

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO. 5 OF 2021

K. HENRY DANIEL

.... PETITIONER

Versus

STATE, THR. CRIME BRANCH, PANAJI RESPONDENT

Mr. Anthony D'Silva with Ms. Kimberley Gracias, Advocates
for the Petitioner.

Mr. Pravin Faldessai, Additional Public Prosecutor for the
Respondent.

Coram:- M.S. JAWALKAR, J.

Reserved on:- 1st March 2021.

Pronounced on:- 6th March 2021.

ORDER:

The present Petition is filed being aggrieved by the
impugned order dated 15.01.2021 passed by the learned
Sessions Judge, North Goa at Panaji, Goa in Criminal
Miscellaneous Application No. 13/2020, thereby dismissing
application seeking transfer of Criminal Appeal No. 147/2020
pending before the Additional Sessions Judge, North Goa,
Panaji.

2. The petitioner herein contended that he was convicted by learned JMFC, Panaji in CC No. IPC/242/2015/A for commission of offences made punishable under Sections 468, 471 and 419 of IPC and is sentenced to undergo R.I. for a term of seven years. The Appeal against the said judgment being Criminal Appeal No. 147/2020 is pending disposal before the learned Additional Sessions Judge. It is further submitted that the said learned Additional Sessions Judge had previously convicted the present petitioner by a judgment dated 13.11.2019 in Special Case No. 1/2018 for commission of offences punishable under Sections 7 and 13(1)(d) of the Prevention of Corruption Act. His further contention is that co-incidentally, the said judgment dated 13.11.2019 is passed by the very same Presiding Judge before whom the present Appeal being Criminal Appeal No. 147/2020 is pending, which has been filed against the judgment of JMFC dated 30.12.2019. The learned Counsel for the petitioner has drawn my attention to the observations made in Special Case No. 1/2018 at pages 56 and 57, which reads as under:

“During the course of this case, it was brought to my notice that there are other cases pending against. To a question posed by this Court

whether there was any other conviction against the accused, Ld. Adv. Shri Naik submitted, on instructions of the accused, that cases under the Negotiable Instruments Act against the accused have been compounded by the accused. Though the fact that the accused was involved in cases under the Negotiable Instruments Act, which have been compounded by the accused, it would not call for enhances punishment or punishment of a different kind, for which a charge had to be framed in terms of Sec. 211 of the Code of Criminal Procedure, the fact that the accused has been involve in such cases can be taken into consideration when deciding whether leniency ought to be shown to the accused. In my opinion, considering the involvement of the accused in such cases, it would not be in the interest of justice to show leniency to the accused.”

3. He further submits that the petitioner is having reasonable apprehension that justice will not be done to the petitioner if the learned Additional Sessions Judge at Panaji proceeds to hear the said Appeal considering the observations made in the earlier judgment in Special Case No. 1/2018. The application moved before the learned Sessions Judge is dismissed on the ground that the petitioner had failed to

produced anything to show that the learned Additional Sessions Judge had made up her mind and secondly, connected matters should be allotted to the same Judge and these observations/findings are made by the learned Judge while imposing sentence.

4. It is also pointed out by the learned Counsel for the petitioner that in view of provision of Section 320(8) of Cr.P.C., the composition of an offence under this Section shall have an effect of an acquittal with whom the offence has been compounded. In spite of this position, the learned Additional Sessions Judge has taken into consideration these compounded matters while awarding punishment. In view thereof, there is reasonable apprehension that the learned Additional Sessions Judge may take into consideration the petitioner's conviction in Special Case No. 1/2018 while deciding Criminal Appeal No. 147/2020.

5. To support his contentions, the learned Counsel for the petitioner has relied on **Sri Jayendra Saraswathy Swamigal, Tamil Nadu Vs. State of Tamil Nadu &**

Others, (2005) 8 SCC 771 and the decision of the Principal Bench of this Court in **Charu K. Mehta Vs. Chetan P. Mehta & Others, 2010(1) Bom. C.R. 605.**

6. The learned Additional Public Prosecutor, Mr. Pravin Faldessai, opposed the application strongly. It is pointed out that while convicting the petitioner in Special Case No. 1/2018, the said compounded matters were not taken into account, but those were considered while deciding the quantum of sentence. He has pointed out that the conviction order is of 13.11.2019 and the information about pending matters is received subsequently i.e. on 15.11.2019. As such, the said pending matters have not influenced the judgment of conviction. If such application, merely on the apprehension, is entertained, it will hamper the criminal justice system.

