(1931) 06 CAL CK 0002

Calcutta High Court

Case No: None

Neamat Sha		APPELLANT
	Vs	
Hanuman Buksha Agarwalla		RESPONDENT

Date of Decision: June 15, 1931

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 526(8), 537
- Penal Code, 1860 (IPC) - Section 147, 323

Citation: AIR 1931 Cal 626

Hon'ble Judges: Mallik, J; Lort-Williams, J; Lord-Williams, J

Bench: Full Bench

Judgement

Lort-Williams, J.
The petitioner, with two other accused persons, was tried by the Sub-Deputy Magistrate at Noagaon for offences u/s 147 and 323, I. P.C., and convicted.

2. On 24th October 1930, the case for the defence was closed and the Magistrate adjourned the trial to 27th November for argument and judgment only.

3. On that day an order transferring the Magistrate was communicated to him in Court. On hearing this, the defence pleader retired immediately from Court. Later he returned and filed a petition for adjournment u/s 526. The two other accused dissociated themselves from this petition. No reasons were given, and it was obvious to the Magistrates that the sole object of the petitioner was to render the trial abortive. He rejected the petition on the ground that the trial was finished, the arguments and judgment forming no part of it. For this proposition he relied upon the decision in Public Prosecutor of Madras v. Chockalinga Ambalam A. I.R. l929 Mad. 210. Thereupon the pleader filed a hajira of three further witnesses, and asked for permission to examine them. To this the Magistrate acceded, because they ware present in Court and ha did not

like to shut out their evidence. After this ha heard the arguments. On the following day ha gave judgment.

4. The petitioner appealed to the District Magistrate who dismissed his appeal. The case than came before this Court in revision u/s 435 and a rule was granted on the ground inter alia that the conviction was illegal because the Magistrate had not complied with the mandatory provisions of Section 526 (8), Criminal P.C.

5. The question to be decided is whether in such circumstances, we are bound to, or alternatively whether in our discretion we ought to set this conviction aside.

6. The position created by Section 526 (8) is truly amazing, one effect being that no accused person can be convicted except with his own consent. No discretion is given to the Court by the section. If the accused notifies his intention to make an application to the High Court for transfer, the trial must be adjourned immediately. There is no limit to the number of such notifications which may he given during the course of any trial.

7. The accused may have no such intention. His object may be simply to delay the proceedings, or he may give the notification because his frivolous application for an adjournment has been rejected, or because it is not convenient for his pleader to attend, or in order to escape from the evidence of a witness who is about to leave the jurisdiction and cannot be recalled, or simply to annoy the prosecution or the Magistrate, or, as in this case, to avoid trial or obtain a second trial. At any moment during the course of the trial, even when the Magistrate has reached the concluding words of his judgment, the accused may, in so many words, order him to stop and adjourn the hearing.

8. Or the accused may have a bona fide intention to make such an application but on wholly frivolous grounds. No limit is imposed to the number of such applications.

9. The accused might continue to give notifications and obtain adjournments, and if he chose, to make applications indefinitely, with the result that he could never be convicted.

10. The only discretion given in the section is to a Sessions Judge u/s (9) and the only safeguards against abuse of the process of the Court are provided in Sub-sections (5) and (6-A). These are wholly illusory because in practice the application in the first instance is heard ex parte, and they do not touch cases where the application is not made at all. Moreover the application in this Court is opposed usually by or on behalf of the Legal Remembrancer, who is paid by salary and not by fees, which makes it difficult to assess his reasonable expenses incurred in opposing the application.

11. The abuse of process which Sub-section (8) makes possible, obviously may be aggravated to almost any extent, where there is a joint trial, and each accused person is represented by a different pleader. What is perhaps a worse blot upon the subsection is that it enables a vindictive complainant, by adopting similar tactics, to harass and ruin an innocent person who has been accused and is upon trial but who for similar reasons, can

never be acquitted except with the complainant''s consent.

12. The history of the section is curious. Section 35, Act 25 of 1861 (Criminal Procedure Code), expowered the Sudder Court to order the transfer of any criminal case or appeal or inquiry from one criminal Court or district to another if this would promote the ends of justice or tend to the convenience of the parties or witnesses. Section 64, Criminal P.C. of 1872, gave similar powers to the High Court in almost similar terms. Section 526, Criminal P.C. of 1882, elaborated these powers, in terms very similar to those contained in Section 526, Sub-sections 1 to 7 of the present Code. For the first time, it was provided expressly that the fact that a fair and impartial inquiry or trial could not be had, was a ground for transfer.

