

ITEM NO.301

COURT NO.1

SECTION X

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Writ Petition (Criminal) No.85/2018

MOHD. AKHTAR

Petitioner(s)

VERSUS

THE STATE OF JAMMU AND KASHMIR

Respondent(s)

WITH W.P.(Cr1.) No.86/2018 (PIL-W)

Date : 07-05-2018 These petitions were called on for hearing today.

CORAM :

HON'BLE THE CHIEF JUSTICE
HON'BLE DR. JUSTICE D.Y. CHANDRACHUD
HON'BLE MS. JUSTICE INDU MALHOTRA

For Petitioner(s) Ms. Indira Jaising, Sr. Adv.
Mr. Sunil Fernandes, AOR
Ms. Sangeeta Madan, Adv.
Ms. Deepiika Singh Rajawat, Adv.
Ms. Astha Sharma, Adv.
Mr. Nupur Kumar, Adv.
Ms. Anju Thomas, Adv.
Ms. Ajita Sharma, Adv.
Ms. Aanchal Singh, Adv.
Mr. Paras Nath Singh, Adv.
Ms. Nehmat Kaur, Adv.
Mr. Tanveer Khan, Adv.

WP(Cr1.) 86/18 Petitioner-in-person

For Respondent(s) Mr. Maninder Singh, ASG
Mr. R. Balasubramanian, Adv.
Ms. Uttara Babbar, Adv.
Ms. Aarti Sharma, Adv.
Mr. Prabhas Bajaj, Adv.
Mr. Akshay Amritanshu, Adv.
Mr. B. V. Balaram Das, AOR

Mr. Gopal Subramaniam, Sr. Adv.
Mr. Jahangir Iqbal Ganai, Adv. Gen.

Mr. M. Shoeb Alam, AOR
Ms. Fauzia Shakil, Adv.
Mr. Ujjwal Singh, Adv.
Mr. Mojahid Karim Khan, Adv.

Ms. Meenakshi Arora, Sr. Adv.
Mr. Sumit Singh Somria, Adv.
Ms. Anannya Ghosh, Adv.
Ms. Bhabna Das, Adv.

Mrs. Geeta Luthra, Sr. Adv.
Dr. Nishesh Sharma, Adv.
Mr. Vibhu Tiwari, Adv.
Mr. Chandan Sharma, Adv.

Ms. Harvinder Chowdhury, Adv.
Mr. Ankur Sharma, Adv.
Dr. Nishesh Sharma, Adv.
Mr. Chandan Sharma, Adv.
Mr. Vibhu Tiwari, Adv.

Mr. Aakarshan Aditya, Adv.
Mr. Chandan Sharma, Adv.
Mr. Vibhu Tiwari, Adv.
Dr. Nishesh Sharma, Adv.
Mr. Ashok Kr. Singh, Adv.

Mr. Aseem Sawhney, Adv.
Mr. D.K. Sinha, Adv.
Mr. Vijay Kumar, Adv.
Mr. R.K. Jha, Adv.
Mr. Raju S., Adv.
Mr. Swarn Kr. Jha, Adv.

UPON hearing the counsel the Court made the following
O R D E R

The pivotal fact around which the controversy centers, is abduction, rape and murder of an eight year old girl. An F.I.R. was lodged at Hiranagar Police Station, Kathua, which was registered as F.I.R. No.10 of 2018. The investigating agency, namely, the Crime Branch, which took over the investigation on 22nd January, 2018 from the local police has already filed the charge-sheet on 9th April, 2018, in the court of Chief Judicial Magistrate, Kathua in the State of Jammu & Kashmir.

As asserted in the writ petition, since there have been some unwarranted situations that have occurred in and outside the Kathua Bar Association, the locality in question, the involvement of many groups and various other aspects, a fair trial is not possible at Kathua. Be it noted, the High Court of Jammu & Kashmir had called for a report from the District & Sessions Judge, Kathua, who has submitted the report and the same has been brought on record. Suffice it to mention that the report indicates that there had been some obstruction by the Bar Association at Kathua. We do not intend to dwell upon the same in detail.

The issues that emerge for consideration are whether the charge-sheet filed by the Crime Branch should be treated to have been denied to have an investigation by the Central Bureau of Investigation, to transfer the case outside the District of Kathua or outside the State of Jammu & Kashmir, the duty of the State to provide protection to the accused persons, one of whom is a juvenile and the witnesses, if the case is transferred to another place, what kind of protection is to be given to the witnesses and further what kind of arrangements can be made so that the witnesses not only feel protected, but depose absolutely in a fearless manner and that in the case of transfer to some other State, who should be allowed to prosecute the trial and how the trial Judge can be rendered assistance.

