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**IN THE HIGH COURT OF ORISSA AT CUTTACK
TRP (CRL) No.30 of 2022**

Shyam Sundar Patel

.... ***Petitioner***
Mr.L.N.Patel, Advocate

Versus

1.State of Odisha
2.Pradeep Kumar Pandey

.... ***Opposite Parties***
Mr.S.S.Pradhan, AGA
(for O.P.1)
Mr.G.C.Swain, Advocate
(for O.P.2-informant)

CORAM:
JUSTICE SAVITRI RATHO

ORDER
27.09.2022

Order No.
06.

(Through hybrid mode)

1. This application has been filed by the petitioner under Section 407 of Cr.P.C. for transfer of the Special G.R. case No.56 of 2022 from the Court of learned Additional District Judge-cum-Special Court (POCSO), Sundargarh (in short “the trial Court”) to any other Court under the jurisdiction of this Court.

2. The brief facts of the case is that on 01.04.2022 at 2.35 P.M., the informant-Pradeep Kumar Pandey lodged an FIR before the IIC, Lephripada P.S. alleging therein that his daughter aged about 15 years has been studying at Patuadihi High School (hereinafter referred to as

“the School”) in Class-X and residing in the School hostel. On the same day at about 1.00 P.M., he received a phone call from the School that his daughter has become senseless and shifted to DHH, Sundargarh. The complainant arrived at the hospital and found his daughter was dead with severe injuries on her head. As the staff of the School did not give any satisfactory reply about this incident, the informant suspected that the head injury was due to a heavy blow with an object and the Head Master of the School- present petitioner, the hostel warden and their associate staff killed his daughter. She had been beaten earlier by School staff. The complainant learnt that the petitioner had tried to keep sexual relation with his daughter and therefore committed her murder.

3. Learned counsel for the petitioner submitted that the petitioner has been implicated in the case as he was working as the Headmaster of the School at the relevant point of time, although he had no role to play with the crime in question. As the mother of the deceased girl is an Advocate practising in Sundargarh, the lawyers of the Sundargarh Bar Association have decided not to appear on behalf of the petitioner and there is a hostile environment prevailing in the Court, for which he is apprehensive that he will not get a fair trial if the trial is held in any Court in Sundargarh. So, he has prayed for transfer of the aforesaid

G.R. Case from the trial Court to any other Court under the jurisdiction of this Court.

4. A report had been called for from the learned trial Court and report dated 07.07.2022 has been received. It is stated therein that the victim's mother is an advocate of Sundargarh Bar Association. The accused was heard in person on 2.4.2022 and his bail application was rejected and police paper have been supplied to him on 20.06.2022 and the case was posted to 27.06.2022 for consideration of charge on which date, the petitioner submitted that he wants to engage his own lawyer to defend his case but as the local lawyers are not willing to take up the case for which he wanted time. The case was posted to 20.07.2022, to permit the petitioner to engage his own counsel. From the report, it is not clear if the lawyers of Sundargarh Bar Association have refused to appear on behalf of the petitioner or the petitioner is not willing to engage a lawyer from Sundargarh Bar Association.

5. Mr. S.S.Pradhan, learned Addl. Government Advocate opposed the prayer for transfer and on the basis of instruction received from the IIC, Lephripada Police Station submitted that the Members of the Sundargarh Bar Association have decided not to defend the accused as mother of the deceased is a member of their Association. But they have

no objection if any Advocate or State Defence Counsel is engaged to defend the accused. The instructions is kept in the record.

6. The informant-opposite party No.2 has filed a counter affidavit stating that his wife has not approached anybody in the Sundargarh Bar Association not to conduct the case and there is no decision in the Bar Association not to defend the accused. He has also submitted that a State defence Counsel can be engaged on behalf of the accused by the Court in case he faces difficulty in engaging a counsel himself.

7. Before proceeding to decide whether the petitioner has made out a case for exercise of power conferred by Section – 407 of the Code of Criminal Procedure to transfer the case, it would be apposite to refer to the provisions of Section 407 and some of the decisions of the Supreme Court on the question of transfer. Most of these decisions are based on scope of powers of the Supreme Court under the provisions of Section – 406 of the Cr.P.C., but are applicable to exercise of power under Section – 407 of the Cr.P.C by the High Courts as the provisions are similar.