13. But the wording of all these sections seems to indicate quite clearly, that what was contemplated was an application and a transfer, to be made prior to the commencement of any trial or appeal. Nowhere is there any suggestion that it was conceived to be necessary or desirable to provide for such transfer after the trial had commenced.

14. Up to this time the provisions were similar to those with which English practitioners have been long familiar.

15. Unfortunately in 1884 an amendment was made, the drafting of which was clumsy and confused and the necessity for which it was difficult to appreciate. This caused much judicial uncertainty which in turn led to confusion in the minds of the members of the Special Committee who revised the Code prior to 1923, and is the origin of the absurd position which exists today.

16. By an amending Act passed in that year, Section 526-A was added to the Code. This reads as follows:

If any criminal casa or appeal, before the commencement of the hearing, the Public Prosecutor, the complainant or the accused notifies to the Court before which the ease or appeal is pending his intention to make an application u/s 526 in respect of the case, the Court shall exercise the powers oï¿½ postponement or adjournment given by Section 341 in such a manner as will afford a reasonable time for the application being made and an order being obtained thereon, before the accused is called on for his defence, or in the case of an appeal before the hearing of the appeal.

17. The meaning of the section seams to be reasonably clear and its construction ought not to have caused much difficulty. The first thing to be observed is that the notification must be given before the commencement of the hearing of the case. Secondly, the Court must direct such postponements or adjournments as will be necessary to afford a reasonable time to the accused to make the application and obtain the order of the High Court thereon, before the time arrives when he is called upon for his defence. Or in other words, the trial may commence and may proceed in spite of the notification, but the accused must not be called upon for his defence, unless there has elapsed a reasonable

time for the application to be made and an order thereon to be obtained.

18. If no application were made or no order for transfer obtained, then after such reasonable time had elapsed, the trial would proceed and the accused; would be called upon for his defence. If an order for transfer were obtained, the trial would not have been delayed very much, the case for the prosecution or part of it, would .have been heard, the Court to which the case was transferred would proceed from where the first Court left off, would rehear some or all of the witnesses if necessary, would hear the defence and pronounce the judgment. This saving of time and delay was not possible in the case of an appeal, which could not be commenced until such necessary time for leaking the application and obtaining the order had elapsed.

19. The object of the section seems to have been to meet the case where the decision to apply for a transfer had been made so late that insufficient time was left to apply and obtain an order before the commencement of the trial, But it is difficult to understand why, in view of .the words of the section, it was thought necessary to apply the latter part of its provisions to the Public Prosecutor and the complainant. Moreover it is not clear whether the reasonable time to be afforded is to run from the date of the notification, or whether the fact that the applicant has had sufficient time and opportunity to make the application prior to the notification is to be taken into account. This point has bean made clear in the later amendment of the section in 1923 by the inclusion of an express provision thereon in Sub-section (9).

20. It is important to note that no provision was made in the section for any application for an adjournment, but only for a notification that it was intended to apply to the High Court, upon which being given, certain obligations as to adjournment arose.

21. The amendment was incorporated in the revised Code of 1898, and it was provided in addition that an order of transfer might be made if it were expedient for the ends of justice are required by any provision of the Code.

22. Confusion seems to have arisen very soon. Thus in Queen-Empress v. Gayitri Prosonno Ghosal [1888] 15 Cal. 455. the case was called on 16th November. Thereupon the complainant put in a petition asking for an adjournment to enable him to apply to the High Court for transfer. The Magistrate deferred consideration of the petition until after the examination of the complainant, and then refused it. The complainant after calling witnesses closed his case and the hearing was adjourned until 21st November when the defence was heard and the accused was acquitted.

23. The Judges held that the Magistrate''s refusal to grant the application for adjournment was illegal, that such a grant was obligatory and that the proceedings were invalid from that point, namely, 19th November.

24. In my opinion this decision was in form incorrect. The Magistrate was under no obligation to grant any application for adjournment but ha ought not to have proceeded to

hear the defence on 21st November because sufficient time had not then been afforded to the complainant to move the High Court. Therefore the proceedings were invalid from that time. The distinction is important, because the failure to observe "it, was the cause of much subsequent judicial confusion.

