AIR 1947 All 436 : (1947) 17 AWR 266

Allahabad High Court

Case No: Criminal Miscellaneous Case No. 1290 of 1916

Kailash Nath Agarwal and Another		APPELLANT
	Vs	
Emperor		RESPONDENT

Date of Decision: Feb. 7, 1947

Acts Referred:
Criminal Procedure Code, 1898 (CrPC) â€" Section 340, 352, 520, 526#Penal Code, 1860 (IPC) â€" Section 302

Citation: AIR 1947 All 436 : (1947) 17 AWR 266

Hon'ble Judges: Malik, J

Bench: Single Bench

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Malik, J.
This is an application to transfer a case pending in the Court of Mr. J.H. Zaidi, Second Additional District Magistrate of

Allahabad, to the Court of some other Magistrate competent to try the case.

2. The facts of the case briefly are that during the recent communal disturbances in Allahabad a man was stabbed on the Kamta Prasad Kakkar

Road at about seven in the morning of 5-11-1946. The incident is alleged to have taken place near the house of one Mr. Kedar Nath, who is a

Mukhtar practising in the revenue Courts. The applicants, Kailash Nath Agarwal and Amar Nath Agarwal, sons of Kedar Nath, wore arrested in

their house by Muhammad Yakub, Sub-Inspector, about an hour after the incident. Two other persons were also arrested along with them.

Kailash Nath Agarwal is a Pleader practising in the district Court, while Amar Nath Agarwal is a LL.B. student of the Allahabad University. They

were taken to the Police Kotwali and then to the Colvin Hospital where the identification proceedings took place and were then lodged in the

Malaka Jail. It is alleged that a knife and a shirt wore also taken into custody and were sent to the Chemical Examiner and Imperial Serologist for

examination, to find out if there were any marks of human blood on those articles.

3. The applicants were not released on bail and were kept in the Malaka Jail on a charge u/s 302, I.P.C.

4. On 8-11-1946, the learned Magistrate Mr. J.H. Zaidi, went to the Jail to hold an enquiry under Chap. 18, Code of Criminal Procedure., before

committing the applicants for trial to the Court of Session.

5. It is admitted that no information of that date or of the intention of the learned Magistrate to hold the enquiry on that date was given to the

accused.

6. Kedar Nath had, however, heard some rumour that an enquiry may be held on that date and he had, therefore, gone to the Jail. When he found

Mr. Zaidi there ready to hold an enquiry under Chap. 18, Code of Criminal Procedure., he filed an application praying for adjournment for two

weeks on the ground that no information of the date was given to the accused or to any one on their behalf and they had, therefore, not engaged

any lawyer and he wanted a little time to engage a lawyer. It was further mentioned that an application for copies of the first information report, the

injury report, the statements u/s 164, Code of Criminal Procrdure P.O. and the dying declaration etc. had been filed on the 7th, but copies of the

said statements had not till then been issued and that it would be, in the interest of justice, if the enquiry was held after the copies had been

obtained.

7. The application was rejected by the learned Magistrate who passed the following order:

The accused can get copies of the papers and file them later on. I will allow them. I am afraid the case cannot be postponed.

8. Learned Counsel in support of the application has made a point that the learned Magistrate did not apply his mind and did not realise that the

copies were not being obtained for the purpose of being filed but for the purpose of proper prosecution of the case. It is further urged that the

learned Magistrate was bound to give proper facilities to the accused to obtain legal aid.

9. A further request being made to the learned Magistrate for a shorter adjournment to enable the accused to got legal aid, the learned Magistrate

passed the following order:

I can, however, do one thing. It is that I can allow as a special case to let the defence counsel cross-examine the witnesses.

The learned Magistrate then proceeded to record the examination-in-chief of the witnesses for the prosecution.