7. I have heard both the learned Counsel for the parties at length. This Court in **Charu K. Mehta** (supra) has held as under:

“13. The transfer of case from one court to

another is a very sensitive and delicate issue, which, in case of the order of transfer, casts doubt either on the competence or integrity of the Judge. The court hearing the application for transfer, therefore, requires to deal with it with great care and should take not only the facts of the case or the allegations made therein into consideration but should also examine whether there exists circumstances from which reasonable man would think it probable or likely that the presiding officer will be prejudiced against the applicant. If a reasonable man would think on the basis of the existing circumstances that he is likely to be prejudiced, that is sufficient to grant stay or even to transfer the case for that matter. At the same time, it is a duty of the court to reject frivolous, untenable and irresponsible allegations of bias made by dissatisfied litigant/applicant, more particularly when the court finds that the transfer application is filed with an intention to thwart the proceedings. If transfers sought on such grounds/ allegations are allowed, they would not only hamper the course of justice but they would cause a grave damage to the administration of justice. Similarly, merely because another case of the applicant is decided against him, and while doing so certain observations are made which, according to him, are unwarranted, it is not proper to

assume that the judge is bias and would decide other case of the applicant against him. In other words, merely because one case has been decided against the applicant, it cannot be stated that the judge is bias and that he would not get justice in another case. If the order passed in the first case is wrong or illegal, it is always open to the applicant to challenge it before appropriate court. In any case, a litigant cannot be encouraged or obliged by passing an order of stay unless prima facie case of bias is made out. While dealing with the application for transfer/stay and before passing any order, the court hearing such application should be absolutely clear that there is sufficient material on record to prima facie hold that there is a real likelihood of bias on the part of the presiding officer."

8. Thus, while dealing with the application for transfer there has to be sufficient material on record to *prima facie* hold that there is real likelihood of bias on the part of the Presiding Officer.

9. Here, admittedly, while passing judgment of conviction, it appears that the learned Additional Sessions

Judge was not aware about any pending matters or compounded matters. However, on that basis, while passing order of sentence, the learned Additional Sessions Judge has observed that on this count, accused is not entitled for any leniency. The learned Additional Sessions Judge has not considered the provisions of Cr.P.C. that compounding is having an effect of acquittal.

10. The Hon'ble Apex Court in **Shri Jayendra Saraswati** (supra) held that:

“If there is reasonable apprehension on the part of a party to a case that justice may not be done, he may seek transfer of his case. The apprehension expressed by the party must be a reasonable one and the case cannot be transferred on a mere allegation that there is apprehension that justice will not be done”.

11. 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, it should be seemed to have been done. I agree with the learned Sessions Judge that the order passed by the concerned Court does not reveal any bias against the

petitioner. However, it is well settled that while considering an application for transfer, it is essential to decide not merely the question whether there has been really any bias in the mind of the Judge, but also the further question whether the view of the Court creates in the mind of the litigant a reasonable apprehension that he may not have a fair and impartial trial. 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 the litigant or public at large a reasonable doubt of fairness of administration to justice. Though I do not believe that the petitioner will not get justice from the learned Judge, however, observations in the judgment make the petitioner apprehensive that the conviction in Special Case No. 1/2018 may prejudice the mind of the Judge while deciding Criminal Appeal No. 147/2020. In such circumstances, in my considered opinion, proper course would be to transfer the matter to another Court. Thus, I am inclined to allow the Petition.

12. Accordingly, I proceed to pass the following order:

ORDER

- (a) The application is allowed.
- (b) Criminal Appeal No. 147/2019 pending before the learned Additional Sessions Judge-I at Panaji is transferred to the Court of Adhoc District Judge-2 and Additional Sessions Judge, Panaji (Fast Track Court-II).
- (c) Parties to appear before the Court of Adhoc District Judge-2 and Additional Sessions Judge, Panaji (Fast Track Court-II) on 22.03.2021 at 10:00 a.m.
- (d) The Criminal Writ Petition is disposed of.

M.S. JAWALKAR, J.

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