

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE SIDE

CRIMINAL APPLICATION NO.617 OF 2016

Dr.Jayesh Arjun Katira ... **Applicant**

V/s.

The State of Maharashtra ... **Respondent**

....

Mr.Samir A. Vaidya with Mr.Umesh Mohite and Ms.Hetal Pandya,
Advocate for the Applicant.

Mr.S.V.Gavand, APP for the Respondent/State.

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CORAM : A. M. BADAR J.

DATED : 12th JANUARY 2017.

P.C . :

1 This is an application under Section 407 of the Code of Criminal Procedure filed by the applicant/original accused who is facing trial for offences punishable under Sections 328, 376, 506 of the Indian Penal Code and under Section 4 and 12 of the Prevention of Children from Sexual Offences Act, 2012 ("POCSO Act" for the sake of brevity) and under Section 66(A) of the Information Technology Act. By this application, the applicant/accused is praying for transfer of the said POCSO Special Case No.481 of 2014 from the file of the learned designated Judge under POCSO Act, 2012 for Greater Bombay presiding over the Court at Court Room No.35 of the City Civil and Sessions Court, Mumbai to another Court in the interest of justice.

2 Heard the learned counsel appearing for the applicant/accused. By pointing the order dated 11/07/2016 passed by this Court in Criminal Writ Petition No.2209 of 2016, the learned counsel argued that accepting this order passed by this Court directing the trial Judge to postpone hearing of the said Sessions Case to some other date, the learned trial Court ought to have adjourned hearing of the POCSO Special Case from time to time till disposal of the Criminal Writ Petition No.2209 of 2016. The learned counsel by pointing out the development which took place in the trial Court on 14/07/2016, 20/07/2016, 27/07/2016, 05/08/2016, 12/08/2016, 01/09/2016, 21/09/2016 and 05/10/2016 submitted that the applicant/accused despite interim order passed by this Court was compelled to file applications for adjournment on several dates and on same dates adjournments were granted even imposing cost on the applicant/accused. This according to the applicant/accused gives rise to a reasonable apprehension of bias on the part of the learned trial Judge against the applicant/accused. The learned counsel further argued that in the wake of interim order which virtually operates as stay to the further proceedings before the trial Court, the learned trial Judge ought not to have conducted proceedings on adjourned dates by compelling the applicant/accused to file applications for adjournments for getting the hearing of the POCSO Special Case adjourned from time to time. Reliance is placed by the learned counsel on orders of the learned Special Judge noted on order

sheets of the case. It is argued that even on the very first date after passing of the interim order by this Court in Criminal Writ Petition No.2209 of 2016 the copy of that order was placed on record of the trial Judge with an application for adjournment dated 27/07/2016. The learned counsel for the applicant/accused submitted that ultimately the interim order was continued till 19/12/2016 when ultimately the Criminal Writ Petition filed by the applicant/accused was disposed of. Hence in submission of the learned counsel for the applicant/accused, the applicant/accused has reasonable apprehension that he may not get justice from the Presiding Officer of the Court where his trial is pending.

3 The learned Additional Public Prosecutor opposed the application by contending that nothing wrong is committed by the designated Judge under POCSO ACT, 2012 in adjourning the matter from time to time on the basis of application moved by the applicant/accused. He submitted that it cannot be said that the applicant has reasonable apprehension of bias as during some period, the interim order was not in vogue.