10. It is urged by learned Counsel that by reason of the fact that the evidence of the prosecution witnesses was recorded in the absence of any

lawyer on behalf of the accused, an examination of the statements of the witnesses would show that many matters which were not relevant were

included in the statements of the witnesses. It is further alleged that improper questions were put in the examination-in-chief and the evidence was

not properly recorded as the Magistrate translated the statements in his own words and then dictated the same to the stenographer and to the

peshkar. I have not allowed learned Counsel to go further in this matter, nor have I examined the statement''s for myself, as I consider this is not

the stage at which I should express any opinion on the merits.

11. After the learned Magistrate had recorded the evidence-in-chief of two witnesses for the prosecution, Abdul Rauf and Shafat Ahmad, a third

witness, Mr. Saidullah, Magistrate, was to be produced. Some objection was taken by the accused to the relevancy of the evidence of the third

witness, and on the Magistrate asking them to substantiate the same, a short adjournment of three days was given by him at the request of the

accused.

12. Mr. A.P. Pandey, a senior advocate practising in this Court, was engaged on behalf of the defence and he states that he found it impossible to

prepare the case for the defence in the absence of the papers, copies of which had been applied for on 7th November. He however, attended the

jail on the 12th morning and ho has made a grievance of the fact that he remained for some time outside the gate and then for about forty-five

minutes between the two gates before ho could enter the room inside the jail where the enquiry was to be held. I may mention here that under the

orders of the District Magistrate all enquiries and trials held by Magistrates in cases arising out of the communal disturbances were to be held inside

the jail.

13. Mr. Pandey has made a further grievance of the fact that in the room where the enquiry was to be held, the arrangement was that there were

three chairs, one for the learned Magistrate, another for the Court Inspector and a third for the Reader with a table between them. There was no

chair and no table for the use of the lawyers for the accused. There were, I was told, at two ends of the room running along the walls raised

platforms which were meant for the use of the members of the Bar and any member of the public who may happen to have been admitted into that

room. A point is made of this arrangement also, and it is urged that not only it is humiliating that the members of the Bar should be treated in the

manner mentioned above but also that it is impossible to expect that they would be able to do their duty under those conditions and in such an

atmosphere.

14. On 12th November when Mr. Pandey appeared he again filed an application for adjournment, and one of the points raised by him was that

though be had applied for copies of the relevant papers as far back as 7th November, the copies had not till that date been issued. It is said that

the Prosecuting Inspector at this stage produced the papers from his own custody and filed them before the Magistrate. The Magistrate thereupon

insisted that as the papers were there, learned Counsel may look at thorn and cross-examine the witnesses. He further agreed that he would record

the evidence of formal witnesses on that date and that of material witnesses on succeeding dates and that he would examine the Civil Surgeon on

15th November. Mr. Pandey objected to that procedure and "further to the examination of the Civil Surgeon on 15th on the ground that the knife,

with which the offence is said to have been committed, had been sent, on 11th November, to the Chemical Examiner and ho wanted the report of

the Chemical Examiner and also the knife to show it to the Civil Surgeon at the time of his cross-examination and to find out whether the injury of

the nature mentioned could have been caused by that knife. The learned Magistrate refused the request for adjournment and then an application

was filed u/s 520, Code of Criminal Procedure. for two weeks time to enable the accused to move the High Court to transfer the case to some

other Court. The learned Magistrate then passed the following order:

Every material document is on the record and copies of it can be given very soon. It is not necessary to possess the copies of the documents for

the purposes of cross-examining all the accused (sic. witnesses) and I gave assurance that I will not take up the examination of the witnesses for

whose cross-examination the copies of the documents will be necessary unless the counsel of the accused gets the copies. In spite of this the

application which was typed and ready already has been moved. This is only another method of getting time. But since it is necessary to adjourn

the case u/s 526 I will adjourn it for two weeks provided that bond for Es. 200 is executed as laid down in Section 520, Clause 8.

15. The bonds were executed and the case was adjourned to 20th November. The accused then moved the learned District Magistrate for the

transfer of the case. The learned District Magistrate rejected the transfer application by an order dated November 19th. While dealing with this

application the learned Magistrate observed:

The only real question is whether the proceedings are being conducted in such a manner that the case of the accused is prejudiced or that they

have valid grounds to apprehend an unfair trial. In the first place there are standing orders that all cases of communal character are to be tried

within the jail premises, partly because police escorts are not available and secondly because it is not desirable in view of the present tension that

incidents of communal character should be related in open Court.

