

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPLICATION NO. 279 OF 2022

Hasmukh Solanki

Applicant

Versus

The State of Maharashtra

Respondent

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Mr. Milan Desai i/by Saeeda Shaikh, Advocate for the Applicant.

Mr. S. R. Agarkar, APP for the Respondent – State.

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CORAM : PRAKASH D. NAIK, J.

RESERVED ON : 30th SEPTEMBER, 2022

PRONOUNCED ON : 7th FEBRUARY 2023

ORDER :

1. This is an application under Section 407 of Cr.P.C. seeking transfer of criminal case from the Court of Sessions Court Room No. 24 to another Sessions Court.

2. The Applicant is tried for the offence under Section 302 of IPC. vide Sessions Case No. 86 of 2011 pending in Court Room No. 24 at Sessions Court for Greater Bombay.

3. The factual aspects disclosed in this application would indicate that, the trial had already commenced and the prosecution had examined about 11 witnesses. On 22nd November 2021, the evidence of PW-8 was recorded in part. The case was adjourned to

29th November 2021. At the instance of prosecution, the recording of evidence of PW-8 was deferred and in the meantime the evidence of three other witnesses was recorded during the period from 29th November 2021 to 9th March 2022. The examination-in-chief of PW-3 was completed and the case was adjourned to 16th March 2022 for cross-examination. The said witness was absent on 16th March 2022 and the case was adjourned to 24th March 2022. PW-8 was absent and the proceedings were adjourned to 2nd May 2022 and thereafter, to 25th May 2022 and 8th June 2022. On account of regular transfer of the learned Judges, the learned Sessions Judge Shri A. A. Kulkarni presided in Court No.24. On 8th June 2022 the case was adjourned to 15th June 2022.

4. Learned Advocate for the applicant submitted that, on 15th June 2022 PW-8 was present in the Court for the purpose of cross-examination. In the first session, the case was kept back at the request of advocate for accused No.1. Since the advocate representing accused No.1 was required to leave the Court on family emergency, he was not able to attend Court for cross-examination of PW-8. Request was made for adjournment at the instance of advocate for accused No.1. The trial Court insisted that, the advocate should conduct the cross-examination of the witness. Thereafter, request was made to defer the cross-examination of the witness at the

instance of the accused No.1 post the cross-examination of witness by the advocate for applicant. Learned Judge refused to deffer the cross-examination and directed the advocate to file an application for adjournment. The application for adjournment was rejected. The advocate for applicant began cross-examination of PW-8. However, the witness started answering the questions asked by advocate for applicant in most demeaning, abhorrent and arrogant manner. The advocate for applicant requested the learned Judge to reprimand the witness for his conduct. The witness continued his misdemeanor and behaved in arrogant manner. The learned advocate for the applicant requested the learned Judge to take note of the conduct of the witness and to caution him not to behave in rude and insulting manner. However, learned Judge refused to take cognizance of the same and refused to even say word of caution to the witness. The witness continued to be rude while answering the questions put to him. The applicant has quoted certain questions put to the witness of the answers given by him in this application to demonstrate the conduct of the witness. At about 05:10 pm, Advocate for applicant, who had been conducting cross-examination of the witness since about 3:30 pm or so, requested that it will not be possible to complete the cross-examination and the matter may be adjourned. The witness stated that the advocate be directed to complete cross-

examination on the same day. Learned Judge refused to adjourn the cross-examination. The advocate for applicant submitted to the Court that, he cannot proceed with the cross-examination of the witness due to L4-L5 nerve compression. He was having pain in his leg. The witness started accusing that the advocate for applicant was deliberately harassing him and he will not come on the next date if, the matter is adjourned. On making such accusation against the advocate for applicant and on browbeating the Court, the advocate for applicant took strong objection to the same and requested the Court to take the same on record. However, the Court showed its disinclination for the same. It is the duty of the trial Court to ensure that the trial proceeds in fair and unbiased manner. It is the duty of the trial Court to ensure that the dignity of the Court and the advocate appearing for accused is maintained. It is the duty of the Court to ensure that decorum of the Court is maintained and that the witness behaves properly and answers the questions in proper and courteous manner. The Court has to record the demeanor of the witness on account of the incidents. There is reasonable apprehension in the mind of the applicant that, he will not get fair and unbiased trial before the said Court. The application for transfer preferred by applicant before the principal Judge was rejected, without considering the factual aspects in proper prospective. The

