

A.F.R.

THE HIGH COURT OF ORISSA : CUTTACK

TRP (CRL) Nos. 15 & 17 of 2009

In the matter of an application under Section 407 read with Section 482 of the Code of Criminal Procedure.

(In TRP (CRL) Nos. 15 of 2009)

Sister Meena Lalita Borwa Petitioner
-Versus-

State of Orissa and others Opp. Parties

(In TRP (CRL) Nos. 17 of 2009)

Thomas Chellan and others Petitioners
-Versus-

State of Orissa and others Opp. Parties

For Petitioners : Mrs.J.Choudhury, Sr.Advocate.
M/s. Sujata Jena,
B.P.Chhualsingh,
R.R.Jena & S.Bindhani.

For Opposite party No.1 : Mr. Ashok Mohanty,
Sr. Advocate.
(Advocate General)

For Opposite Parties 2,3,
4,6,7,8 & 11 : M/s. D.P.Dhal, K.Das,
S.K.Tripathy,
A.R.Mishra &
S.Mohapatra.

For Opposite Parties 5 & 9 : None

For Opposite Party No.10 : Mr. B.K.Dash

P R E S E N T :**THE HON'BLE MR. JUSTICE INDRAJIT MAHANTY.**

 Date of hearing: 25.03.2010

 Date of Judgment: 30.03.2010

I.Mahanty, J. These transfer applications under Section 407 read with Section 482 of the Code of Criminal Procedure have been filed by Sister Meena Lalita Borwa (Petitioner in TRPCRL No.15 of 2009) and Thomas Chellan and others (Petitioners in TRPCRL No.17 of 2009) seeking transfer of Sessions Trial No.1 of 2009, arising out of Balliguda P.S. Case No.70 of 2008, corresponding to CID CB Case No.39 of 2008 and G.R. Case no.188 of 2008 of the court of learned S.D.J.M., Balliguda, pending trial in the court of learned Additional Sessions Judge, Fast Track Court-1, at Phulbani to Cuttack. Whereas Sister Meena Lalita Borwa (Petitioner in TRPCRL 15 of 2009) is the victim/informant and Thomas Chellan and two others (Petitioners in TRPCRL No.17 of 2009) are witnesses in the aforementioned G.R. Case for the alleged commission of offence under Sections 147, 148, 324, 354, 355, 294, 506, 376(2)(g) read with Section 149 of the Indian Penal Code.

2. Mrs. J.Choudhury, learned Senior Advocate, appearing for the petitioner-Sister Meena Lalita Borwa submitted that, while the petitioner was working as a nun in the Catholic Church at Kandhamal, she became a victim of a ghastly rape and sexual assault, which is the subject matter for trial.

It is submitted that, in the month of December, 2007 communal violence broke out in Kandhamal District, Orissa and while tension continued to prevail in the said area, Swami Laxmanananda Saraswati was murdered in August 2008, once again, resulting in large scale violence in Kandhamal district and other parts of Orissa. During

such violence, on 25.8.2008, Sister Meena Lalita Borwa was allegedly sexually assaulted, raped and paraded naked by a mob of 40-50 persons. Complaint in this regard was lodged at Baliguda P.S. on 26.8.2008 and was registered as P.S. Case No.70 of 2008, corresponding to CID CB Orissa Case No.39 of 2008 dated 4.10.2008.

Ms. Choudhury stated that, Sister Meena Lalita Borwa was brought to Delhi for treatment, since she was suffering from serious Post-traumatic Stress Disorder and was undergoing treatment in St Stephen's Hospital, Delhi. It is further stated that the petitioner-victim Sister Meena Lalita Borwa had been summoned to appear at a T.I.Parade to be held at Balliguda, to identify the accused persons. The petitioner claiming threat to her life moved before this Court in Crl.M.C. No.2777 of 2008 praying therein to transfer the T.I.Parade from Balliguda to Cuttack and by order dated 5.12.2008, directions were issued allowing the said petition by directing conduct of the T.I.Parade at Cuttack.

3. Ms. Choudhury submitted that the petitioners were still being threatened not to go to Baliguda or to participate in the trial and the witnesses were also threatened with dire consequences and hence are scared to attend the trial in Phulbani. She has alleged that the situation in Phulbani continues to be tense and the friends and relatives of the accused being residents of Phulbani, the petitioners apprehend danger to their lives and also the possibility of hampering a free and fair trial. Ms. Choudhury submitted that the situation in Kandhamal continues to be communally volatile and has cited various instances where witnesses have either turned hostile and/or have approached the trial court seeking protection. In the light of the aforesaid facts, learned counsel for the petitioners submitted that this Court is empowered under Section 407 Cr.PC. to transfer the trial if

there is any apprehension of an impartial or fair trial and also keeping in view the convenience of the parties and witnesses.