He further mentioned that the proceedings before the Magistrate were merely of the nature of a preliminary enquiry and pointed out that the

Magistrate had recently boon posted to this district and there could, therefore, be no question of his being prejudiced against the accused.

16. An application for transfer was then moved in this Court u/s 526, Code of Criminal Procedure. on 22-11-1946. The main grounds on which

the transfer is sought are that the manner in which the enquiry is being conducted is bound to prejudice the case of the accused. The contentions

are that the enquiry on the 8th should not have been started without giving previous notice to the accused so that they may have proper legal aid

and they should not have been forced to enter on their defence without any legal assistance. The second ground is that it was (sic) for the members

of the Bar to do justice to (sic) in the surroundings in which they were (sic) The next ground is that the accused had a right to an open enquiry in a

Court and not an enquiry in camera inside the jail where the public had no right to enter. As against the learned Magistrate it is urged that the

learned Magistrate was not justified in recording the examination-in chief in the absence of defence counsel, that the statements were not properly

recorded, that the copies of the documents had not "boon given to the accused and that it was not possible, therefore, for the lawyers appearing

for the accused to cross-examine the witnesses properly. That although the material exhibits were sent to the Chemical Examiner on 11th

November and the report was not likely to be received before the 15th, the Magistrate was in a great hurry to finish the case and insisted on fixing

15th November for the examination of the Civil Surgeon and remarked that he wanted to finish the enquiry by the 16th.

17. These are some of the main grounds on which the transfer is sought from the Court of Mr. Zaidi to the Court of some other Magistrate of

competent jurisdiction.

18. As regards the first point we have the provisions of Section 340, Code of Criminal Procedure. under which ""any person accused of an offence

before a criminal Court, or against whom proceedings-are instituted under this Code in any such Court, may of right be defended by a pleader.

There can be no doubt that the proceedings under chap. 18, are in the nature of judicial proceedings in a criminal Court and the applicants were

persons who were accused of an offence and they were entitled, as a matter of right, to be defended by a pleader. The learned Magistrate was,

therefore, bound to give to the accused sufficient facility to be represented by a lawyer, specially as they were in custody from the time that they

had been arrested and accused of the offence. In 50 Bom. 7411 Fawcett J. held that Section 340, Code of Criminal Procedure.,

not only contemplates that the accused should be at liberty to be defended by a pleader at the time the proceedings are actually going on, but also

implies that he should have a reasonable opportunity, if in custody, of getting into communication with his legal adviser for the purpose of preparing

his defence.

and Madgavkar J. observed.:

If the end of justice is justice and the spirit of justice is fairness, then each side should have equal opportunity to prepare its own case and to lay its

evidence fully, freely, and fairly, before the Court. This necessarily involves preparation. Such preparation is far more (sic) from the point of view

of justice, if it is made with the aid of skilled legal advice so valuable that in the gravest of criminal trials, when life or death hangs in the balance, the

very State, which undertakes the prosecution of the prisoner, also provides him, if poor, with such legal assistance.

19. I am satisfied, from the explanation given by the learned Magistrate, that he was not inspired by any unfair motive, but he did, to my find, show

far too much haste. The learned Magistrate did not apparently realise the importance from the point of view of the (sic) of the recording of the

examination-in-chief of the witnesses for the prosecution. I have already said that I have not examined the evidence of the witnesses for I consider

that at would be improper at this stage to go (sic) the question whether the evidence was (sic) recorded, but, to my mind, the examination-in -chief

and the manner in which the (sic) is recorded are just as (sic) more so, as the cross-(sic) and learned Magistrate erred in deciding to record

examination-in chief of the witnesses without living an opportunity to the accused to (sic) legal assistance. See AIR 1925 . The accused had been

arrested on the 5th had been kept in custody ever since. They hot been informed that the enquiry would begin the 8th. Their application for copies