25. In Queen Empress v. Virasawmi [1896] 19 Mad. 375 the. Judges to some extent recognized this distinction, and refused to follow Gayitri"s ease, holding that there was no obligation to grant an adjournment in every casa but only when, at the time when the application for adjournment was made, such an adjournment was necessary to afford the party a reasonable time to apply to the High Court and obtain an order "before the commencement of the trial." The obligation was not to ""adjourn" but to "exercise the powers of adjournment" given by Section 344, and subject to the limitation contained in that section. In this case the accused had applied for his case to be adjourned from the November to the December Sessions. This was granted. Then on 20th November he put in a petition stating that he had applied to the High Court for transfer, and asked verbally for an adjournment of the trial on that account. This was refused on the ground that no further adjournment was necessary. The accused had ample time to obtain an order from the High Court "before the commencement of the trial."

26. On 30th November the accused made a further application for adjournment and this also was refused. His first application to the High Court had failed owing to his use of an insufficient affidavit.

27. The Judges held that the accused had had ample time to move the High Court if he had been diligent, therefore no adjournment was necessary. But unfortunately, in their judgment they fell into the same error of treating failure to grant an application for adjournment as the last point of validity and they failed to regard or misinterpreted the words oï¿½ the section "before the accused is called on for his defence."

28. In Sarat Lal Chaudhuri v. Emperor [1902] 29 Cal. 211 Stevens and Harington, JJ., made the same mistakes. They distinguished the Madras ease and approved Gayitri"s casa (2) holding that the Magistrate"s refusal to grant an adjournment on the day of trial was illegal, because there was then no time left for applying to the High Court still less for obtaining an order of transfer "before the commencement of the trial" and that the whole of the proceedings which followed the refusal were invalid.

29. Further, they held that if an intention is notified at however short a time before the commencement of the hearing the Court is bound to exercise its powers of adjournment without reference to any opportunity that the party might have had of making an application at some earlier time.

30. However, in Dhone Kristo Samanta. v. Emperor 6 C. W.N. 717 the same learned Judges for the first time construed the section in the way which I have suggested is correct. They approved the Madras case and held with what appears to be undue clarity

that all the decisions to which I have referred were correct and consistent and meant that after receiving notification of an intention to apply for transfer the Magistrate was not under any obligation to accede to an application for adjournment if the party had sufficient time to apply for transfer between the time when he notified his intention and the time when the accused was called on for his defence. Therefore it was competent to the Magistrate before granting an adjournment to proceed with the case up to that point.

31. In Kishori Gir v. Ram Narayan Gir 8 C.W.N. 77 there was again a set back. Sale Handley, JJ., followed Sarat Lal Chaudhuri''s case and held that the refusal :to grant an adjournment was illegal and invalidated all subsequent proceedings. They did not even consider the question whether opportunity for applying for transfer had been afforded before the defence was called on.

32. But in Joharuddin Sarkar v. Emperor [1904] 31 Cal. 1715. Pratt and Handley, JJ., expressed disapproval of that case and approved the later decision of the same judges, in the case of Dhone Kristo Samanta (5).

33. This clarity did not last very long. In Kali Charan Ghose v. Emperor [1906] 33 Cal. 1183 the trial was fixed for April 24th. On that day an application was made for adjournment "under Section 526." This was refused and the trial proceeded. After examining certain witnesses the ease was postponed until 7th May to enable the party to apply to the High Court. Mitra, J., succeeded in approving both the lines of authorities to which I have referred seeming to think that they could be reconciled. He held that a Magistrate was bound to postpone the trial on application being made therefor and that his refusal rendered all subsequent proceedings voidable, if not void.

34. But he held also that a Magistrate was entitled to proceed with the trial up to the defence, before he granted an adjournment. Then he went on to say that ordinarily such right ought to be exercised and that the prayer for adjournment ought to be granted at once. Thus the learned Judge decided not only that the Magistrate must grant an application for which there is no provision in the section, but that he must disregard the plain directions contained therein. Such a masterly solution of difficulties created by ill-considered legislation may commend itself to laymen and even to lawyers, but will hardly meet with the approval of the legislators concerned.

