance in the Court, who has also been examined as witness at the said trial No. 611 of 2015.

12. The dispute lies here. It is the case of the petitioner that a petition was filed by the “prosecution” on 29.08.2016 in Sessions Trial No. 611 of 2015 that since the main Investigating Officer had already been examined in the present case, Ajay Kumar, who is the Investigating Officer of the further investigation, was not required to be examined and accordingly, recording of evidence of Ajay Kumar was not warranted in the present case. The so-called petition, said to have been filed on



behalf of the “prosecution” has been brought on record by way of Annexure-5 to the present application. On perusal of the said Annexure-5, it is easily evincible that the said application was not filed on behalf of the State by the Public Prosecutor or Additional Public Prosecutor; rather, it was filed by the petitioner himself describing it to be an application on behalf of the prosecution. The petitioner being an informant of the case made a prayer before the trial Court that there was no necessity of examination of Ajay Kumar as a witness since the accused against whom he had submitted charge-sheet was not put on trial in the concerned Sessions Trial No. 611 of 2015. He also mentioned in his application that the prosecution had got examined all the prosecution witnesses and, therefore, the case of the prosecution should be closed. Notice of the said application appears to have been given to the learned Additional Public Prosecutor but by no means the said application can be described as an application filed by or at the instance of Public Prosecutor. It is the case of the petitioner that by an order, dated 29.08.2016, the learned trial Court allowed the said application dated 29.08.2016 and closed the prosecution evidence but despite there being request not to examine Ajay Kumar as a witness, the learned trial Court recorded his deposition as P.W.19 and thereafter closed the prosecution



evidence.

13. Mr. Ajay Kumar Thakur, learned counsel appearing on behalf of the petitioner has submitted, referring to the order passed by the trial Court, dated 29.08.2016 that the said petition, which has been brought on record by way of Annexure-5 was the only petition presented before the trial Court for closing the evidence of the prosecution, which was allowed by the trial Court by an order passed on the same date.

14. The petitioner, thereafter, filed an application before the trial Court on 05.09.2016 for not proceeding with the case but it is his grievance that the learned trial Court started and continued with hearing the arguments on behalf of the prosecution and defence. It is the further case of the petitioner that since he became apprehensive that a free and fair trial was not possible in the Court of learned 14th Additional Sessions Judge, East Champaran, since he had unnecessarily directed the prosecution to adduce evidence, which was contrary to the case of the prosecution, only for the purpose of making out a case of *alibi* in favour of the accused persons, he filed a transfer petition before learned District and Sessions Judge for transferring the said Sessions Trial No. 611 of 2015 from the Court of learned 14th Additional Sessions Judge, Motihari to any Sessions Court or



Additional Sessions Court, giving rise to Cr. Misc. (Transfer) Petition No. 98 of 2016, which came to be dismissed by an order, dated 17.09.2016 passed by learned Sessions Judge.

15. The crux of the case of the petitioner seeking transfer is that initially the learned trial Court had rejected the petition of the prosecution for not examining such witnesses as prosecution witnesses, which prosecution did not want to examine as prosecution witnesses, which order came to be set aside by an order of this High Court. Further, the trial Court allowed examination of the Investigating Officer who had submitted the second charge-sheet, as a prosecution witnesses though he had no concern with the first charge-sheet. The evidence adduced by the second Investigating Officer, Mr. Thakur contends, has weakened the case of the prosecution against Opposite parties No. 2 and 3. According to him, learned trial Court initially tried to get examined such witnesses who would have supported the defence of Opposite parties No. 2 and 3 and would have thus, been deposing against the case of the prosecution and subsequently he permitted examination of Investigating Officer of second charge-sheet which was not the basis for the trial in question. This situation according to him generates reasonable apprehension in the mind of the informant that a fair trial was not possible in the said trial Court. To buttress his



contention, Mr. Thakur, has laid great emphasis on Supreme Court's decision in case of ***Captain Amarinder Singh Vs. Parkash Singh Badal and others*** reported in (2009) 6 SCC 260 with specific reference to paragraph 19 which reads thus:-

“19. Assurance of a fair trial is the first imperative of the dispensation of justice. The purpose of the criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. When it is shown that the public confidence in the fairness of a trial would be seriously undermined, the aggrieved party can seek the transfer of a case within the State under Section 407 and anywhere in the country under Section 406 Cr.P.C.”

16. He has also relied on Supreme Court's decision in case of ***Mrs. Maneka Sanjay Gandhi and another Vs. Miss Rani Jethmalani*** (AIR 1979 SC 468).

