

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

TRANSFER PETITION (CRIMINAL) NO. 29 OF 2008

Vikas Kumar Roorkeewal

... Petitioner

Versus

State of Uttarakhand and others

...Respondents



J.M. Panchal, J.

By filing this petition under Section 406 of the Code of Criminal Procedure 1973 ("The Code", for short), the petitioner, who is son of late Radhey Shyam and who is also the first informant in the case relating to the murder of his father, has prayed that the case titled as *State Vs.*

Aakash Tyagi and others being S.T. No. 6 of 2007 pending in the Court of learned Additional District Judge, Fast Track Court, Haridwar (Uttarakhand) arising out of crime No. 182 of 2006 and FIR No.169 of 2006 be transferred to the Court of competent jurisdiction at Delhi.

2. The background facts as projected by the petitioner in the instant petition are as follows:-

Late Radhey Shyam was initially appointed Executive Engineer in Irrigation Department of Uttar Pradesh. In January, 2004 he was posted to look after a project known as Upper Ganga Link Canal Project, under which two rivers, namely, Ganga and Yamuna were to be linked. It is claimed that because of his excellent track record, efficiency and honesty, he was promoted to the post of Superintending Engineer in November, 2005 and was placed in charge of the said project, the total cost of which was Rs.240 crores. The project was intended to solve the long standing irrigation and drinking water

problems of western U.P. and also to provide a solution to control floods. He was brutally murdered in cold blood in broad day light in the afternoon of June 18, 2006 by three persons at his residence located in his Camp Office at Roorkee (Uttarakhand). The petitioner, who claims to be an eye-witness, has stated that he had chased the accused but they had escaped and, therefore, he had called the police and reported the matter to the police immediately. The police on arrival at the place of the incident had taken the deceased to the Government Hospital where he was declared brought dead. On the basis of the information given by the petitioner, the police had registered an FIR No. 169/2006 on 18.6.2006. On the same day post mortem on the dead body of the deceased was conducted by the medical officers, on the intervention of the District Magistrate (Uttarakhand). The murder of Radhey Shyam, Superintending Engineer of U.P. had sent shock waves throughout Uttarakhand and U.P and in the engineering and bureaucratic community and the incident was widely reported in the

newspapers.

3. Because of the high profile of the accused involved in the murder of the deceased engineer, the Uttarakhand police was found to be incapable/reluctant to investigate the crime. Therefore, the State of Uttar Pradesh had directed the Special Task Force along with Special Operation Group to investigate the murder and to arrest the accused. It may be mentioned that the Special Task Force along with Special Operation Group appointed to investigate the matter and to arrest the accused had conducted large number of raids. All the arrests were made by Special Task Force, Uttar Pradesh except one which was effected by the Uttarakhand police on the information of Special Task Force, Uttar Pradesh.

4. It is mentioned by the petitioner that large scale corruption is prevailing in the Irrigation Department and earlier two Junior Engineers were also murdered brutally. It was reported that disputes concerning the contracts which were entrusted and to be entrusted

under the project had emerged as the main reason for the murders of these engineers including that of late Radhey Shyam. The record shows that after investigation, charge-sheet was filed and charges have been framed against accused persons, who are respondent Nos. 2 to 9 in the Transfer Petition, under Section 302 read with Section 120B of the Indian Penal Code and Section 3(2)(V) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The trial has commenced in the Court of learned Additional District Judge, Fast Track Court, Haridwar (Uttarakhand) and by this time, one witness is already examined.

5. Grievance of the petitioner is that continuously threats are being administered to his family including him and other witnesses that they would meet the same fate as that of the deceased, if they dare to depose before the Court. The petitioner has mentioned that the first eye witness examined in the court, who was the driver of the deceased, has turned hostile because of the threats

given to him and the learned Judge presiding over the trial could not do anything except being a passive spectator. The petitioner claims that he along with his wife was chased by the gang when they were enroute to Haridwar to appear before the court on May 25, 2007, and due to fear, they have not been able to appear before the court on several dates.

6. The petitioner has mentioned that the other witnesses who are yet to be examined are regularly receiving/getting summons calling upon them to remain present before the court to tender testimony, but they are unable to appear and depose before the Trial Court at Haridwar due to regular threats being administered to them. It is also mentioned by the petitioner that his mother on account of fear and threats has already left Roorkee and is staying with brother of the petitioner in Delhi and is thus unable to depose before the court at Haridwar. What is claimed by the petitioner is that due

to the threats received by him, he and his wife who are material witnesses have also started residing at Delhi.

7. The petitioner has mentioned that he has written several letters/made applications and prayed the competent authorities to take immediate action and to provide security to him and other witnesses, but no action has been taken.