35. Holmwood, J., held that the Magistrate ought to have postponed his order on the application for adjournment, instead of rejecting it in terms, and that his refusal might be held to be technically illegal although afterwards he granted a sufficient adjournment.

36. In Wahed Molla v. Shaik Basaraddi 11 C.W.N. 507 the same Judges went still further and came to the somewhat extraordinary conclusion that where a Magistrate had granted a sufficient adjournment, but previously thereto and after receiving the notification, had proceeded with the trial as contemplated by the section, this was a good ground for transfer.

37. In Kali Mudaly v. Emperor [1912] 35 Mad. 701 it was decided that "before the commencement of the hearing of the case" meant "before the charge is read to the accused," and strong doubt was expressed about the correctness of the decision in Sarat Lal Chaudhurie"s case.

38. In Kishori Gir"s case it had been held, inter alia, that where a case had been commenced before one Magistrate and ho had been transferred, and the case had been taken up by another Magistrate and there was some objection to the case being tried by him, the application for adjournment could be made to him, this being in the particular circumstances the commencement of the hearing of the case, within the meaning of the section. In Abdul Rab v. Azmat Ali [1920] 59 I.C. 376 Gokul Prasad, J., refused to follow Wahed Molla"s case 11 C.W.N. 507 and Kishori Gir"s case and held that the trial could proceed without adjournment up to the defence. This being the position of the law and the authorities, an amending Bill was introduced in 1914 which was revised by the Lowndes Committee and did not become law until 1923.

39. One result of the deliberations of the Select Committee was the astonishing piece of legislation contained in Section 526 as it stands today.

40. The Committee said that they found Section 526 difficult to deal with, because one class of opinions pressed for greater safeguards against frivolous, vexatious or dilatory applications for transfer, while another deprecated any attempt to make the application more difficult. That they thought it unavoidable to retain in the Code some provision for compulsory adjournment of a case when an intention to apply for a transfer had been notified, which seems to indicate that they were under the impression that the Code already contained such a provision. But they recognized that the provisions of the section as they stood had lent themselves to gross abuse, and therefore felt that greater safeguards are necessary. Thereupon with this wholly praiseworthy object in view the Committee modified the provisions of Sub-section (6-A), the safeguards in which I have shown already to be almost entirely illusory, and then proceeded to remove from Sub-section (8) the few remaining hindrances to abuse which it contained.

41. The bill for some inexplicable reason had suggested a complete deviation from the known and well-tried principles of this portion of legal procedure. Instead of providing for transfer before the commencement of a trial on such well ascertained grounds as the interest of the Judge, the unsuitability of the Court, or the inconvenience of the venue, the bill provided for notification at any stage of the cas8 provided that it was made before the commencement of a day"s hearing and before the accused was called upon for his defence.

42. The Committee struck out both these limitations and provided for notification at any stage of the case, and for compulsory adjournment immediately thereafter: Satraj Singh v. Emperor AIR 1924 All. 533. Thus, far from shielding the Courts against abuse, they removed the last hindrances, and placed them in the intolerable position with which we

are familiar.

43. By a further amendment the word "criminal" was deleted from Sub-section (1) (E), (ii) and (iii) and from Sub-section (8) thus presumably intending to make clear (which had been in doubt) that the provisions of the section applied to proceedings under Chs. 8 and 12 of the Code. But the wording of Sub-section (8) was not made suitable to such proceedings, and it has been held in Jamir Sheik and Others Vs. Murari Mohan Chaudhury and Another, , that the subsection does not apply to proceedings; u/s 145.

44. It should be noted that in the new section as in the old one, no provision is made for any application for adjournment. Nevertheless the practice of applying still persists, after all these years, and Judges still refer to the Magistrate''s refusal of such an application as being illegally committed, rather than his failure to adjourn after receiving a notification.

45. Since the enactment of the amended section, notifications have been given in most cases with the sole object of compelling the Magistrate to grant unnecessary adjournments against his will and proper judgment, or simply to retaliate upon him, out of spite, on account of some real or fancied grievance. And applications even when made honestly and seriously are made upon the most absurd grounds, such as that the Magistrate has excluded or included certain evidence, or has sat late, or refused adjournments, or bail, or otherwise has exercised the discretions given to him and performed the duties imposed on him by law, but has done so in some way not altogether pleasing to the applicant. Even the tone of his voice and the expression of his face have been urged as grounds for transfer.