4. Reliance was placed by the learned counsel for the petitioners on various judgments of the Hon'ble Supreme Court in the cases of (i) **Himanshu Singh Sabharwal v. State of Madhya Pradesh and others**, (2008) 3 SCC 602 (ii) **Maneka Sanjay Gandhi v. Rani Jethmalani**, (1979) 4 SCC 167 (iii) **G.X.Francis and others v. Banke Bihari Singh and another**, AIR 1958 SC 309 and (iv) **Zahira Habibulla H. Sheikh and another v. State of Gujrat and others**, (2004) 4 SCC 158.

5. Sri Ashok Mohanty, learned Advocate General, on behalf of the State, placed reliance on an affidavit filed by the State, denying all the allegations made by the petitioners regarding the law and order situation in Kandhamal district. He also denied all allegations regarding the competence of the Investigating Agency or the Public Prosecutor as well as the allegations against the manner in which the trial is conducted. It is contended by the learned Advocate General that the situation in Kandhamal district is now completely normal and peaceful and two Fast Track Courts have been set up for expeditious trial of all the cases arising out of communal violence in the year 2007 as well as the violence that followed the death of Late Swami Laxmanananda. It is stated that trial of a number of cases are being conducted in a free and fair manner and since the Crime Branch has taken over the charge of investigation, there should not be any doubt for the impartiality of the said investigating agency.

Learned Advocate General further stated that as Special Public Prosecutors have been appointed, their impartiality cannot be doubted and extensively argued that a substantially large number of trials have ended with conviction. It is further stated that the Investigating Agencies are providing all necessary assistance in cases

where witnesses seek security or directions were issued by the trial court. The learned Advocate General also reiterated the offer made by the State to provide all necessary assistance/security to the prosecutrix as well as witnesses, as may be required.

6. Sri D.P.Dhal as well as Sri B.K.Das, learned counsels for the opposite parties state that, they have no objection to the prayer of the petitioners for transfer of the trial of the case to any other place, but since a number of accused persons continue to remain in custody pending trial, the learned counsels pray that directions may be issued for early conclusion of the trial.

7. Ms. Choudhury, learned Senior Advocate appearing for the petitioner drew the attention of the Court to the averments made by the petitioners in Paragraphs 11, 12 & 13 of the transfer petitions and asserted that the same have not been specifically controverted nor denied in the counter affidavit of the State, sworn to by Sri Dillip Kumar Mohanty, Inspector of Police, CID CB. Relevant Paragraphs both of the writ petition and the counter affidavit are noted hereinbelow:

(In petition)

11. That under Section 407 of Cr.P.C. this Hon'ble Court is empowered to transfer the trial if there is an apprehension of impartial or fair trial and also this Hon'ble Court can direct for transfer of case keeping in view the convenience of the parties and the witnesses.

12. That in this case as it has been stated in the forgoing paragraphs not only the informant but also the witnesses are threatened by the accused persons who are the

(in counter affidavit)

11. That the averments made in Paragraph-11 of the affidavit needs no comments.

12. That in reply to the averments made in Paragraph-12 of the affidavit, it is humbly stated that if any witness being apprehensive of any offensive activities from the side of the accused persons,

local people of Phulbani and the aggressors of the said communal violence. Therefore they are apprehending danger to their lives and limbs if they will go to Phulbani. This fact is been further fortified from the fact that the informant and the witnesses are still staying out side the Kandhamal District.

solicits security, the State is committed to provide the same without any sense of fear and favour.

“13. That 13. That it has been held by the Hon’ble Supreme Court of India in a decision as reported in AIR 2008 (SC) page 1943 at Paragraph (a) at page 1947:

“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, witnesses or the cause which is being tried is being eliminated. If the witnesses are threatened or are found 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”.

13. That in reply to the averments made in Paragraph-3 of the affidavit, it is humbly stated that if a witness, in course of trial turned hostile to the prosecution, the State machinery has nothing to do with that, only the conducting Public Prosecutor with leave of the court can be permitted to put leading questions to such witnesses u/s 154 Evidence Act. The witness who denies his examination by the I.O., his veracity is open to be tested by the court while scrutinizing the evidence in toto.

8. The learned counsel for the petitioners submitted that in view of the law settled by the Hon’ble Supreme Court in the judgments cited above, the transfer applications of the petitioners may be allowed and directions be issued, similar to the directions issued by the Hon’ble Supreme Court in the case of **Himanshu Singh Sabharwal** (supra), especially in connection with the directions pertaining to those

witnesses who have already been examined and had resiled from their earlier statements.

