

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.157 OF 2017
WITH
CRIMINAL APPLICATION NO.823 OF 2017
AND
CRIMINAL APPLICATION NO.28 OF 2018
IN
CRIMINAL APPLICATION NO.157 OF 2017

Rita Gupta, Adult, Occ.Teacher,
R/o.Flat No.C-12, Affinity Apartment,
North Main Road, Koregaon Park, Pune

Applicant

versus

1. The State of Maharashtra.
2. Tushar Sampat, Adult,
R/o.Flat No.B-10, Affinity Apartment,
North Main Road, Koregaon Park, Pune.

Respondents

Ms.Rita Gupta, applicant, in person, argued the matter (absent on
7.2.2018 when order is dictated in Court)

Mr.Tushar Sampat, respondent no.2, in person, present.

Ms.R.M.Gadhavi, APP, for State.

CORAM : PRAKASH D. NAIK, J.

DATE : 7th February 2018

PC :

1. Heard both parties. Rule. Rule is made returnable forthwith.
Applications taken up for hearing.

2. This is an application seeking transfer of the proceedings in
R.C.C. No.4140 of 2016 pending before the Court of Judicial
Magistrate, First Class, Court No.3, Pune to any other Court at Pune.

3. The applicant is the original complainant in the complaint registered vide first information report bearing No.45 of 2015, which was registered with Koregaon Park Police Station, Pune for offences under Sections 354, 354-A, 354-D, 504, 506(2), 509 of Indian Penal Code. On completing the investigation the charge sheet is filed and the proceedings are numbered as RCC No.4140 of 2016, which is pending before the Court of Judicial Magistrate, First Class, Court No.3, Pune. The respondent no.2 is the accused in the said proceedings.

4. The applicant had filed an application before the Court of Sessions Judge, Pune for transfer of the said proceedings to any other Court. The proceedings were pending in the Court of Judicial Magistrate, First Class, Court no.3, Pune presided over by the concerned learned Magistrate. The application was preferred on 5th January 2017. The said application was rejected vide order dated 20th January 2017. Thereafter present application has been filed before this Court.

5. The grounds raised by the applicant seeking transfer of the proceedings is that the applicant is apprehending that she would not get fair trial and justice before the Court where the proceedings are pending. It is submitted that the applicant was also a complainant in another proceeding lodged by her for offence of defamation. The said case was numbered as RCC No.1607 of 2016. The same Court directed police to conduct investigation under Section 156(3) of Code of Criminal Procedure, 1973. The applicant filed an application seeking transfer of said case before Sessions Judge, Pune. The said application was withdrawn from the said Magistrate and

transferred to Chief Judicial Magistrate, Pune vide order dated 19th July 2016. It is further submitted that the applicant had filed an application before the Trial Court on 24th September 2016 praying for right to be heard in the said proceedings. The said application was rejected by learned Magistrate vide order dated 2nd January 2017. According to the applicant, the contents of application shows that the applicant wanted to take part in the proceedings along with public prosecutor by means of 'Right to be heard' in accordance with Section 301 of Cr.PC. It is submitted that the Trial Court has misconstrued the prayers made in the said application and has made certain observations while disposing off the said application. It is submitted that the learned Magistrate has observed that permission can be granted to the victim to conduct prosecution in person, if the cause of justice would serve better. It is also observed that the Court did not find that the cause of justice would be served better by granting permission to the informant to conduct the prosecution in person. It is submitted that the applicant had not filed the said application seeking permission to conduct the trial, which has been misinterpreted by the Trial Court, and unwarranted observations were made by the Trial Court. It is submitted that the approach of the Trial Court shows that the applicant would not get fair justice. Hence, the proceedings are necessary to be transferred to other Court. It is submitted that the conduct of learned Magistrate evidenced vide order dated 2nd January 2017 has given rise to a strong and reasonable apprehension in her mind that she would not get justice before the said Court. She has lost faith that she would have a fair trial in the said Court presided over by Shri P.T.Gotey. It is submitted that even the Sessions Court in the impugned order has made an observation that the applicant has rightly stated that she