learned Judge has relied upon the report submitted by trial Court. On 4th August 2022, the learned Judge had told the Special Public Prosecutor that the advocate for defence is wasting time and he did not know how to cross-examine the witness. He was not aware of law and stretching cross-examination by asking irrelevant questions. In the report submitted to learned Principal Judge in transfer application, the learned Judge had stated that, the advocate for applicant was asking questions to the witness in loud voice and trying to influence the witness. He was shouting at the Court and insisting for recording evidence as per his say. The report does not represent true state of affairs. If the advocate for applicant behaved in the manner stated in report, the learned Special Public Prosecutor would have placed the same by filing his say to that effect. The learned Special Public Prosecutor though did not file any written say would have pointed it out in the course of argument. The advocate for applicant has appeared throughout the case and cross-examined witnesses and never used loud voice nor tried to influence the witness. The trial Court would have made note of such behaviour of advocate in Roznama. The Court could have cautioned the Advocate to maintain decorum of the Court. It is not clear how the Advocate would influence the witness during cross-examination. In the event irrelevant questioned were asked by Advocate for accused, the Court

would have rejected the same by recording them. Certain portion of evidence which reflects that, trial judge was giving unwarranted latitude to the witness and which also reflected on the demeanor of the witness were recorded in question and answer form. It reflects that it was recorded as per say of the witness and not as per say of Advocate of applicant. Nothing as stated in the report has transpired in proceedings. The learned Principal Judge had ventured into surmises that, if the Advocate has cross-examined the witness in similar loud manner witness was justified in giving arrogant answers. The learned Judge did not verify the said fact from learned Special Public Prosecutor. The co-accused had filed say supporting prayer for transfer. The applicant has filed affidavit giving details of what had transpired during proceedings. The affidavit is annexed to this application. The applicant apprehends that he will not get fair trial before the concerned Judge and hence the case is required to be transferred to another Court.

5. Learned APP submitted that, no case was made out for transferring the proceedings to another Court. The learned Principal Judge has relied upon the report of the trial Court and rejected the application for transfer by assigning reasons. There was no material to come to the conclusion that the accused would not get fair trial before the Court. No interference is required in the order passed by

Principal Judge.

6. Undisputed factual matrix indicates that, the applicant is tried for offence under Section 302 of IPC. The trial has commenced. the prosecution has examined about 11 witnesses. The applicant is represented by advocate before the trial Court. Co-accused is also represented by advocate. PW-8 is one of the witness. His examination-in-chief was recorded. He was under cross-examination. The grievance of the applicant is about the rude/arrogant attitude of PW-8 in answering question put to him during his cross-examination and the alleged biased approach of the trial Court.

7. The provision of Section 407 of Cr.PC. relates to power of High Court to transfer cases and appeals. As per the said provision whenever it is made to appear before the High Court that, the fair and impartial inquiry or trial cannot be held in any Criminal Court subordinate thereto, or is expedient for the ends of justice, it may order the transfer of proceedings to another Court. The application for transfer of case has been rejected by learned Principal Judge vide order dated 10th August 2022. The learned Principal Judge has relied upon report submitted by concerned trial Judge. The assurance of fair trial is the main criteria for exercise of power under Section 407 of the Cr.PC. The primary grievance of the

applicant which is apparent from the record is based on the conduct of PW-8 alleged latitude shown to the said witness and alleged bias approach of trial Judge. It is contended by the advocate for applicant that, PW-8 was rude and arrogant while answering the questions. Some of the questions and answers incorporated in this application which were put to PW-8 during his cross-examination does indicates to some extent that, the witness was arrogant and also went to the extent of asking countering the question put to him by advocate for applicant. It is true that the trial Court is the in-charge of the Court proceedings and required to control the proceedings. If it is found that, the witness is misbehaving or arrogant, avoiding answering question, abhorrent and rude, it is for the trial Court to caution him and or reprimand him. The witness is expected to be courteous while answering questions put to him during examination-in-chief or cross examination. While cross-examination the endeavour of defense is to defend the accused by bringing truth on record. The witness cannot be allowed to brow-beat. The dignity of the advocate representing the accused should be maintained during the cross-examination and the witnesses cannot be permitted to cross their limits. It is also true that the trial Court is required to protect the witness and see that he deposes before the Court in healthy atmosphere to meet the ends of justice. However, the material on

record is not sufficient to draw conclusion that the trial Court is biased against the applicant and that he would not get fair trial before the said Court. No case is made out for transfer of investigation. In the event the aforesaid witness or any other witness is found rude, arrogant while answering questions in cross-examination or otherwise, the trial Court is expected to caution him or reprimand him. It is also expected that the defense would co-operate in smooth conclusion of trial. Although the learned Principal Judge has rightly rejected the application for transfer, the observation in paragraph 8 that the counsel for applicant has argued in loud manner and if he had cross-examined the witness in such fashion, then there is every possibility of coming arrogant answers from the witness is in the form of surmises and unwarranted. Be that as it may, for the reasons stated herein above, I do not find any reason to come to the conclusion that the learned Judge was biased against the applicant. There is no material to apprehend for the applicant that he would not get fair trial before the learned Judge. Hence, no case is made out for transferring the proceedings to any other Sessions Judge.

ORDER

- (i) Criminal Application No. 279 of 2022 is rejected and disposed off.

(ii) Trial Court shall proceed with the matter and conclude the case in accordance with law.

(PRAKASH D. NAIK, J.)