

Criminal Revision

Present: **The Hon'ble Justice Ashim Kumar Roy**

C.R.R. No. 2633 of 2009

Judgment On: 07-04-2010.

Susanta Ghosh & Ors

versus

The State of West Bengal & Anr

POINTS:

TRANSFER- Learned Trial Court put some questions to witness- Whether parties have any right to put objection and pray for transfer of the case-Evidence Act, 1872 S.165-Code of Criminal Procedure, 1973 S.407

FACTS:

The petitioners facing their trial before the Learned Additional District & Sessions Judge, Fast Track Court, of a charge under Sections 498A/304B/34 of the Indian Penal Code have moved this Court for transfer of their trial to any other Court on the ground the Learned Presiding Judge is biased against the accused/petitioners and as such they cannot have any fair and impartial trial.

HELD:

The Presiding Judge by asking P.W. 3 how Barnali died and the reason for murder as well as when the post mortem doctor in his chief stated that death was a natural one to put to him a question what does it mean by the term natural death, the Learned Presiding Judge has not exceeded his jurisdiction. The Learned Judge was very much within his judicial domain as conferred under Section 165 of the Evidence Act, which permits the Learned Judge to put any question he pleases in any form to any witness about any fact relevant or irrelevant and no parties have any right to raise

any objection as to the same. This does not show any bias on the part of the Learned Presiding Judge even very remotely as against the petitioners. Similarly, the Learned Presiding Judge has not shown any biasness against the petitioners by putting some questions to P.W. 18 for eliciting his opinion for arriving at his conclusion. Whatever the Learned Presiding Judge asked the witnesses and their answers to that cannot be the basis of the judgment unless same are declared relevant and duly proved according to the provisions of the Evidence Act, therefore, the accused cannot be prejudiced.

Paras-8&9

CASES REFERRED:

- (i) Rajinder Singh @ Manu & Anr. Vs. State of West Bengal, 2004 Cri. L.J. 4023,
- (ii) (ii) Satish Jaggi Vs. State of Chhattisgarh & Ors., Eastern Criminal Notes 2007 (2) 1,
- (iii) Ratan Das Vs. The State of West Bengal & Ors, (2008) 2 C Cr LR (Cal) 597.
- [iv] Zahira Habibulla H. Sheikh & Anr Vs State of Gujarat & Ors, 2004 SCC (Cri) 999.

For Petitioners : Mr. Joy Sengupta
Ms. Sreyashee Biswas
Mr. Subhajit Rakshit

For State : Mr. Sandipan Ganguly

For O.P. No. 2: Mr. Ranjit Kumar Das

THE COURT:

1. Invoking Section 407 of the Code of Criminal Procedure the petitioners who have been facing their trial before the Learned Additional District & Sessions Judge, Fast Track Court, Amta, Howrah of a charge under Sections 498A/304B/34 of the Indian Penal Code have moved this Court

for transfer of their trial to any other Court on the ground the Learned Presiding Judge is biased against the accused/petitioners and as such there cannot have any fair and impartial trial.

2. In support of this application it has been contended by the Learned Advocate of the petitioners;

(a) The Court put some questions to the Investigating Officer of the case as to whether the P.W. 3 and P.W. 6 made any statement to him for further demand of dowry by the accused persons although no such allegation was made by the said witnesses in their evidence.

(b) The Court made attempt to bring into records inadmissible evidence, namely, what have been allegedly stated by the witnesses to the police.

(c) The Court asked a question to the P.W. 3 which practically changed the complexion of his evidence. The witness was asked by the Court, how the death of Barnali Ghosh took place and when the witness replied she was murdered the Court again asked why she was murdered and the witness reply for demand of further dowry.

(d) The post mortem doctor P.W. 13 practically demolished the prosecution case. According to him the death of the victim Barnali was natural but the Learned Court tried to bring in evidence by putting some questions to P.W. 18, the doctor who held the inquest to make out a case that the death was unnatural. Some hyper-technical questions were put to the witnesses.

(e) A question was put to the P.W. 18 as to what kind of drug would be administered in a case where a patient suffered heart and cerebral problems although the doctor, who treated the patient at hospital was still to be examined.

(f) The examination of the accused persons under Section 313 of the Code were not in accordance with law and the questions were too lengthy and confusing and they were also not permitted to explain away the materials actually appearing against them.