being a victim has a right to be heard. It is further submitted that the observations of the learned Magistrate made in the order dated 2nd January 2017 that it will not be just and proper for the fair and smooth trial of the case, show that the Trial Court is biased against the applicant. It is submitted that the applicant has also forwarded the complaints against concerned Magistrate to Hon'ble the Chief Justice against the approach of the said Court. It is further submitted that the observations in the order dated 2nd January 2017 and the approach of the Trial Court has given rise to strong and reasonable apprehension in the mind of the applicant that she would not get fair justice. The Sessions Court has failed to appreciate the scope of Section 408 of Cr.PC.. If there is reasonable apprehension on the part of party to a case that justice will not be done, the proceedings are required to be transferred. The applicant is not required to demonstrate that justice will inevitably fail. The Sessions Judge failed to take into consideration that the learned Magistrate passed an order rejecting the application (Exhibit-20) and allowed the applicant to assist the learned APP in person or by engaging an advocate. That was the prayer of applicant which was granted and under misconception that applicant seeks to conduct prosecution, the application was rejected. It is further submitted that pending the transfer application, the applicant made an application before the said Court praying that the Court may not pass any order till the outcome of transfer application pending in High Court is decided. The respondent had filed an application for discharge which was pending. It is submitted that the respondent no.2 filed Miscellaneous Application No.571 of 2017 for contempt. Without considering that application is not maintainable, the said Court issued notice to applicant on 10th March 2017 calling for say. The applicant also

referred to summary report by the investigating officer in CR No.65 of 2016 before the same Court. It is submitted that the application filed by the applicant for additional charges was also not decided by the Trial Court. The applicant has placed reliance on the decision of this Court in the case of **Nilesh Jap Daru Vs. The State of Maharashtra reported in 2005(1)-Mh.L.J.-561**. The applicant has also preferred an application seeking stay of the proceedings before the Trial Court.

6. The applicant filed Criminal Application No.28 of 2018 for stay of the proceedings. The applicant has filed affidavit regarding service of Criminal Application No.157 of 2017 and Criminal Application No.28 of 2018.

7. The respondent no.2 who is also appearing in person, has opposed the grant of relief, as prayed in this application. It is submitted that the learned Sessions Court, Pune has rejected the application and no interference is called for in the said order. It is submitted that no grounds are made out for seeking transfer. The respondent no.2 has filed his reply as well as written submissions to oppose the reliefs sought in this application. It is submitted that the proceedings are pending before the Trial Court for a long period of time. The respondent no.2 had filed an application for discharge which is pending before the Trial Court. The respondent no.2 has tendered reply which is at pages 94 to 241. The respondent no.2 has also filed an affidavit under Section 65-B of Indian Evidence Act. In the reply it is contended that the applicant herein has been seeking adjournments in the proceedings on flimsy grounds. It is submitted that the applicant has filed a false case against the applicant. The

sole object of the applicant is to delay the proceedings on one pretext or the other. The respondent no.2 has placed on record copy of first information report and other documents including the application for discharge filed by respondent no.2. It is contended that the applicant is taking undue advantage of leniency shown to women. She has succeeded in adjourning the proceedings from time to time. Even after application for transfer was rejected, the applicant has delayed the proceedings. Although the applicant had cast aspersion on the learned Magistrate, the proceedings were adjourned at her request. The applicant has also filed molestation complaint against two other persons. The had threatened the accused of fixing them. Thereafter she filed first information report. One of the accused had filed non-cognizable complaint mentioning threat before the FIR. The police have filed closure report. After the respondent filed reply to transfer application, she filed Criminal Revision Application No.29 of 2017. It is also contended that the applicant hides facts. She intends to delay the discharge application preferred by him. Despite allowing her application for right to be heard, the applicant is trying to use that as a ground for transfer. It is stated that the applicant is claiming that there was attempt to murder her. The forensic report relied upon by her is no evidence to support her claim. The application for modifying the charge is not tenable in law. The respondent no.2 has also submitted his reply to Criminal Application No.28 of 2008 filed by the applicant for staying the proceedings before the Trial Court. In the said reply it is contended that the applicant is trying to assail the order passed by Division Bench before Single Judge. The submission was made in the light of the fact that the respondent no.2 had filed Writ Petition No.3680 of 2017 before the Division Bench of this Court. The said petition was filed by

challenging the proceedings pending before the Trial Court. The petition was disposed off vide order dated 4th December 2017, a copy of which is placed on record by respondent no.2. The petition was disposed off by directing the Trial Court to dispose off the respondent no.2's application for discharge as expeditiously as possible and preferably within three months from the date of receipt of order. The respondent no.2 has also tendered written notes of arguments wherein it is stated that Criminal Application No.28 of 2018 is filed to deprive the respondent-accused the relief granted in Writ Petition No.3680 of 2017.