4 At this juncture, it needs to mention here that in the matter of *M.V.Ganesh Prasad v. M.L.Vasudevamurthy & Ors.* reported in **AIR 2003 SC 39**, it is observed that it must be kept in mind that the reasonable apprehension of bias on the part of a

litigant should be a 'bona fide, reasonable apprehension and not a mere apprehension of the litigant that can be a basis to order transfer of the pending case in the exercise of the powers conferred to the Court. What amounts to bias is aptly explained by the Honourable Supreme Court in ***Ranjit Thakur v. Union of India*** reported in (1987) 4 SCC 611. Paragraphs 16 to 21 of that Judgment needs to be quoted for proper adjudication of the case in hand. Those read thus :

“16. It is the essence of a judgment that it is made after due observance of the judicial process; that the Court or Tribunal passing it observes, at least the minimal requirements of natural justice, is composed of impartial persons. acting fairly and without bias and in good faith. A judgment which is the result of bias or want of impartiality is a nullity and the trial '*coram non judice*'. [See ***Vassiliades v. Vassiliades***, reported in ***AIR 1945 PC 38***]

17. As to the tests of the likelihood of bias what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. The proper approach for the Judge is not to look at his own mind and ask himself, however, honestly, “Am I biased?” ; but to look at the mind of the party before him.

18. Lord Esher in *Allinson Vs. General Council of Medical Education and Registration*, reported in [1894] 1 Q.B. 750 :

"The question is not, whether in fact he was or was not

biased. The Court cannot inquire into that In the administration of justice, whether by a recognised legal court or by persons who, although not a legal public court, are acting in a similar capacity, public policy requires that, in order that there should be no doubt about the purity of the administration, any person who is to take part in it should not be in such a position that he might be suspected of being biased."

19. In *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon*, [1969] 1 Q.B. 577, 599, Lord Denning M.R. Observed:

. .. in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be nevertheless if right minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit.

20. Frankfurter, J. in *Public Utilities Commission of the District of Columbia Vs. Pollack* (343 US 451 at 466-67 : 96 L ed 1068, 1079) :

"The judicial process demands that a judge move within the framework of relevant legal rules and the court covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feeling

on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted. But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment or may not unfairly lead others to believe they are operating, judges recuse themselves. They do not sit in judgment."

21 Referring to the proper test, *Ackner LJ in Regina Vs. Liverpool City Justices, Ex-parte Topping, [1983] 1 WLR 119 :-*

"Assuming therefore, that the justices had applied the test advised by Mr. Pearson : 'Do I feel prejudiced ?' then they would have applied the wrong test, exercised their discretion on the wrong principle and the same result, namely, the quashing of the conviction, would follow."

From bare perusal of the law laid down by the Honourable Apex Court, it is clear that the Court is expected to use arm chair of the litigant in order to determine the apprehension and likelihood of bias. What is relevant is not

to look into its own mind, but to look into the mind of the litigant to consider whether he feels that the Judge is biased against the litigant and that the litigant may not get justice at the hands of that Judge.

5 It is not in dispute that the applicant/accused has approached this Court challenging the charge framed against him by filing Criminal Writ Petition No.2209 of 2016 and on 11/07/2016 this Court had directed the trial Court that till the next date of hearing, the learned Special Judge shall adjourn the hearing of the POCSO Special Case bearing No.481 of 2014 arising out of Crime No.428 of 2014 registered against the applicant/accused. In the backdrop of this factual aspect let us examine whether learned trial Judge acted fairly and without bias as well as in good faith on subsequent dates. It is basic principle of administration of justice that the justice should not only be done, but it should be seen to have been done. Keeping in mind this principle let us examine what happened despite passing of the interim order in Criminal Writ Petition No.2209 of 2016 on 11/07/2016. It is apparent from the record that thereafter POCSO Special Case No.481 of 2014 was fixed for hearing before the learned trial Court on 27/07/2016. The order sheet maintained by the learned trial Court of the said date in that Special Case goes to show that on behalf of the applicant/accused an application (Exh.16) for adjournment came to be moved. In paragraph 2 of