8. What is mentioned in the petition is that in the Dainik Jagran newspaper published on June 8, 2007 it was reported that Sunil Rathi, responsible for murdering the deceased is running his gang in Uttar Pradesh and Uttarakhand from Dehradun Jail and has created wide spread terror which would not permit fair trial commenced in case of the murder of the deceased. The petitioner has mentioned that the investigation by the police is not impartial and has been influenced by powerful people involved in the murder of the deceased. It is also highlighted that the trial court also did not make a serious effort to see that justice is done. Thus,

by filing the instant petition, the petitioner has prayed to transfer the case pending in the court of learned District Judge, Fast Track Court, Haridwar to competent court of jurisdiction at Delhi.

9. The petition was placed for preliminary hearing before the Court on May 1, 2008 and after hearing the learned counsel for the petitioner, this Court had ordered notices to be issued to the respondents. On service of notice, the State of Uttarakhand has filed counter affidavit controverting the averments made in the petition. It is mentioned in the reply that the accused were arrested on different dates and proper investigation was made in the case. And mobile phone used in the incident, one pistol of 315 bore from Akash Tyagi, cartridges, motorcycle having blue colour etc., were seized. In the reply it is mentioned that on interrogation of Akash Tyagi and his co-accused other accused namely Vineet Sharma @ Chinu Pandit was arrested and that the accused are being tried for alleged commission of serious

offences. According to the reply affidavit Uttarakhand police was capable to investigate the case and was not reluctant to investigate but in view of allegations levelled against local police investigating the case, the investigation was handed over to special agency. By filing reply, it is claimed by State of Uttarakhand that the petition has no substance and the same should be dismissed.

10. The petitioner has filed rejoinder to the affidavit in reply filed on behalf of the State Government.

11. The respondent No. 2, i.e., Kumar Gaurav has also filed affidavit in reply mentioning inter alia that the Transfer Petition is wholly misconceived and the allegations leveled therein are baseless, vague and incorrect and, therefore, the petition should be dismissed. In the reply the respondent No. 2 has referred to a decision of this Court in Abdul Nazar Madani Vs. State of Tamil Nadu AIR 2000 SC 2293, wherein it is held that not only the convenience of the complainant alone

but convenience of the accused should also be taken into consideration before ordering transfer of criminal case from one State to another. The reply proceeds to mention that the investigation is not yet complete and, therefore, if the trial is transferred from Haridwar to any other State, the same shall have adverse effect on the trial and that there is every possibility that injustice and prejudice would be caused to the accused. What is stated is that the witnesses proposed to be examined on behalf of accused would not be willing to travel to any other place for tendering defence evidence and, therefore, transfer of case would result into injustice to the accused. According to the reply, the present case is a classic example of trial by media and the petitioner who is influential and had widely publicized the incident has succeeded in falsely implicating the respondent No. 2 in the case. The reply states that no ground is made out by the petitioner to transfer the case from Court of Haridwar to competent Court of jurisdiction at Delhi and therefore the petition should be dismissed.

12. This Court has heard the learned counsel for the parties at length and in great detail. This Court has also considered the documents forming part of the instant petition.

13. From the record of the case it is evident that several letters have been written and/or applications have been made by the petitioner making grievances about the threats administered to him and his family by the accomplices of the accused. However, it is an admitted position that no action, worth the name, is taken either by the SSP, Haridwar or by Government of Uttarakhand either to afford protection to the petitioner and his family or to thwart such threats made by the accused and/or their accomplices. It is relevant to notice that it was claimed by the prosecution that the driver of the deceased was an eye-witness and it is the case of the petitioner that due to threats, he turned hostile. The fact that the driver had turned hostile is not in dispute. The fact that in spite of the receipt of several summons

neither the petitioner nor his wife nor his family members nor other witnesses have been able to go to Haridwar to depose before the Court is not denied by the State Government. Therefore, this Court is inclined to accept the case of the petitioner that he and other witnesses have not been able to respond the summons only because of fear to their lives due to the threats administered by the accomplices of the accused. There is no manner of doubt that because of chasing of the petitioner and his relatives by the accomplices of the accused, they have not been able to attend the Court and tender evidence. If this situation continues then the prosecution would not be able to lead any evidence in such a brutal murder case and the accused will have to be acquitted. The record indicates that four accused have been already enlarged on bail but neither the police nor the State agency has taken any steps for the purpose of getting their bail order cancelled.