Though various submissions were advanced by Ms. Indira Jaising, learned senior counsel appearing for the petitioner, the crux of the matter is how to proceed with the trial so that it is effective regard being had to the fundamental principle of fairness of a trial. She has drawn our attention to many an authority of this Court. We need not refer to all the judgments, except two. In Maneka Sanjay Gandhi vs. Rani Jethmalani (1979) 4 SCC 167, the Court has

observed thus:-

"2. 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.

5. ... It is becoming a frequent phenomenon in our country that court proceedings are being disturbed by rude hoodlums and unruly crowds, jostling, jeering or cheering and disrupting the judicial hearing with menaces, noises and worse. This tendency of toughs and street roughs to violate the serenity of court is obstructive of the course of justice and must surely be stamped out. Likewise, the safety of the person of an accused or complainant is an essential condition for participation in a trial and where that is put in peril by commotion, tumult or threat on account of pathological conditions prevalent in a particular venue, the request for a transfer may not be dismissed summarily. It causes disquiet and concern to a Court of justice if a person seeking justice is unable to appear, present one's case, bring one's witnesses or adduce evidence. Indeed, it is the duty of the court to assure propitious conditions which conduce to comparative tranquillity at the trial. Turbulent conditions putting the accused's life in danger or creating chaos inside the court hall may jettison public justice. If this vice is peculiar to a

particular place and is persistent the transfer of the case from that place may become necessary. Likewise, if there is general consternation or atmosphere of tension or raging masses of people in the entire region taking sides and polluting the climate, vitiating the necessary neutrality to hold a detached judicial trial, the situation may be said to have deteriorated to such an extent as to warrant transfer..."

In Asha Ranjan v. State of Bihar (2017) 4 SCC 397, the two-Judge Bench, after referring to a three-Judge Bench decision in Rattiram vs. State of M.P. (2012) 4 SCC 516, has held thus:-

"It is settled in law that the right under Article 21 is not absolute. It can be curtailed in accordance with law. The curtailment of the right is permissible by following due procedure which can withstand the test of reasonableness. The submission that if the accused is transferred from jail in Siwan to any other jail outside the State of Bihar, his right to fair trial would be smothered and there will be an inscription of an obituary of fair trial and refutation of the said proponent, that the accused neither has monopoly over the process nor does he have any exclusively absolute right, requires a balanced resolution. The opposite arguments are both predicated on the precept of fair trial and the said scale would decide this controversy. The interest of the victim is relevant and has to be taken into consideration. The contention that if the accused is not shifted out of Siwan Jail, the pending trials would result in complete farce, for no witness would be in a position to depose against him and they, in total haplessness, shall be bound to succumb to the feeling of accentuated fear that is created by his unseen tentacles, is not an artifice and cannot be ignored. In such a situation, this Court should balance the rights between the accused and the victims and thereafter weigh on the scale of fair trial whether shifting is necessary or not. It would be travesty if we ignore the assertion that if the respondent No. 3 is not shifted from Siwan Jail and the trial is held at Siwan, justice, which is necessitous

to be done in accordance with law, will suffer an unprecedented set back and the petitioners would remain in a constant state of fear that shall melt their bones. This would imply balancing of rights."

Needless to say, a fair trial is a sacrosanct principle under Article 21 of the Constitution of India and a 'fair trial' means fair to the accused persons, as well as to the victims of the crime. In the instant case, direct victims are the family members of the deceased, although ultimately collective is the victim of such crime. The fair trial commands that there has to be free atmosphere where the victims, the accused and the witnesses feel safe. They must not suffer from any kind of phobia while attending the court. Fear and fair trial are contradictory in terms and they cannot be allowed to co-exist.

Concept of 'fair trial', needs no special emphasis and it takes within its sweep the conception of a speedy trial and the speedy trial meets its purpose when the trials are held without grant of adjournment as provided under the provisions contained in Section 309 Cr.P.C.