8. Section – 407 is extracted below :

Section - 407. Power of High Court to transfer cases and appeals.

(1) Whenever it is made to appear to the High Court-

(a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or

(b) that some question of law of unusual difficulty is likely to arise, or

(c) that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice,

it may order-

(i) that any offence be inquired into or tried by any Court not qualified under sections 177 to 185 (both inclusive), but in other respects competent to inquire into or try such offence;

(ii) that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction;

(iii) that any particular case be committed for trial to a Court of Session; or

(iv) that any particular case or appeal be transferred to and tried before itself.

(2) The High Court may act either on the report of the lower Court, or on the application of a party interested, or on its own initiative: Provided that no application shall lie to the High Court for transferring a case from one Criminal Court to another Criminal Court in the same sessions division, unless

an application for such transfer has been made to the Sessions Judge and rejected by him.

(3) Every application for an order under sub- section (1) shall be made by motion, which shall, except when the applicant is the Advocate- General of the State, be supported by affidavit or affirmation.

(4) When such application is made by an accused person, the High Court may direct him to execute a bond, with or without sureties, for the payment of any compensation which the High Court may award under sub- section (7).

(5) Every accused person making such application shall give to the Public Prosecutor notice in writing of the application, together with copy of the grounds on which it is made; and no order shall be made on of the merits of the application unless at least twenty- four hours have elapsed between the giving of such notice and the hearing of the application.

(6) Where the application is for the transfer of a case or appeal from any subordinate Court, the High Court may, if it is satisfied that it is necessary so to do in the interests of justice, order that, pending the disposal of the application, the proceedings in the subordinate Court shall be stayed, on such terms as the High Court may think fit to impose: Provided that such stay shall not affect the subordinate Court' s power of remand under section 309.

(7) Where an application for an order under sub- section (1) is dismissed, the High Court may, if it is of opinion that the

application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding one thousand rupees as it may consider proper in the circumstances of the case.

(8) When the High Court orders under sub- section (1) that a case be transferred from any Court for trial before itself, it shall observe in such trial the same procedure which that Court would have observed if the case had not been so transferred.

(9) Nothing in this section shall be deemed to affect any order of Government under section 197.

Thus, under the provisions of Section – 407 of the Code of Criminal Procedure, the High Court has the power to transfer a case (which can be a case, or appeal, or class of cases or appeals) from a Criminal Court subordinate to its authority to any other Criminal Court of equal or superior jurisdiction or even before itself, whenever it is made to appear to it that a fair and impartial inquiry or trial cannot be held in any criminal court subordinate to it or that some question of law of unusual difficulty is likely to arise; or that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice, it may order that any particular case, or appeal, or class

of cases or appeals, be transferred. The High Court may act either on the report of the lower Court or on an application of the party interested or even on its own initiative.

9. In the case of ***Gurcharan Das Chadha vs. State of Rajasthan*** reported in ***(1966) 2 SCR 678***, the Supreme Court has observed as follows:

..... “13....*The law with regard to transfer of cases is well-settled. 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 of 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.”.....

In the case of ***Maneka Sanjay Gandhi & Anr. Vs. Rani Jethmalani (1979) 4 SCC 167***, Justice V.R. Krishna Iyer, J. in his inimitable style speaking for the bench of three Judges, has held as follows :

....."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 imperilling, 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."....

In ***Abdul Nazar Madani Vs. State of T.N. & Anr*** reported in **(2000) 6 SCC 204** , the Supreme Court has held :

...."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.".....

In ***K.Anbazhagan Vs. Superintendent of Police & Ors.*** reported in **(2004) 3 SCC 767**, the Supreme Court has held as follows :

....."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.".....

In **Zahira Habibulla H. Sheikh Vs. State of Gujarat & Others** reported in (2004) 4 SCC 158, the Supreme Court has observed as follows:

..."Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial."