(sic) documents which Would be necessary any lawyer to go through and consider before (sic) is able to assist the accused in a proper (sic) had

not been obtained. (granted?) On the (sic) the Magistrate recorded the evidence of (sic) important witnesses for the prosecution (sic) there was no

lawyer who had been engaged look after the interest of the accused. In (sic) case before Mackney J. in AIR 1938 the learned Judge observed:

The Magistrate appatly did not realise that a pleader defending a person as to do more than go through the record. He has too through all the

prosecution evidence, find out (sic) defence may best be set up and what means there (sic) putting up that defence. It seems to me that in (sic) of

this nature certainly more than a day would be (sic) for even the most skilful and able lawyer in (sic) to decide this matter.

20. The learned Magistrate, if ho had any experience at (sic) would not have considered it enough (sic) on 12th November the prosecuting

Inspector had taken the relevant papers out of his pocket and had put them on the record. He would have realised that it was necassary for Mr.

Pandey to study those documents, question his clients and get other information before he could be ready to cross-examine the witnesses. The

same learned Judge in the same case observed:

It is not only the Sate which is to be considered in these matters; it is (sic) administration of justice. Even if considerable expense is incurred by the

State in the proper administration of justice yet that expanse must be incurred and injustice must not be porperated simply because justice is

expensive.

21. On that solo ground the learned Judge, who belonged to the Indian Civil Service and must, therefore, have had considerable experience of

criminal work, transferred the case from the Court of the Magistrate, I would have followed the decision quoted by me above and transfer-red the

case on that sole ground, but in this case I regret to say there-are some other grounds which I consider equally important.

22. I cannot lightly brush aside the complaint that was made to me, while I was receiving applications, by more than one senior counsel, practicing

in this Court, of the treatment that they had received while they wore engaged to do their duty in defending their clients. Every one of them

complained that there was inordinate amount of delay outside the jail and inside the jail; the learned Magistrate failed to realise that he must, as far

as possible, try to reproduce the atmosphere of a Court room. The learned Magistrate may have been compelled to hold his enquiry inside the jail

by reason of the standing order mentioned by the District Magistrate in his order rejecting the application for transfer. I can find no pro-, vision in

the Code of Criminal Procedure which compels a Magistrate to hold his Court in the usual Court room. Section 352, Code of Criminal Procedure,

probably contemplates that a Magistrate can hold his Court any where he likes. The standing order cannot bind the learned Magistrate in his

judicial capacity, but as both the executive and the judicial functions are not separated, the executive order directing the Magistrate to hold his

Court inside the Jail is probably binding on him. But the learned Magistrate, wherever he may be compelled to sit by executive orders, is bound by

the provisions of Section 352, Code of Criminal Procedure, and he must realise that the place where the trial is held must be something like an

open Court to which the public generally may have access so far as the same can conveniently contain them. The discretion to exclude the public

generally or any particular person at any stage of any enquiry or trial must be a judicial discretion exercised by him. I am laying emphasis on this

point because, to my mind, if the Magistrate is compelled to hold a trial in jail, then the jail must become something like an open Court where any

member of the public may have a right of access, if the room in which the trial is being held can conveniently contain him and unless the learned

Magistrate, for reasons which he must, to my mind, record, decides to exclude the public or any particular person. In a jail the Magistrate must

himself be subject to the jail rules and subject to the authority of the officer in charge of the jail, and though in theory, if the public is given free

access, I can see no objection to a trial being held in jail, in practice I do not think it is possible, unless the jail rules make provision for such

enquiries or trials in jail when any member of the public may have a right to attend.

23. In AIR 1917 Lab. 3114 where the trial was held in jail, it was argued that it was vitiated on that account. The learned Judge observed: ""There

is nothing to show that admittance was refused to any one who desired it or that the prisoners were unable to communicate with their friends, or

counsel. No doubt it is difficult to get counsel to appear in the jail and for that reason if for no other such trials are usually undesirable, but in this

case the executive authorities were of the opinion that it would be unsafe to hold the trial elsewhere.