In Vinod Kumar vs. State of Punjab (2015) 3 SCC 220, it has been held thus:-

"There is no cavil over the proposition that there has to be a fair and proper trial but the duty of the court while conducting the trial is to be guided by the mandate of the law, the conceptual fairness and above all bearing in mind its sacrosanct duty to arrive at the truth on the basis of the material brought on record. If an accused for his benefit takes the trial on the path of total mockery, it cannot be countenanced. The court has a sacred duty to see that the trial is conducted as per law. If adjournments are granted in this manner it would tantamount to violation of the rule of law and eventually turn such trials to a farce. It is legally impermissible and

jurisprudentially abominable. The trial courts are expected in law to follow the command of the procedure relating to trial and not yield to the request of the counsel to grant adjournment for non-acceptable reasons.

In fact, it is not at all appreciable to call a witness for cross-examination after such a long span of time. It is imperative if the examination-in-chief is over, the cross-examination should be completed on the same day. If the examination of a witness continues till late hours the trial can be adjourned to the next day for cross-examination. It is inconceivable in law that the cross-examination should be deferred for such a long time. It is anathema to the concept of proper and fair trial.

The duty of the court is to see that not only the interest of the accused as per law is protected but also the societal and collective interest is safeguarded. It is distressing to note that despite series of judgments of this Court, the habit of granting adjournment, really an ailment, continues. How long shall we say, "Awake! Arise!". There is a constant discomfort. Therefore, we think it appropriate that the copies of the judgment be sent to the learned Chief Justices of all the High Courts for circulating the same among the learned trial Judges with a command to follow the principles relating to trial in a requisite manner and not to defer the cross-examination of a witness at their pleasure or at the leisure of the defence counsel, for it eventually makes the trial an apology for trial and compels the whole society to suffer chicanery. Let it be remembered that law cannot allowed to be lonely; a destitute."

In the course of hearing, we have been apprised by Mr. Gopal Subramaniam, learned senior counsel appearing for the State of Jammu & Kashmir that the case has been committed by the learned Chief Judicial Magistrate, Kathua to the District & Sessions Judge, Kathua.

In view of the aforesaid, we think it appropriate to issue the following directions:-

(i) The matter that has been committed to the court of the District & Sessions Judge, Kathua, shall stand transferred to the file of the District & Sessions Judge, Pathankot situate in the State of Punjab;

(ii) The District & Sessions Judge, Kathua shall send all the materials relating to the charge-sheet and other documents in sealed covers through special messengers with the assistance of the police force to the transferee court;

(iii) The transferee court shall proceed under the Ranbir Penal Code as that applies to the State of Jammu & Kashmir;

(iv) The statements of the witnesses that have been recorded in Urdu language, as accepted by Mr. Gopal Subramaniam, shall be translated to English so that the transferee court does not face any difficulty in conducting the trial;

(v) The State of Jammu & Kashmir shall provide requisite number of interpreters as directed by the learned District & Sessions Judge, Pathankot so that the deposition of the witnesses can be properly recorded and translated copies thereof can be provided to the accused persons;

(vi) It shall be the duty of the State of Jammu & Kashmir to transport the witnesses to Pathankot and provide all other necessary facilities, including food, etc. so that the witnesses do not face any difficulty;

(vii) The accused persons shall also be similarly treated so that they do not feel that solely because they are accused persons, they are presumed to be guilty, for it is the settled principle that they are innocent till they are found guilty;

(viii) The learned District & Sessions Judge, Pathankot shall himself take up the trial and not assign it to any Additional Sessions Judge;

(ix) The learned District & Sessions Judge, Pathankot shall fast-track the trial and take it up on day-to-day basis so that there is no delay in trial;

(x) The examination-in-chief and the cross-examination of witnesses shall be in a continuous manner and for no reasons whatsoever the same shall be deferred;

(xi) The State of Jammu & Kashmir is granted liberty to appoint the Public Prosecutor for prosecution of the case;

(xii) The trial shall be held *in camera* so that the witnesses feel protected and the accused persons feel safe;

(xiii) As this Court is monitoring the matter, no court shall entertain any petition pertaining to this case; and

(xiv) The juvenile, who is facing the trial, shall be dealt with in accordance with law and he should be given all special care and protection as per the command of the law.

In view of the aforesaid directions, the order staying the trial before the Kathua court stands vacated. The protection that we had granted *vide* order dated 16th April, 2018, shall continue and shall not be varied till the trial is over.

Let the matter be listed on 9th July, 2018.

(Chetan Kumar)
Court Master

(H.S. Parasher)
Assistant Registrar