8. On perusal of the documents on record, the impugned order, reply filed by respondent no.2 as well as written arguments, it is apparent that the applicant is the original complainant in the subject proceedings which are pending before the concerned Magistrate. It is also apparent that the applicant had filed an application before the learned Magistrate for participating in the proceedings. The said application was rejected on 2nd January 2017. While rejecting the said application it was observed by learned Magistrate that permission can be granted to the victim to conduct the prosecution in person, if the cause of justice would be served better. However, in the present case, the informant has not engaged any pleader. She wants to conduct the prosecution herself. The Court was of the view that it will be just and proper that the prosecution should be conducted by public prosecutor and the informant to assist him. It is further observed that the Court did not find that the cause of justice would serve better by granting permission to the informant to conduct the prosecution in person and even it will not be just and proper for the smooth trial of case. On perusal of the application

filed by the applicant, it is apparent that the said application was not filed for conducting the prosecution by herself and in fact prayer which was sought by the applicant, was granted by the Trial Court. However, from the observations made by the Court that it will not be just and proper for the smooth trial of the case to allow the informant to conduct the prosecution, has developed the apprehension in the mind of the applicant that she would not get justice or fair trial in the said proceedings. It is also contended by the applicant that the Court has entertained the application which is still pending for decision with regards to the alleged contempt, as contended by respondent no.2. It is also contended by the applicant that her application for additional charges is not being decided and when the proceedings were pending before this Court, the concerned Magistrate has entertained the contempt application filed by respondent no.2. It is also pointed out that the complaint filed by applicant for offence of defamation has been transferred to another Court on the basis of application for transfer preferred by applicant. In the order dated 2nd January 2017 the learned Magistrate has observed that the application was preferred by applicant for conducting prosecution in person and she wants to conduct prosecution herself. The proceedings can be transferred if there is reasonable apprehension on the part of party that justice will not be done. An applicant is not required to demonstrate that justice will inevitably fail.

9. The observations made by this Court in the decision relied upon by the applicant in the case of Nilesh Jap Daru (supra) are required to be noted here. In the said decision, this Court had observed in paragraph 7 as follows :

“7. Keeping in view the overall facts and circumstances of the case, I agree with the learned Sessions Judge that the proceedings of the case and the order dated 11.6.2004 does not reveal any bias against the petitioner. At the worst, they show the concerned Judge's annoyance at the failure on the part of the learned Advocate for the petitioner to be present in his Court when the case was taken up for hearing on 10.6.2004 and 11.6.2004. It is now well settled that in considering the expediency of directing a transfer for the ends of justice, it is essential to decide not merely the question whether there has been any real bias in the mind of a Judge but also the further question whether the incidents happened in the Court create in the mind of an accused a reasonable apprehension that he may not have a fair and impartial trial. In other words, it often becomes necessary to consider whether there is a reasonable ground for assuming the possibility of bias and whether it is likely to produce in the mind of a litigant or public at large as reasonable doubt about fairness of administration of justice. It would always be a question of fact to be decided in each case. The events in the Court dated 10.6.2004 and 11.6.2004 followed by the order dated 11.6.2004 passed in Misc. Application No.761 of 2004, in my opinion, are sufficient to create such apprehension in the mind of the petitioner that he would not get justice from the concerned Judge. The said order was ultimately quashed and set aside by this Court by order dated 16.6.2004. Though I do not believe that the petitioner will not get justice from the learned Judge, the things have taken such a turn in this case as to make the petitioner apprehensive that he will not get a fair trial from the learned Judge. In the circumstances, in my opinion, the learned Sessions Judge should not have rejected but allowed the application of the petitioner under Section 408 of Cr.P.C.”

In the light of aforesaid observations what is required to be seen is that whether there is reasonable ground for assuming the possibility of bias and whether it is likely to create in the mind of litigant a reasonable doubt about fairness of administration of justice.