17. The Opposite parties No. 2 and 3 have entered appearance through their learned counsel and a counter affidavit has been filed on their behalf. Before I take into account certain facts in the said counter affidavit I must at once refer to Annexure-D to the counter affidavit, which is the attendance filed by said Ajay Kumar, Investigating Officer of the second charge-sheet, who was presented by learned Additional Public Prosecutor for being examined as a prosecution witness. A question, in such circumstance, would arise as to whether a finger of suspicion could



be validly raised against the trial Court for having allowed said Ajay Kumar to be examined as prosecution witness at the request of the Additional Public Prosecutor. In my view, the mandate of Section 231 of the Code of Criminal Procedure, 1973 is clear and it requires the Sessions Court to proceed to take all such evidence as may be produced in support of the prosecution. Possibly, the Court could not have refused to examine said Ajay Kumar as a prosecution witness after having been produced by the Additional Public Prosecutor. The prosecution is entitled to produce any person as a witness, though not listed as witness in the charge-sheet.

18. In any view, can examination of said Ajay Kumar as prosecution witness be said to be forming a basis for reasonable apprehension that fair trial was not possible before the said learned trial Court, in the facts and circumstances of the present case?

19. Coming back to the counter affidavit filed on behalf of the Opposite parties No. 2 and 3, it is their stand that the prosecution had filed an application giving the list of such witnesses whom the prosecution did not want to examine. In the said petition names of all the witnesses of second charge-sheet, eight in number had been mentioned. The said list, however, did not contain the name of Ajay Kumar as a person whom the prosecution did not intend to examine. This statement is counter to the stand



taken on behalf of the petitioner that despite the order of this Court, the trial Court let the said Ajay Kumar be examined as prosecution witness.

20. Mr. Uma Kant Shukla, learned counsel appearing on behalf of the Opposite parties has submitted that as a matter of fact, the first charge-sheet against the opposite parties was submitted even without completion of investigation, which clearly mentioned as follows:-

“घटना के वास्तविक हमलावर एवं घटना में प्रयुक्त हथियार की बरामदगी एवं सभी अभियुक्तों के विरुद्ध साक्ष्य एकत्र करने हेतु पूरक अनुसंधान जारी है ।”

Translated version of Hindi reads thus:-

“Supplementary investigation is continued for real assailants of the occurrence, recovery of weapons used in the occurrence and collecting evidence against all the accused persons.”

21. What transpires from the above that the investigation, which was done after submission of the charge-sheet against Opposite parties No. 2 and 3 was not a further investigation within the meaning of Section 173 (8) of the Code, rather, till the date of submission of the said charge-sheet, investigation was yet to be completed by the police, which continued, in view of what has been noticed above.



22. What has further emerged from the above that there was no application filed on behalf of the prosecution for closure of prosecution evidence before said Ajay Kumar was examined as P.W.19 at the trial. Ajay Kumar was evidently produced by the prosecution for examination as prosecution at the trial.

23. It is also the case of the Opposite parties No. 2 and 3 as stated in the counter affidavit that one Chandan alias Victor, who was cited as witness in the first charge-sheet has been made accused as Ansul Raj upon completion of investigation. I shall not comment upon these aspects in the present matter so that it may not be prejudicial to the case of any of the parties at the trial.

24. There is another crucial aspect, which needs to be taken note of. The learned Sessions Judge, East Champaran, Motihari in his order dated 17.09.2016 passed on the application of the petitioner for transfer of the case has recorded that the learned counsel for the State had opposed the move for transfer of the case. Evidently, thus, the State, which is the prosecutor did not have any objection to examination of said Ajay Kumar as prosecution witness, rather, he was examined as a witness at the instance of the prosecution.

25. Now, coming to Supreme Court's decision in case of *Captain Amarinder Singh Vs. Prakash Singh Badal and others*



(supra), relied on by Mr. Thakur, I find that in the same judgment the Supreme Court observed in paragraph 51 that a mere allegation that there is an apprehension that justice will not be done in a given case alone does not suffice. In case of Mrs. ***Maneka Sanjay Gandhi and another Vs. Miss. Rani Jethmalani*** (supra), the Supreme Court observed that 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. For the Court to exercise of its power of transfer, something more substantial, more compelling, more imperiling, from the point of view of public justice and its attendant environment is essential, the Supreme Court observed.

26. Both these decisions do not support the case of the petitioner, rather, the ratio laid down therein go against the plea of transfer of case on the ground stated therein.

27. In a recent decision in case of ***Ashish Chadha Vs. Asha Kumari and another*** reported in (2012) 1 SCC 680, the Supreme Court had the occasion to examine the scope of Sections 406 and 407 of the Code of Criminal Procedure, wherein the Court observed that unless a very strong case based on concrete material is made out, order under Section 407 of the Code for transfer of the case should not be made.



28. In case of *Usmangani Adambhai Vahora Vs. State of Gujarat and another* reported in (2016) 3 SCC 370, the Supreme Court took serious note of making callous allegations by the parties against the trial Court for making out a case of transfer and has cautioned that unless there is a reasonable apprehension that there would be miscarriage of justice, the Court should not order for transfer of the case.

