

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPLICATION (MAIN) NO. 195 OF 2016**

Snehal Dias, Son of Vincent Dias,
Aged 24 years, occupation-student,
Resident of House No. 19/1, Non
mon, Vasco, Goa.

.... Applicant/
Petitioner

Versus

State, Through PP, High Court,
Panaaji, Goa.

.... Respondent

Shri Siddesh Shet, Advocate for the Petitioner.

Shri S.R. Rivankar, Public Prosecutor for the
Respondent.

CORAM:- C.V. BHADANG, J.

DATE:- 4th OCTOBER, 2016.

ORAL ORDER:

Heard the learned Counsel for the
petitioner and the learned Public Prosecutor for
the respondent.

2. This is an application for transfer of
Sessions Case No. 38/2010 from the file of the
learned Sessions Judge, South Goa, Margao to any
other competent Court.

3. The brief facts are that the petitioner is facing prosecution for the offences punishable under Sections 449, 450, 397 and 302 of IPC, for having caused the death of Naresh Dourado, nephew of the complainant, Herculino Dourado. After the charge was framed in the case, the prosecution examined as many as 54 witnesses from 07.03.2011 to 02.12.2015, which was followed by a statement of the petitioner being recorded under Section 313 of Cr.P.C. It appears that Shri P.V. Sawaikar, the predecessor of the present Presiding Officer heard the final arguments from 06.01.2016 to 21.03.2016 and the sessions case was posted for judgment on 18.04.2016. However, it so happened that two days prior thereto i.e. on 16.04.2016, Shri P.V. Sawaikar got his orders of transfer and he relinquished the charge of his post on 16.04.2016. Thereafter, the matter came before the present Sessions Judge. The learned Sessions Judge heard the arguments and the matter was posted for judgment on 19.05.2016.

4. According to the petitioners, at the fag end of the arguments, the Presiding Officer opined that there were gaping holes in the prosecution case that go to the root of the matter. On 19.05.2016 (when the matter was fixed for judgment), the learned Sessions Judge expressed that she intends to recall the investigating officer and the father and the brother of the deceased. In fact, the learned Sessions Judge passed an order under Section 309 of Cr.P.C. on 19.05.2016 to recall the investigating officer (PW-26), for the purpose of ascertaining as to why the 'locks' were changed and PW-2 and PW-10 for identifying the items, which were said to be stolen. The said order was challenged by the petitioner before this Court in Criminal Writ Petition No. 117/2016, which was dismissed on 10.08.2016. It was contended on behalf of the petitioner in the said petition that by virtue of recall of the witnesses, the prosecution would be able to fill in lacunae in the prosecution case, which was not permissible. The contention raised

has not been accepted, as a result of which, the said petition was dismissed.

5. In the meantime, the petitioner filed an application before the learned Sessions Judge requesting her to recuse from the matter. The learned Sessions Judge has rejected the said application (Exhibit-197) on 04.08.2016, on the ground that the Court has no power to recuse from the matter. It is thereafter that the petitioner has approached this Court under Section 407 of Cr.P.C. for transfer of the Sessions Case.

6. I have heard the learned Counsel for the petitioner and the learned Public Prosecutor for the respondent-State.

7. On behalf of the petitioner, reliance is placed on the decision of the Hon'ble Supreme Court in the case of **Satish Jaggi Vs. State of Chhattisgarh and Others, (2007) 3 SCC 62** and in particular paragraphs 5 and 6 thereof. It is

submitted that there is material to support a reasonable apprehension, that the learned Sessions Judge has formed an opinion and that the petitioner would not get a fair trial. It is submitted that while considering a prayer for transfer, the Court has to be concerned with the apprehension of the parties and not whether, the Court has indeed formed an opinion.

8. On the contrary, it is submitted by the learned Public Prosecutor that the learned Sessions Judge after going through the matter had stated that she knows the facts and there is nothing objectionable about this. It is submitted that the order passed by the learned Sessions Judge has been confirmed by this Court and thus it is, not open for the petitioner to place reliance on the order of recall, as a ground for transfer. It is submitted that the transfer of any case is not to be lightly ordered and the petitioner has failed to establish any ground for transfer.