10. Considering the aforesaid circumstances, it will have to be considered that there is reasonable apprehension in the mind of the applicant that she would not get fair trial. Transfer of the proceedings would not mean that integrity of the Trial Court is under doubt. What is required is reasonable apprehension as stated by this Court in the aforesaid decision. Similar view has been expressed in various decisions of this Court as well as Hon'ble Supreme Court.

11. It is true that the Division Bench of this Court has passed an order dated 4th December 2017 in Writ Petition No.3680 of 2017 wherein the Court directed that application for discharge preferred by respondent no.2 be decided within three months from the date of receipt of order. The said order definitely cannot be disturbed by this Court. By granting reliefs in this application, it cannot be construed that this Court is interfering in order dated 4th December 2017.

12. The Hon'ble Supreme Court on various occasions had opportunity to discuss the importance of fair trial in criminal justice system and various circumstances in which trial can be transferred to dispense fair and impartial justice. In **Vikas Kumar Roorkewal Vs. State of Uttarakhand and others [(2011)2-SCC-178]**, the Hon'ble Supreme Court has quoted the observations made by the Supreme Court in several decisions in following paragraphs :

“25. In Gurcharan Dass Chadha Vs. State of Rajasthan (AIR-1966-SC-1418), this Court held as under :

‘13. 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. 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. It is one of the principles of the administration of justice that justice should not only be done but it should be seen to be done. However, a mere allegation that there is apprehension that justice will not be done in a given case does not suffice. The Court has further to see whether the apprehension is reasonable or not. 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.'

26. In *Maneka Sanjay Gandhi Vs. Rani Jethmalani* [(1979)4-SCC-167], this Court has observed as under :

`2. 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 easy availability of legal services or like mini-grievances. 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. We have to test the petitioner's grounds 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. Even so, the process of justice should not harass the parties and from that angle the Court may weigh the circumstances.'

27. In *K.Anbazhagan Vs. Supdt. Of Police* [(2004)3-SCC-767], this Court held as under :

`30. Free and fair trial is sine qua non of Article 21 of the Constitution. It is trite law that justice should

not only be done but it should be seen to have been done. If the criminal trial is not free and fair and not free from bias, judicial fairness and the criminal justice system would be at stake shaking the confidence of the public in the system and woe would be the rule of law. It is important to note that in such a case the question is not whether the petitioner is actually biased but the question is whether the circumstances are such that there is a reasonable apprehension in the mind of the petitioner.'

28. In *Abdul Nazar Madani Vs. State of T.N.* [(2000)6-SCC-204], this Court observed as under :

'The purpose of criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. When it is shown that public confidence in the fairness of a trial would be seriously undermined, any party can seek the transfer of a case within the State under Section 407 and anywhere in the country under Section 406 CrPC. The apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary, based upon conjectures and surmises. If it appears that the dispensation of criminal justice is not possible impartially and objectively and without any bias, before any court or even at any place, the appropriate court may transfer the case to another court where it feels that holding of fair and proper trial is conducive. No universal or hard-and-fast rules can be prescribed for deciding a transfer petition which has always to be decided on the basis of the facts of each case. Convenience of the parties including the witnesses to be produced at the trial is also a relevant consideration for deciding the transfer petition. The convenience of the parties does not necessarily mean the convenience of the petitioners alone who approached the court on misconceived notions of apprehension. Convenience for the purposes of transfer means the convenience of the prosecution, other accused, the witnesses and the larger interest of the society.'

13. In the circumstances, the application is required to be allowed and hence I pass following order :

ORDER

- (i) Criminal Application No.157 of 2017 is allowed;
- (ii) The proceedings pending before Judicial Magistrate, First Class, Court no.3, Pune being RCC No.4140 of 2016 are directed to be transferred to any other Court within the jurisdiction of Pune city;
- (iii) Learned Principal District and Sessions Judge, Pune is directed to take appropriate steps with regards to transfer of the proceedings and the same may be assigned to any other Magistrate within the jurisdiction of Pune city. The proceedings be transferred as expeditiously as possible;
- (iv) Criminal Application No.157 of 2017 is disposed of.

(PRAKASH D. NAIK, J.)

MST