29. I must refer to a significant observation made by the Supreme Court in case of *K.P. Tiwari Vs. State of M.P.* reported in 1994 supp (1) SCC 540, where the Court took into account the ground realities and the charged atmosphere under which the Judicial Officers mostly function. An extract from paragraph 4 of the said decision is relevant and being reproduced hereinbelow:-

“4..... It has also to be remembered that the lower Judicial officers mostly work under a charged atmosphere and are constantly under a psychological pressure with all the contestants and their lawyers almost breathing down their necks—more correctly up to their nostrils. They do not have the benefit of a detached atmosphere of the higher courts to think coolly and decide patiently. Every error, however, gross it may look, should not, therefore, be attributed to improper motive.”

30. Taking a cue from the said decision, in my opinion, only on the basis that an order of the trial Court was found to be not sustainable in law by this Court, whereby he had rejected an



application filed by the prosecution for not examining certain witnesses as prosecution witnesses, no motive can be attributed to the Court.

31. There is yet another important aspect, which needs to be considered. It was the petitioner who had filed an application for closing the evidence of the prosecution. The petitioner being informant of the case had no business to file an application for closing the evidence of the prosecution. I am completely unconvinced with the submission that the said application filed by the Informant was supported by the learned Public Prosecutor or the Additional Public Prosecutor. The petitioner had acted in complete breach of the requirement of Section 301 of the Code of Criminal Procedure, 1973. Section 301 of the Code reads thus:

“301. Appearance by Public Prosecutors.

(1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any Court in which that case is under inquiry, trial or appeal.

(2) If in any such case, any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case.”



32. In case *of Shiv Kumar vs. Hukam Chand and another* reported in (1999) 7 SCC 467, the Supreme Court had the occasion to interpret and decide the import of Section 301 of the Code. While considering the said provisions, the Supreme Court took note of Section 225 of the Code, which mandates that in every trial before a Court of Sessions, the prosecution shall be conducted by a Public Prosecutor. The Court held that Sub-Section (2) of Section 301 of the Code imposes a curb on a counsel engaged by any private party in a trial to prosecute any person in any Court. The Supreme Court clearly held that limit of role of the counsel engaged by any private party to prosecute any person is confined to act during such prosecution “under the direction of the Public Prosecutor”. The other liberty, which the section allows to such counsel, is to submit written arguments after closure of the evidence at the trial but even that can be done only if he has the permission of the Court to do so, held Supreme Court in case of *Shiv Kumar v. Hukam Chand* (supra).

33. In paragraph 14, the Supreme Court laid down the role of the private counsel in following words:-

“14. It is not merely an overall supervision which the Public Prosecutor is expected to perform in such cases when a privately engaged counsel is permitted to act on



his behalf. The role which a private counsel in such a situation can play is, perhaps, comparable with that of a junior advocate conducting the case of his senior in a Court. The private counsel is to act on behalf of the Public Prosecutor albeit the fact that he is engaged in the case by a private party. If the role of the Public Prosecutor is allowed to shrink to a mere supervisory role the trial would become a combat between the private party and the accused which would render the legislative mandate in Section 225 of the Code dead letter.”

34. What emerges from the decision of the Supreme Court in case of ***Shiv Kumar V. Hukam Chand*** (supra) is, that in view of Section 225 read with Sections 301 and 302 of the Code it is not permissible for anyone, other than the Public Prosecutor to conduct prosecution in Sessions Court. Explaining the reason why the Parliament applied a bridle on a private counsel and subjected his role confined to the instructions given by the Public Prosecutor, the Supreme Court has held that a private Counsel, if allowed a free hand to conduct prosecution would focus on bringing the case to conviction even if it is not a fit case for conviction. Against what the Supreme Court had issued a note of caution in case of ***Shiv Kumar V. Hukam Chand*** (supra), has been attempted to be done by the petitioner as the informant through his counsel in the trial Court by filing a petition as noted above. The conduct of the petitioner deserves to be deprecated, which I do.



35. On the basis of what has been discussed above, I am of the considered view that apprehension entertained by the petitioner in the case on hand cannot be construed as reasonable one and the case on hand cannot be transferred on the allegation, which has been taken note of, that there is apprehension that justice will not be done.

36. I am also of the view that if such apprehensions are treated to be the basis for transfer of a trial in exercise of power under Section 407 of the Code, it will have a demoralizing effect on a trial Courts. I do not find that the petitioner has been able to make out a strong case based on concrete material for exercise of power under Section 407 of the Code.

37. Considering the above, I do not find any merit in this application, which deserves to be dismissed with cost.

38. This application is, accordingly, dismissed with a cost of Rs. 5,000/-(five thousand) payable by the petitioner to be deposited in the account of District Legal Service Committee, East Champaran, Motihari within three months from today.

39. Before parting with this judgment, I make it clear that the discussions in the present judgment are confined to the purpose of considering relief of the petitioner for making an order of transfer of the trial in exercise of power under Section 407 of the



Code. No observation or comment made in the present judgment and order shall be so construed and treated to be an expression on the merit of the case of the prosecution or the defence at the trial for any purpose whatsoever and the same should not be prejudicial to the case of any of the parties.

(Chakradhari Sharan Singh, J)

Arun Kumar/

AFR/NAFR	AFR
CAV DATE	N/A
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