that application, the applicant/accused has categorically stated that High Court, on 11/07/2016 has passed an order directing the trial Court that till the next date of hearing, the learned Special Judge shall adjourn the hearing of POCSO Special Case No.481 of 2014. The statement is made at bar that this application for adjournment (Exh.16) was accompanied by a copy of interim order passed by this Court in Criminal Writ Petition No.2209 of 2016 dated 11/07/2016. The same is not disputed by the learned APP. On the basis of this material, the only available course of action that the trial Court was having is to simply adjourn the hearing of the POCSO Special Case to another suitable date. However, instead of that long order sheet running into two full scape pages came to be written which gives an indication that the learned trial Judge was monitoring the proceedings of the said POCSO Special Case throughout the day by writing down the events happening chronologically. This was not at all necessary. In the wake of interim order passed by this Court on 11/07/2016, the only option available with the learned trial Court was to simply adjourn the hearing of the said Special Case. It is seen from the order sheet dated 27/07/2016 that the learned trial Judge has recorded whether the advocate for the parties are present, whether the accused is present, timings of his presence etc. Apart from this at about 4.00 p.m. of that day the learned trial Judge recorded its observations that the accused and his Advocate are not present in the Court and that the victim has been

waiting since 11.45 a.m. The learned trial Judge went further and record that this is against the mandate of POCSO Act. It is further recorded that the conduct of the accused and his Advocate is not appropriate as they are not available for hearing on the adjournment application (Exh.16). One fails to understand as to why it was necessary to conduct hearing of the adjournment application (Exh.16) when this Court in no unclear terms on 11/07/2016 had directed that till the next date of hearing of Criminal Writ Petition No.2209 of 2016, the learned Special Judge should adjourn hearing of the POCSO Special Case No.481 of 2014. Prima facie, it appears that instead of ascertaining whether the interim order of this Court was in operation or not, the learned trial Judge was interested in hearing the applicant/accused as well as his Advocate on the adjournment application (Exh.16) whereby order of this Court was intimated to the learned trial Judge.

6 What happened thereafter on 22/07/2016 itself which is apparent from the order sheet is still more surprising. Despite intimation of the interim order dated 11/07/2016 in Criminal Writ Petition No.2209 of 2016 vide adjournment application (Exh.16) the learned trial Judge had imposed the cost of Rs.3000/- on the applicant/accused for adjourning the POCSO Special Case No.481 of 2014 and has made the cost payable to the victim. Imposition of cost for adjournment was not at all justified in the wake of order of this Court directing the trial Judge to adjourn the

proceedings in POCSO Special Case No.481 of 2014. The learned trial Judge ought to have ascertain factually if any such order was passed and was holding the field on that day. Pendency of the said Criminal Writ Petition ought to have been considered by the learned trial Judge while taking decision in the matter. The learned trial Judge has only observed that no appropriate order of this Court regarding stay of the proceedings was produced by the accused. The learned trial Judge could have directed the applicant/accused to file affidavit regarding the interim order passed by this Court, if the learned trial Judge was having doubt regarding averments made in the application for adjournment (Exh.16). The learned trial Judge could have insisted for an affidavit of the applicant/accused as to ascertain whether the interim order dated 11/07/2016 was still in operation on 27/07/2016 instead of recording conduct of the accused and his Advocate in the order sheet dated 27/07/2016. This course of action adopted by the learned trial Court is giving an apprehension to the applicant/accused that he may not get fair trial at the hands of the Presiding Officer of the Court as he has challenged some order passed by the learned trial Court before this Court. Without ascertaining whether the interim order dated 11/07/2016 was in operation or not by making necessary inquiry from the parties and recording the finding to that effect, it was not justified on the part of the learned trial Judge to impose the cost of adjournment on applicant/accused on 27/07/2016. This course of

action followed by the learned trial Court is sufficient to give reasonable apprehension of bias to the applicant/accused.

7 It is also seen that on 05/08/2016, the adjournment application moved by the applicant/accused at Exh.17 was allowed with a direction that he shall be permitted to cross-examine the victim subject to payment of cost of Rs.3000/-. At that point of time, Criminal Writ Petition No.2209 of 2016 was still pending before this Court and thus no efforts were made by the learned Trial Judge to ascertain and record the finding as to whether the interim order passed by this Court was in operation or not.