I am, however, of the opinion, with great respect to the learned Judge, that it is not necessary for the accused to prove that any person who

actually desired admittance was refused. It is for the prosecution to satisfy the Court that any person who desired to attend could do so and there

was no prohibition against his admittance.

24. It is well established in England that every Court of justice is open to every subject of the King and that a right to an open trial is one of the

cherished rights of the subject. It is not necessary for me to give a historical survey of how the right has grown, but the point has now been settled

by a decision of the House of Lords in 1913 A.C. 4175 where it was emphasised that even in a case where the parties had agreed that a case may

be heard in camera, a Judge would have no right'' to exclude the public, except in some special class of cases, unless the parties agreed to appoint

him an arbitrator and to hear the case as such. Those special cases are: ward-ship and relation between the guardian and ward, and secondly the

care and treatment of lunatics. A third ground was mentioned by Vis-count Haldane, L.C., that if it was strictly necessary for the attainment of

justice and the Court was satisfied that by nothing short of the exclusion of the public it is possible to do justice, can a Judge decide to sit in

camera. Even this ground was not accepted by the Earl of Halsbury who thought that this would be leaving the matter too much to the discretion of

individual Judges, who might think that in their view the paramount object of the administration of justice could not be attained without a secret

hearing. It is not necessary for me to go into this question further as, unlike the law in England, the Code of Criminal Procedure in India gives a

Criminal Court a right to exclude the public generally or any particular person, but this being an exception to a very well settled rule, to my mind,

the Magistrate must record his reasons for doing so if he decides to exclude either the public or a section of the public; and it must be understood

that it is a matter within the judicial discretion of the Magistrate himself and not a matter about which he can be controlled by executive orders.

25. Though, therefore. I am of the opinion that it was not illegal for the learned Magistrate to hold the enquiry in jail or anywhere else the learned

Magistrate must realise that the place where the enquiry is held must be deemed to be an open court where the public as such have a right to a

(sic) and that such right may be controlled in (sic) on special grounds by the court and not (sic) the jail rules or by the officer in charge of the jail. If

the Magistrate cannot have the absolute right to regulate the proceeding at (sic) place where he is holding the trial, he ought not (sic) trial or the

enquiry at such a place.

26. I consider it a matter (sic) that though a Magistrate mold his enquiry anywhere, he owes a duty see that proper facilities are given to (sic) of the

Bar. No lawyer can do his duty is client, nor can a Magistrate discharge his is as such, in a room where the Magistrate in one corner with the

Prosecuting Inspection one side and the Header on the other, (sic) three of them having chairs, with member the Bar standing in front as suppliants

for favours. I want to make it perfectly clear thin my judgment, it is impossible to administration justice properly without legal aid, and in thanse the

members of the Bar probably do as (sic) a work as Judges themselves and, there, for the proper administration of justice it is necessary that the

members of the Bar should adequate facilities and proper treatment. No accused can have confidence in a Magistrate (sic) treats his counsel in the

manner in which Mr. P. Pandey was treated, and I am surprised at any Magistrate should have the discourtesy keep a member of the Bar standing

in his Court while he allows a chair to the Prosecuting Inspector and to his Reader. I do not want to (sic) anything further on this point as the-

learned Government Advocate has assured me that (sic) incidents would not occur in future. I hope incidents like this would not again come to the

notice of this Court and the Magistrates would (sic) that just as the members of the Bar on a duty to show proper respect to the Bench, be Bench

has an equal duty to be courteous ad considerate to the Bar.

27. Having, therefore, carefully considered this matter, I am of the opinion that there was enough ground for apprehension in the mind of the

accused that they would not receive a fair trial in the Court of the learned Magistrate. I, therefore, direct that the case be transferred from the

Court of Mr. J.H. Zaidi, Magistrate, First Class, to some other Court of competent jurisdiction.