The reliance has been placed on the following decisions on behalf of the petitioners, viz., (i) Rajinder Singh @ Manu & Anr. Vs. State of West Bengal, reported in 2004 Cri. L.J. 4023, (ii) Satish Jaggi Vs. State of Chhattisgarh & Ors., reported in Eastern Criminal Notes 2007 (2) 1, (iii) Ratan Das Vs. The State of West Bengal & Ors., reported in (2008) 2 C Cr LR (Cal) 597.

On behalf of the State this prayer for transfer was vehemently opposed and it was contended;

(a) According to the Evidence Act the Learned Trial Court has been amply empowered to put any question to a witness and parties have no right to put objection as to the same.

(b) The question put to the witnesses were aimed towards the discovery of the relevant facts in the case and to obtain proper proof.

(c) The question put to the P.W. 3 by the Learned Trial Court is clearly not an irrelevant question but reflects the intention of the Trial Court to discover the relevant facts, i.e. how Barnali Ghosh died.

(d) The question put to P.W. 18 is not irrelevant. In the said question the Trial Court extracted a portion from Modi's Medical jurisprudence and toxicology and asked the opinion of P.W. 18 as regards to the probable cause of death of Barnali Ghosh.

(e) Although, it is alleged that the Trial Court demonstrate its biasness on and from April 2, 2009 when a question was put to P.W. 3 and thereafter two other witnesses on other dates, but at the fag end of the trial when the examination of accused under Section 313 of the Code was over they have approached the High Court for transfer of the case and as such the prayer for transfer at such belated stage is clearly motivated and aimed to delay the conclusion of the trial.

(f) Mere apprehension of a party is not sufficient for causing transfer of a trial unless such apprehension is reasonable.

In this regard on behalf of the State reliance has been placed in the decision of the Hon'ble Supreme Court in the case of *Zahira Habibulla H. Sheikh & Anr. Vs. State of Gujarat & Ors.*, reported in 2004 SCC (Cri) 999.

It has been submitted on behalf of the opposite party no. 2, the defacto-complainant that it is the duty of the Trial Court to find out the truth and in doing so the Court is very much empowered to put questions to the witnesses to arrive at a just decision. According to the provisions of Section 165 of the Evidence Act, the Trial Court has ample power to put both relevant and irrelevant questions and on fanciful ground no trial can be transferred unless the same has some real basis.

On behalf of the opposite party no. 2 the reliance have been placed on the following two decisions, viz., (i) *State of Rajasthan Vs. Ani @ Hanif & Ors*, reported in AIR 1997 SC 1023, (ii) *Mrs. Maneka Sanjay Gandhi & Ors. Vs. Miss Rani Jethmalani*, reported in AIR 1979 SC 468.

3. I have given my anxious and thoughtful consideration to the rival submissions of the parties as well as to the case laws cited by them. Perused the materials on record.

4. This is a case where transfer of a criminal trial has been sought for at the post examination stage of the accused under Section 313 of the Code of Criminal Procedure on the sole ground the Presiding Judge is biased.

5. It is now well settled from various judicial pronouncements free and fair trial is a sine quo non of Article 21 of the Constitution. It is one of the salutary principles of administration of justice that the justice should not only be done but it should seem to have been done. The question is not whether the Court is actually biased against the petitioner but the question is whether the

circumstances are such that there is reasonable apprehension in the mind of a party, seeking transfer that the justice should not be meted out to him. However, when the question is one of transfer of a criminal case on the ground of judicial bias, mere allegation of apprehension of bias is not enough, the Court has to see whether such apprehension is reasonable or not. Of course, the state of mind of a person apprehending judicial bias is a relevant consideration but not the only determinant factor. The Court has to be fully satisfied that such apprehension is a reasonable one.

In this regard reliance may very well be placed on the following decisions of the Hon'ble Supreme Court, viz., *Mrs. Maneka Sanjay Gandhi & Ors. Vs. Miss Rani Jethmalani*, reported in AIR 1979 SC 468, *Rajinder Singh @ Manu & Anr. Vs. State of West Bengal*, reported in 2004 Cri. L.J. 4023, *Zahira Habibulla H. Sheikh & Anr Vs. State of Gujarat & Ors*, reported in 2004 SCC (Cri) 999.

The role of a Court in criminal justice delivery system is very succinctly highlighted by the Apex Court in the case of *Zahira Habibulla H. Sheikh & Anr. Vs. State of Gujarat & Ors*(supra). Some of such observations quoted below, have a definite bearing for just decision of the present case.