46. Various attempts have been made from time to time, by Judges to mitigate some of the absurdities of the position created by this section. Thus in the case of Joharuddin Sarkar supra it was suggested for the first time that the intention to apply and the application itself must be bona fide and'' not a mere pretence, and that frivolous or illusory grounds for transfer were evidence of such lack of bona fides, and that the Magistrate could refuse an adjournment in such circumstances. The Judges pointed out the absurdity of the position which would arise otherwise in a case where the Magistrate had refused an adjournment because he thought the application mala fide if the subsequent proceedings must be held invalid ipso facto, though the Court agreed with him and refused a transfer. The same Judge would retry the case precisely as before,, although no possible advantage would be gained by anyone, by such duplication.

47. This decision was followed in Nathoomal v. Emperor AIR 1926 Sind 137 and Jatoi v. Emperor AIR 1926 Sind 288 in which cases the Sind Judicial Commissioners held that the Magistrate need not adjourn the case unless satisfied that the intention notified was bona fide. But they were alive to what is the obvious impracticability of such a course, because the party could always defeat the Magistrate by proceeding to make the application for transfer. This would probably be considered to be sufficient proof of the bona fides of his intention, and the proceedings subsequent to his notification would have

to be declared invalid.

48. In Kishore Rai and Another Vs. Emperor, Dalai, J., held that if a case were adjourned to allow an application for transfer to be made, and the party did not apply, no second adjournment would be allowed. In Public Prosecutor, Madras v. Chokalinga Ambalam. Reilly, J., held that the trial, as that word is used in the Criminal P.C., is completed before judgment is pronounced, and that an intimation of intention to apply for a transfer which is given just before judgment is pronounced is too late. That this is shown by a reference to Sections 366 and 497 of the Code. In Misc. Case No.,59 of 1929, Shamapada Roy v. Emperor a Division Bench of this Court seemed to be of opinion that a Magistrate could refuse an adjournment if he thought that the application was not made bona fide. In Revision No. 181 of 1929 Makbul Ahmed v. Emperor another Division Bench held that a party was not limited to one application for the transfer during the course of a trial, but that where the Magistrate had refused to adjourn be-cause he thought that the application was not made bona fide, and this Court agreed with him there was no necessity to interfere in revision.

49. However praiseworthy these attempts may have been, to make the section sensible, in our opinion they were not justified by its terms. In Chockalinga"s case upon which the Magistrate in the present case relied, the judge had to admit that the arguments were part of the trial, and in spite of the fact that " trial " means something else in the sections to which he refers, we are satisfied that in Section 526, its meaning must be held to include the judgment also. Bearing in mind the wide objects of that section, it might well be that the necessity for transfer might not be disclosed until the Magistrate was in course of delivering his judgment.

50. The abuses made possible by the section cannot be cured in these ways. The only remedy is by way of amending legislation, which we trust will be undertaken at the earliest possible moment. It should be provided that no application for transfer will be heard, unless it is made sufficiently early to allow time for the orders of the High Court to reach the Subordinate Court before the day fixed for the trial. No notification to the Subordinate Court of intention to apply, and no adjournment compulsory, would then be necessary and the procedure regarding transfer by the High Court would again be restricted within its reasonable and proper scope.

51. In the absence of any such amendment we have no option but to hold that the Magistrate"s refusal to adjourn was not justified, and was contrary to the provisions of the section. The only point left to decide is, whether we must or ought to set aside the proceedings as invalid in spite of the fact that the notification was given mala fide for the purpose of delay and to defeat the ends of justice, that the accused had no intention of applying to the High Court, and that no grounds existed upon which an order for transfer could have been made. In our opinion we are not driven to such an absurd conclusion; we consider that the refusal of the Magistrate to adjourn was an irregularity which can be cured by applying the provisions of Section 537, Criminal P. C: see the remarks of Lord

Penzance, quoting Lord Campbell, on the difference between directory and obligatory provisions in a statute: Moward v. Bodington 2 P.D. 203 at p. 210. Moreover the powers of revision which the Court has u/s 435 are discretionary, and we do not propose to exercise them. For these reasons the rule is discharged,

Mallik, J.

52. I agree.