9. Learned Advocate General on behalf of the State sought for an adjournment, in order to obtain further instructions from the State and on 25.3.2010 filed a memo to the following effect:

“In view of the averments made in this application that the petitioner is undergoing physical, mental and traumatic stress, the Government, for the larger interest of justice and transparency, has no objection for transfer of this particular case. However, the allegations regarding the overall law and order situation in Kandhamal District and partiality of the Investigating Agency or the Public Prosecutor and the manner of trial is categorically denied. This non-objection may not be construed as a reflection or acceptance of the allegations made in the transfer application as the situation in Kandhamal is now completely normal and peaceful and in fact two Special Fast Track Courts have been set-up for expeditious trial of these type of cases and the trials are conducted in a free and fair manner. The Crime Branch has taken over the charge of investigation and there should not be any doubt on the impartiality of the said Investigating Agency. Similarly, Special (cader) Public Prosecutor has been appointed whose sincerity and impartiality can not be doubted. As such the concession for transferring the case should not be construed as acceptance of the allegation regarding over all law and order situation prevalent in Kandhamal District and/or the impartiality of the Investigating Agency or the Public Prosecutor or non-existence of conducive atmosphere for free and fair trial in the district. Since the concession is made by taking into consideration the peculiar facts and circumstances of the case, this should not be treated as a precedent for other cases on same or similar grounds.”

10. In the light of the aforesaid contentions of the parties, it now becomes necessary to deal with the various citations relied upon by the petitioners:-

In the case of **G.X.Francis and others** (supra), Hon’ble Vivian Bose, J. of the Supreme Court dealt with an application filed

under Section 527 of Cr.P.C. (old Code) for the transfer of a criminal case from Jashpurnagar in the State of Madhya Pradesh to some other State, preferably New Delhi or Orissa and after taking note of the averments made by the appellants and respondents, came to the conclusion in Paragraph-17 which is quoted herein below:

“17. We desire to emphasis that we are taking this step because what would otherwise be a petty defamation case has been magnified by the complainant and by local passion into a communal conflict in which large sections of the local population appear to be ranged on one side or the other, and the words that are bandied back and forth are not aimed at this individual or that but are by one community against another.”

11. In the case of **Maneka Sanjay Gandhi** (supra), Hon’ble Justice Krishna Iyer dealt with a case of transfer of a criminal case of defamation from Bombay to Delhi and came to hold that while it may be true that the petitioner attracts a crowd in Bombay and indeed, it is true that many controversial figures in public life their presence in a public place gathers partisans for and against, leading to cries and catcalls or ‘Jais’ or ‘zindabads’ and when such crowds press into a court hall, it is possible that some pushing, some nudging, some brash ogling or angry staring may occur in the rough and tumble resulting in ruffled feelings for the victim, yet, the same shall be a far cry from concluding that the peace inside the court has broken down, that calm inside the court is beyond restoration or that a tranquil atmosphere for holding the trial is beyond accomplishment or that operational freedom for judge, parties, advocates and witnesses has ceased to exist. While rejecting the application for transfer Hon’ble Krishna Iyer, J. concluded in Paragraph-9 of the said judgment which is quoted herein below:

“9. The Magistrate is the master of the orderly conduct of court proceedings and his authority shall not hang limp if his business is stalled by brow-beating. It is his duty to clear the court of confusion, yelling and nerve-racking gestures which mar the serious tone of

judicial hearing. The officials whose duty is to keep the public peace shall, on requisition, be at the command of the court to help it run its process smoothly. When the situation gets out of hand the remedy of transfer surgery may be prescribed. Every fleeting rumpus should not lead to a removal of the case as it may prove to be a frequent surrender of justice to commotion. The magistrate shall take measures to enforce conditions where the court functions free and fair and agitational or muscle tactics yield no dividends. If that fails, the parties have freedom to renew their motion under Section 406 of the Criminal Procedure Code. For, where tranquil court justice is a casualty the collapse of our constitutional order is an inevitability.”

12. In the case of **Zahira Habibulla H. Sheikh and another** (supra), Hon’ble Dr. Arijit Pasayat, J. came to hold in Paragraphs 38 to 44 of the said judgment as follows:

“38. 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.

39. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty, stage-managed, tailored and partisan trial.

40. 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.

41. “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 clout and patronage and innumerable other corrupt practices ingeniously 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 that the trial is not reduced to a 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 have political patronage and could wield muscle and money power, to avert the 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 the 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.

42. Legislative measures to emphasise prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day. Conduct 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.

43. 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.

44. The power of the court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e.: (i) giving a discretion to the court to examine the witness at any stage, and (ii) the mandatory portion which compels the court to examine a witness if his evidence appears to be essential to the just decision of the court. Though the discretion given to the court is very wide, the very width requires a corresponding caution. In *Mohanlal v. Union of India* this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the words such as, “any court”, “at any stage”, or “any enquiry or trial or other proceedings”, “any person” and “any such person” clearly spells out that the section has expressed in the widest-possible terms and do not limit the discretion of the court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow any discretion but obligates and binds the court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case “essential” to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the section is to enable the court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object or getting the evidence in aid of a just decision and to uphold the truth.”