8 The POCSO Special Case was then adjourned to 12/08/2016. On this date also the Writ Petition filed by the applicant/accused before this Court was pending. The hearing of this POCSO Special Case was then adjourned as the applicant/accused filed an application Exh.18 before the learned trial Court.

9 On 01/09/2016 the hearing was then further adjourned on 21/09/2016. On 21/09/2016, despite pendency of Writ Petition bearing No.2209 of 2016 before this Court, the learned trial Judge recorded submission made by mother of the victim and ordered the applicant/accused to proceed with the case or to furnish suitable orders from this Court.

10 On 05/10/2016, it is seen that this Court after mentioning had continued the interim order in the Criminal Writ Petition by directing the trial Court not to proceed with the case till next date. On the very same day i.e. 05/10/2016, the POCSO Special Cases No.481 of 2014 was also fixed for hearing before the trial Court. The learned trial Court on 05/10/2016 has recorded in the order sheet that the applicant/accused and his advocate is absent and at about 4.50 p.m. it is further recorded that number of adjournments have been given in the case on the request of the applicant/accused and his Advocate, but they have not produced stay order from this Court. It was further observed by the learned trial Judge that the applicant/accused and his Advocate have failed to remain present in the Court when the matter was kept back with further observations that they are given strict directions that such kind of behaviour will not be further tolerated and strict action would be taken against the accused. It is pertinent to note that on that day the interim order in the Writ Petition was continued by this Court. The learned trial Court could have avoided all this unpleasant recording by passing an order below Exh.1 or in the order sheet directing the applicant/accused or his Advocate to file an affidavit specifically mentioning whether the interim order passed by this Court in Criminal Writ Petition No.2209 of 2016 is still in force or not. Without doing this basic exercise, on several dates monitoring the proceedings of the

matter throughout the day regarding presence or absence of the parties, further recording something reflecting behaviour and conduct of the applicant/accused was not justified in a sense that such observations of the trial Judge gives an impression in the mind of the applicant/accused that the trial Judge is prejudiced against him only because he has filed some proceedings before the High Court challenging the order passed by the trial Court.

11 Perusal of the order sheets maintained by the learned trial Court regarding progress of the trial during the period from 11/07/2016 till 19/12/2016 i.e. the date on which the Writ Petition filed by the applicant/accused was dismissed, prima facie shows that the applicant/accused is justified in apprehending bias attitude of the learned trial Judge against him. The question is whether the accused on the basis of the material borne from the record will feel that he is being biased. The question is not whether the Presiding Officer of the Court is or is not actually biased against him. What is required is impression which the litigant receives in the wake of the fact/situation recorded in the earlier paragraphs of this Order culled out from the record of proceedings made in the order sheets by the learned trial Judge. Considering totality of circumstances emerging on record, I am of the opinion that the applicant/accused is holding bona fide and reasonable apprehension of bias that the learned trial Judge is prejudiced against him and he may not get fair trial at the hands

of the learned Presiding Officer before whom the trial against him in respect of serious offences is pending.

12 Considering the material produced by the applicant/accused showing how the proceedings in the trial Court were conducted after 11/07/2016 and that too without directing applicant/accused to file an affidavit regarding continuation of the interim order passed by this Court in Criminal Writ Petition No.2209 of 2016, it appears that apprehension of bias in the mind of the applicant/accused is reasonable, genuine and justifiable. Therefore, the application needs to be allowed and as such, the order :

- i) The application is allowed.
- ii) Proceedings in POCSO Special Case No.481 of 2014 are withdrawn from the file of the designated Judge under POCSO Act, 2012 presiding over the Court in Court Room No.35 of the City Civil Court and Sessions Court, Greater Bombay, Mumbai and the learned Principal Judge of the City Civil & Sessions Court Greater Bombay, Mumbai is directed to allot the same to any other designated Judge under POCSO Act, 2012 for Greater Bombay, Mumbai.
- iii) The application is accordingly disposed of.

(A. M. BADAR J.)