A three judge Bench of the Supreme Court in the case of ***Captain Amarinder Singh Vs. Parkash Singh Badal & Ors.*** reported in **(2009) 6 SCC 260**, has held as follows :

..."18. For a transfer of a criminal case, there must be a reasonable apprehension on the part of the party to a case that justice will not be done. It is one of the principles of administration of justice that justice should not only be done but it should be seen to be done. On the other hand, mere allegations that there is apprehension that justice will not be done in a given case does not suffice. In other words, the court has further to see whether the apprehension alleged is reasonable or not. The apprehension must not only be entertained but must appear to the court to be a reasonable apprehension.

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 CrPC.

20. However, the apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable

and not imaginary. Free and fair trial is sine qua non of Article 21 of the Constitution. If the criminal trial is not free and fair and if it is biased, judicial fairness and the criminal justice system would be at stake, shaking the confidence of the public in the system. The apprehension must appear to the court to be a reasonable one.".....

In the case of ***Nahar Singh Yadav vs Union of India*** reported in ***(2011) 1 SCC 307***, the Supreme Court after referring to a number of its earlier decisions has held as follows:

...."17. Reverting to the main issue, a true and fair trial is sine qua non of Article 21 of the Constitution, which declares that no person shall be deprived of his "life" or "personal liberty" except according to the procedure established by law. It needs no emphasis that a criminal trial, which may result in depriving a person of not only his personal liberty but also his life has to be unbiased, and without any prejudice for or against the accused. An impartial and uninfluenced trial is the fundamental requirement of a fair trial, the first and the foremost imperative of the criminal justice delivery system. If a criminal trial is not free and fair, the criminal justice system would undoubtedly be at stake, eroding the confidence of a common man in the system, which would not augur well for the society at large. Therefore, as and

when it is shown that the public confidence in the fairness of a particular trial is likely to be seriously undermined, for any reason whatsoever, Section 406 of the Cr.P.C. empowers this Court to transfer any case or appeal from one High Court to another High Court or from one criminal court subordinate to one High Court to another criminal court of equal or superior jurisdiction subordinate to another High Court, to meet the ends of justice. It is, however, the trite law that power under Section 406 of the Cr.P.C. has to be construed strictly and is to be exercised sparingly and with great circumspection. It needs little emphasis that a prayer for transfer should be allowed only when there is a well-substantiated apprehension that justice will not be dispensed impartially, objectively and without any bias. In the absence of any material demonstrating such apprehension, this Court will not entertain application for transfer of a trial, as any transfer of trial from one State to another implicitly reflects upon the credibility of not only the entire State judiciary but also the prosecuting agency, which would include the public prosecutors as well.

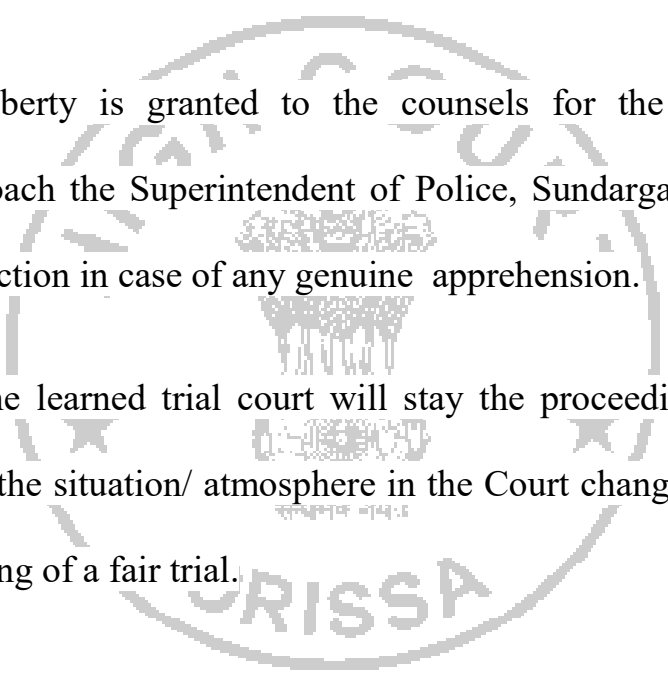
10. Keeping in mind the provisions of Section – 407 and the pronouncements of the Supreme Court and after considering the submissions of the learned counsels, the report of the learned trial Court and the instructions received from the IIC Lephipara Police