“A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny. (para 38)

The fair trial for a criminal offence consists not only in technical observance of the frame and forms of law, but also in recognition and just application of

its principles in substance, to find out the truth and prevent miscarriage of justice. (para 40)

The courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on presiding officers of court to elicit all necessary materials by playing an active role in the evidence-collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that the ultimate objective i.e. truth is arrived at. This becomes more necessary where the court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.” (para 43)

6. To indicate the biasness of the Presiding Judge, against the petitioners the following facts have been referred;

(a) Firstly, the P.W. 3 was asked by the Presiding Judge how the victim Barnali died and the witness replied that she was murdered, the Presiding Judge asked the witness what was the reason for her murder, the witness replied for demand of dowry.

It may be noted the P.W. 3 was examined in April 2009 whereas the application for transfer has been moved in July 2009.

(b) Secondly, the Learned Presiding Judge, asked the Investigating Officer of the case, the P.W. 20, whether P.W. 3 Lakshmikanta Ghosh and P.W. 6 Sunil Ghosh in their statements under Section 161 of the Code stated anything about the further demand of dowry by the accused persons.

(c) Thirdly, when the post mortem doctor P.W. 13, in chief deposed that the death of Barnali was natural still the Presiding Judge put to him a question what does it mean by the term “natural death”.

(d) Fourthly, the Learned Presiding Judge put some unnecessary question to the P.W. 18, a doctor who examined her after her death and was a witness to inquest.

(e) Lastly, during the examination of the accused too lengthy and jumbled up questions were put to them and thereby the accused persons were confused.

7. A plain reading of Section 165 of the Evidence Act makes it abundantly clear that the said provisions confers ample power upon a Judge holding a trial to ask any question, he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant. Furthermore the parties shall not be entitled to raise any objection to such question and without the leave of the Court is not permitted to cross-examine any witness upon any answer given in reply to any such question.

Therefore, in view of the aforesaid provisions in a criminal trial, a Presiding Judge is expected to play a very proactive role to elicit necessary materials from witnesses at the appropriate context, which he deems necessary in order to discover relevant facts and elicit truth for reaching to a correct conclusion. There is nothing which inhibit his power to put question to the witnesses about any fact relevant or irrelevant and the parties are not entitled to raise any objection. Of course it is no doubt true and there is no controversy that the judgment of the Court must be based upon the facts declared by the Evidence Act to be relevant and duly proved and not otherwise.

8. Now, coming to the case in hand, in my opinion, the Presiding Judge by asking P.W. 3 how Barnali died and when the reply of the witness was, she was murdered then again put to him a question what is the reason for murder as well as when the post mortem doctor in his chief stated

that death was a natural one to put him to a question what does it mean by the term natural death, the Learned Presiding Judge has not exceeded his jurisdiction. The Learned Judge was very much within his judicial domain as conferred under Section 165 of the Evidence Act, which permits the Learned Judge to put any question he pleases in any form to any witness about any fact relevant or irrelevant and no parties have any right to raise any objection as to the same. In my opinion, this does not show any bias on the part of the Learned Presiding Judge even very remotely as against the petitioners. I am of the further opinion similarly the Learned Presiding Judge has not shown any biasness against the petitioners by putting some questions to P.W. 18 for eliciting his opinion for arriving at his conclusion.

9. Now, so far as the other questions are concerned, viz., asking the Investigating Officer whether P.W. 3 and P.W. 6 made any statement about the demand of dowry by the accused persons as well as putting lengthy statement which according to the learned advocate of the petitioners confused them, in my opinion could have been avoided by the Learned Presiding Judge, but that does not demonstrate any biasness on his part. In any event, whatever the Learned Presiding Judge asked the witnesses and their answers to that cannot be the basis of the judgment unless same are declared relevant and duly proved according to the provisions of the Evidence Act, therefore, the accused cannot be prejudiced.

10. This application for transfer has no merit and accordingly stands dismissed. Interim order, if any, stands vacated.

11. The Learned Trial Court is directed to conclude the trial as expeditiously as possible preferably within two months from the date of communication of this order.

12. However, I am sure the Learned Presiding Judge shall act in the true sense of a Judicial Officer nevertheless this application for transfer has been moved on the allegation of biasness on his part against the present petitioners.

13. Criminal Section is directed to deliver urgent Photostat certified copy of this Judgment to the parties, if applied for, as early as possible.

(Ashim Kumar Roy, J.)