9. I have given my anxious consideration to the rival circumstances and the submissions made. There cannot be any manner of dispute that this Court would ordinarily be slow in ordering, transfer on mere asking of the parties. At the same time, this Court has to find out whether there is any material, which can form basis of the reasonable apprehension of the party concerned, that the party may not get a fair trial. The Hon'ble Supreme Court in the case of **Satish Jaggi** (supra) has held thus, in paragraphs 5 and 6 of the judgment:

"5. The law with regard to transfer of cases is well settled. This Court in the matter of Gurcharan Dass Chadha v. State of Rajasthan (AIR 1966 SC 1418) held that 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. This Court said that 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. This Court further held that it is one of the principles of the administration of justice that justice should not be done but it should be seen to be done. The court has further to see whether the apprehension is reasonable or not. This Court also said that to judge 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.

6. It was further held by this Court in *Mrs. Maneka Sanjay Gandhi and Anr. V. Miss Rani Jethmalani* (AIR 1979 SC 468) that 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

availability of legal services or any like grievance. Something more substantial, more compelling, more imperiling, 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. This Court, in the facts and circumstances of the case, said that the grounds for the transfer have to be tested on this touchstone 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. It further said that even so, the process of justice should not harass the parties and from that angle the court may weigh the circumstances."

10. It can thus be seen that the question in such a case is not whether indeed the concerned Presiding Officer is biased or has formed an

opinion, but the question is whether the circumstances are sufficient to support a reasonable apprehension being harboured by the petitioner, seeking transfer. The question whether there are such circumstances and whether they are sufficient to support any such apprehension, would depend upon facts and circumstances of each case. No singular circumstance can be indicated as being either sufficient or conclusive to support such apprehension. Mere expression of an opinion by the concerned Judge itself, may also not be sufficient to infer such apprehension or support such apprehension. The Court has to consider and weigh all the attending circumstances and then come to a conclusion.

11. In the present case, it is not in dispute that the learned Sessions Judge expressed that there were gaping holes in the prosecution case, which would require recalling of some of the witnesses. It is in that view of the matter that the learned Sessions Judge has passed the order for

recall of some of the witnesses, which has been confirmed by this Court. The reason for passing of the said order, as has been elicited during the course of the arguments, is that there was a Chevrolet Spark vehicle, which was found abandoned. The vehicle was belonging to the deceased. The vehicle was seized. The complainant requested the Magistrate to permit the complainant to change the locks of the vehicle as the key of the existing locks were not available. The learned Magistrate had permitted the change of the locks without notice to the prosecution. Ultimately, the locks were changed and the old locks were seized by the investigating officer. The learned Sessions Judge found that the old locks so seized, were not shown to the investigating officer for the purpose of identification. Therefore the investigating officer (PW-26) has been recalled to identify the locks, while PW-2 and PW-10 (father and brother of the deceased) are recalled, for the purpose of identifying the locks.

Undisputedly, the case rests on circumstantial evidence and the learned Sessions Judge found that this aspect was material.

12. On a careful consideration of the entire circumstances, I find that although, there is nothing unusual that the learned Sessions Judge has done, however, the circumstances would be sufficient to support the apprehension expressed by the petitioner. It is well settled that justice not only be done, but should be seem to have been done. In my considered view, the case needs to be transferred to some other competent Court.

At this stage, the learned Public Prosecutor fairly states that the sessions case can be transferred to the same Sessions Judge (Shri P.V. Sawaikar), who has recorded the evidence and had also heard the entire arguments and in fact, had fixed the matter for judgment on 18.04.2016. I find it appropriate if, the sessions case is transferred to Shri P.V. Sawaikar, although he is presently sitting at Mapusa in the North Goa

District.

13. Hence, the following order is passed:

O R D E R

(a) The application is allowed.

(b) The Sessions Case No. 38/2010 is withdrawn from the file of the learned Sessions Judge, South Goa, Margao and transferred to the Court presided over by Shri P.V. Sawaikar, the learned Sessions Judge, North Goa, Mapusa, for disposal in accordance with law.

(c) Before parting with the final order, it is made clear that this transfer shall neither be construed as casting any aspersion on the concerned Sessions Judge at Margao nor this Court has recorded any finding that the learned Sessions Judge has indeed formed any opinion. Thus, this order shall not be read as having any adverse effect on the learned Sessions Judge, from whose Court the sessions case is transferred.

(d) The application is disposed of,
in the aforesaid terms.

C.V. BHADANG, J.

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