Station, I find that though it has been reported that the advocates in Sundargarh have decided not to appear on behalf of the petitioner, neither have they passed any resolution to that effect nor have they prevented any counsel from appearing on behalf of the petitioner. The petitioner had sought for adjournment to engage a counsel of his choice on the ground that the local counsels were not agreeing to appear on his behalf and thereafter filed this transfer application. Till date, there has not been any move by anybody to disrupt the Court proceedings or influence the Court by way of demonstration or any type of pressure tactics. It is natural that if relatives of a victim are present in Court, that may give rise to some apprehension in the mind of an accused. But their presence cannot be forbidden, if it does not disrupt the Court proceedings or pressurize the Court in any manner. Hence the circumstances do not make out a case for transfer of Special GR Case No. 56 of 2022 from the Court of the learned Additional District Judge-cum-Special Court (POCSO), Sundargarh to any other Court at present.

11. The learned Counsel has made a request that in case the counsels engaged by the petitioner require police protection for

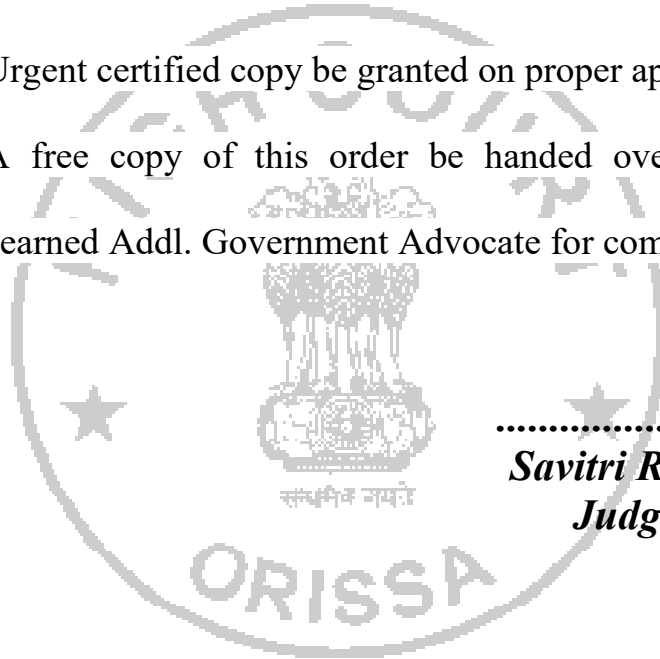
appearing in the Court or moving around the Court premises, necessary protection or security may be provided to them.

12. Although I am convinced that the situation prevailing now, does not make out a case for transfer, but I feel that the following directions are necessary to be issued to ensure that the atmosphere in the trial Court remains conducive for a fair trial.

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- a) Liberty is granted to the counsels for the petitioner to approach the Superintendent of Police, Sundargarh for police protection in case of any genuine apprehension.
 - b) The learned trial court will stay the proceedings, if at any time the situation/ atmosphere in the Court changes, preventing holding of a fair trial.
 - c) The petitioner shall be at liberty to approach the learned Sessions Judge, Sundargarh to permit the learned trial Court to conduct the trial in Rourkela when the trial court holds its circuit bench there, or to approach this Court for transfer of the trial to any other Court in case of necessity.

d) The learned Addl. Government Advocate shall communicate this order to the Superintendent of Police, Sundargarh forthwith so that the latter is not caught unawares, in case of any request for police protection by the counsels appearing on behalf of the petitioner.

13. The TRP (CRL) is disposed of with the aforesaid directions.
14. Urgent certified copy be granted on proper application.
15. A free copy of this order be handed over to Mr. S.S. Pradhan, learned Addl. Government Advocate for compliance.



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Savitri Ratho
Judge

Bichi