14. The learned counsel for the petitioner has placed reliance on a decision of this Court in Himanshu Singh Sabharwal vs. State of M.P. and others (2008) 4 SCR 783, where this Court in paragraphs 14 and 15 has observed as under: -

“14. "Witnesses" as Bentham said: are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control to speak the truth in the Court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by Courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingenuously adopted to smother and stifle truth and realities coming out to surface rendering truth and justice, to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer even in slow process but irreversibly

and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the Court and justice triumphs and the trial is not reduced to mockery. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who has political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in Court the witness could safely depose truth without any fear of being haunted by those against whom he has deposed. Some legislative enactments like the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short the 'TADA Act') have taken note of the reluctance shown by witnesses to depose against dangerous criminals-terrorists. In a milder form also the reluctance and the hesitation of witnesses to depose against people with muscle power, money power or political power has become the order of the day. If ultimately truth is to be arrived at, the eyes and ears of justice have to be protected so that the interests of justice do not get incapacitated in the sense of making the proceedings before Courts mere mock trials as are usually seen in movies.

15. Legislative measures to emphasise prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day. Conducts which illegitimately affect the presentation of evidence in proceedings before the Courts have to be seriously and sternly dealt with. There should not be any undue anxiety to only protect the interest of the accused. That would be unfair as noted above to the needs of the society. On the contrary, the efforts should be to ensure fair trial where the accused and the prosecution both get a fair deal. Public interest in the proper administration of justice must be given as much importance if not more, as the interests of the individual accused. In this courts have a vital role to play.”

15. Above judgment clearly enunciates the importance of witness in criminal trial. This is a case of murder of a Superintending Engineer. There is no manner of doubt that brutal assault was mounted on him which resulted into his death. The son of the deceased is seeking transfer of proceedings on ground of coercion and threat to the witnesses as well as doubtful sincerity of the investigating agency and prosecuting agency. In effective cross-examination by public prosecutor of the driver who resiled from the statement made during investigation

speaks volumes about the sincerity/ effectiveness of the prosecuting agency. The necessity of fair trial hardly needs emphasis. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases. The learned Judge has failed to take participatory role in the trial. He was not expected to act like a mere tape recorder to record whatever has been stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confers vast and wide powers on Court to elicit all necessary materials by playing an active role in the evidence collecting process. However, the record does not indicate that the learned Judge presiding the trial had exercised powers under Section 165 of the Evidence Act which is in a way complimentary to his other powers. It is true that there must be reasonable apprehension on the part of the party to a case that justice may not be done and mere allegation that there is apprehension that justice will not be done cannot be the basis for transfer. However, there is no manner of doubt that the reasonable apprehension that there would be

failure of justice and acquittal of the accused only because the witnesses are threatened is made out by the petitioner.

16. This Court, on various occasions, had opportunity to discuss the importance of fair trial in Criminal Justice System and various circumstances in which a trial can be transferred to dispense fair and impartial justice. It would be advantageous to notice a few decisions of this Court with regard to the scope of Section 406 of Code of Criminal Procedure. In Gurcharan Dass Chadha vs. State of Rajasthan AIR 1966 SC 1418, this Court held as under: -

“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 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.”

In Maneka Sanjay Gandhi vs. Rani Jethmalani (1979) 4

SCC 167, this Court has observed as under: -

“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 K. Anbazhagan vs. Superintendent of Police (2004) 3

SCC 767, this Court held as under: -

“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 Abdul Nazar Madani vs. State of Tamil Nadu (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 Cr.P.C. 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 witness 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.”

17. From the averments made in the petition it is evident that the accused belong to powerful gang operating in U.P. from which State of Uttarakhand is carved out. The petitioner has been able to show the circumstances from which it can be reasonably inferred that it has become difficult for the witnesses to safely depose truth because of fear of being haunted by those against whom they have to depose. The reluctance of the witnesses to go to the court at Haridwar in spite of

receipt of repeated summons is bound to hamper the course of justice. If such a situation is permitted to continue, it will pave way for anarchy, oppression, etc., resulting in breakdown of criminal justice system. In order to see that the incapacitation of the eye-witnesses is removed and justice triumphs, it has become necessary to grant the relief claimed in the instant petition. On the facts and in the circumstances of the case this Court is of the opinion that interest of justice would be served if transfer of the case from Haridwar to Delhi is ordered.

18. For the foregoing reasons the petition succeeds. The case titled as State Vs. Akash Tyagi & Others bearing ST No. 6 of 2007 pending in the Court of learned First Fast Track Court / A.D.J., Haridwar, Uttarakhand arising out of Crime No. 182/2006 and FIR No.169 of 2006 is hereby transferred to competent Court of jurisdiction at Delhi. The investigating agency, the prosecution agency, the State of Delhi as well as State of

Uttarakhand and the learned Judge to whom the trial of the case may be made over, are directed to take appropriate steps for protecting the witnesses and to ensure that the trial concludes as early as possible and without any avoidable delay. The Transfer Petition accordingly stands disposed of.

.....J.
[J.M. Panchal]

.....J.
[H.L. Gokhale]

New Delhi;
January 11, 2011.