13. In the latest judgment of the Hon’ble Supreme Court, in the case of **Himanshu Singh Sabharwal** (supra), **Dr. Arijit Pasayat, J.**, once again reiterated His Lordship’s view expressed in the case of

Zahira Habibulla H. Sheikh (supra), and allowed the application for transfer with the following directions:

“6. We appreciate the fair stand of the State as presented by Mr. Sorabjee and learned counsel for the accused persons. Without, therefore, examining the correctness of the allegations made, we direct that the case in question i.e. Sessions Case No.291 of 2006 pending in the Court of Sessions Judge, Ujjain be transferred to the Court of Sessions Judge, Nagpur, Maharashtra. It shall be open to the learned Sessions Judge to either deal with the case himself or to allot it to an appropriate court. The trial will commence from the stage at which it was when the order of stay was passed by this Court. The petitioner who is the son of the deceased in the peculiar facts of the case is permitted to suggest two names to function as Public Prosecutor. Similarly, two names shall be given by the respondent State. It shall be for the learned Sessions Judge, Nagpur to appoint a Public Prosecutor from the names to be suggested. The fees and other expenses of the Public Prosecutor shall be borne by the State of M.P. It shall be open to the Public Prosecutor to be appointed to seek recall of any witness already examined in terms of Section 311 of Code. This shall be in addition to P.Ws 32, 33 and 34 about whom directions have been given earlier in this order.”

14. It is now well settled principle of law that the State has a definite role to play in protecting the witnesses, especially in sensitive cases, involving those in power, who have political patronage and could wield muscle and money power in order to avoid the trial getting tainted and de-railed and truth becoming a casualty. The State as a protector of its citizens also has to ensure that during a trial in court, the witness could safely depose the truth without any fear of being hunted by those against whom he has deposed. This is a prime requirement of law and the criminal justice system, since the object of the criminal trial, is not only to mete out justice to accused, but also to protect the innocent. A criminal trial is in essence a search for truth. In

our criminal justice system, which is substantially dependent on the oral testimony of witnesses, truth can only be arrived at, if such witnesses, who are the eyes and ears of justice system can come fearlessly and depose the truth in Court. Therefore, witnesses need to be protected by the State (in appropriate cases) in order to ensure that the interest of justice are best served and to ensure that criminal proceedings do not become mere mock trials.

15. In the light of the aforesaid circumstances as narrated hereinabove and various settled issues of law pertaining to an application for transfer of a criminal trial, as laid down by the Hon'ble Supreme Court, in the judgments referred hereinabove, since a very fair stand has been taken by the State of Orissa as exhibited in the memo filed on its behalf, by Sri Ashok Kumar Mohanty, Advocate General, as well as, the consent given by Sri Dhal and Sri Dash, learned counsels appearing for the accused persons, I am not called upon nor required to examine the correctness or otherwise of the allegations made by the petitioners, which has been strongly denied by the State. Hence for the ends of justice, I allow the transfer applications by issuing the following directions:

- (i) The Sessions Trial No.1 of 2009 pending trial in the court of learned Additional Sessions Judge, Fast Track Court-1, at Phulbani be transferred to the Court of Sessions Judge, Cuttack.
- (ii) It shall be open for the learned Sessions Judge to either deal with the case himself or to allot it to an appropriate court.
- (iii) The trial shall commence from the stage at which it was when the order of stay was passed by this Court.
- (iv) The learned Sessions Judge, Cuttack shall appoint a special Public Prosecutor having adequate standing in the

Bar. The fees and other expenses of the Public Prosecutor shall be borne by the State of Orissa.

- (v) The Special Public Prosecutor shall seek recall of the Prosecution Witness Nos. 2, 5, 6 and 9 in terms of Section 311 of the Code, apart from any other witnesses whose recall may also be deemed necessary in the interest of justice.
- (vi) The Special Public Prosecutor may also seek examination of the victim/prosecutrix 'in camera' if circumstances so warrant.
- (vii) Orissa State Police shall also provide all necessary assistance and security/escort to both the Prosecutrix as well as all witnesses and when necessary also provide them suitable/safe accommodation at safe location prior to their production before the trial court for recording their evidence.

All efforts should be made by the learned Sessions Judge or the trial court to whom the matter is transferred, to take up trial on a day-to-day basis and to conclude the same at the earliest.

16. It would be relevant to note herein that these directions have been issued keeping in view of the concession given by the State of Orissa in its memo dated 25.3.2010 as well as the consent of the learned counsels appearing for the accused-opposite parties.

17. The transfer petitions are accordingly allowed in terms of the directions noted in Paragraph-15 hereinabove.

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I.Mahanty, J.