

(1973) 08 CAL CK 0015

Calcutta High Court

Case No: None

Superintendent and
Remembrancer of Legal Affairs,
Govt. of West Bengal

APPELLANT

Vs

Tulshi Mondal and Others

RESPONDENT

Date of Decision: Aug. 17, 1973

Acts Referred:

- Penal Code, 1860 (IPC) - Section 148, 149, 302

Citation: 80 CWN 54

Hon'ble Judges: N.C. Talukdar, J

Bench: Single Bench

Advocate: J.M. Banerjee, for the Appellant; Nisith Nandan Adhikary, for the Respondent

Final Decision: Allowed

Judgement

N.C. Talukdar, J.

A session case against the opposite parties was made over to Shri P. Dutta, Additional Sessions Judge, for trial. After he had examined several witnesses, he cancelled the bail of the opposite parties. They were taken into custody. They applied before the learned Sessions Judge for transfer of the case from the file of Shri P. Dutta, Additional Sessions Judge to some other court. The learned Sessions Judge by his order No. 4 dated 19.8.72 had allowed the prayer and transferred the case "from the 4th Court of Additional Sessions Judge for disposal". The State through its Superintendent and Remembrancer of Legal Affairs has moved this Court challenging the legality of that order.

2. The application on which the learned Sessions Judge has made this order of transfer was filed u/s 526(1A) of the Code of Criminal Procedure. u/s 528(1C) of the Code a Sessions Judge, on an application made to him to transfer, may order that any particular case be transferred from "one Criminal Court to another Criminal

Court" in the same sessions divisions if he is of opinion that it is expedient for the ends of justice. Sub-section (1A) of section 528 says that at any time before the trial of the case has commenced before the additional Sessions Judge, may recall any case which he has made over to any Additional Sessions Judge u/s 193(2) of the Code. In this case, trial commenced and proceeded for some time before Shri P. Dutta, Additional Sessions Judge. The learned Sessions Judge was not, therefore, right in ordering transfer of the case from his file to the file of another Additional Sessions Judge in disregard to the provisions of Sub-section (1A) of Section 528. Sub-section (1C) provides for transfer by a Sessions Judge of a case from one "Criminal Court". In a Sessions division, there is only one Criminal Court in respect of one criminal case at one point of time. As there cannot be more than one Criminal Court in respect of a sessions case in one sessions division, it was not possible for the Sessions Judge to transfer a sessions Judge to transfer a session case from the court of an Additional Sessions Judge to the Court of another Additional Sessions Judge. Reference may conveniently be made to section 9 of the Code of Criminal Procedure. Under sub-section (1) of section 9, the State Government shall establish a Court of Session for every sections division, and appoint a Judge of such Court. Under sub-section (3) of that section, the State Government may also appoint Additional Sessions Judge and Assistant Sessions Judges to "exercise" jurisdiction in one or more such Courts. Additional Sessions Judge an Assistant Sessions Judge, so appointed, exercise jurisdiction in that Court only when cases are made over to them u/s 193(2) and section 438(2) of the Code. It is because of this bar that special provisions have been made in sub-sections (1) and (1A) of section 528 for recall of cases from the file of Additional Sessions Judge or Assistant Sessions Judge for being made over to another and a bar is put under sub-section (1A) to the exercise of such powers. Once a trial commences the Sessions Judge has not the power to recall any case made over to an Additional Sessions Judge under sub-section (1C). In this view of the matter, the order of the Sessions Judge cannot stand.

3. If sub-section (1C) is read as empowering the Sessions Judge to transfer a case from the file of an Additional Sessions Judge or Assistant Sessions Judge on the view that they are also separate Criminal Courts in the same Sessions divisions in respect of the same case, then there would not perhaps have been any necessity for making special provisions of sub-section (1) and (1A) of that section. When there are general provisions and special provisions in respect of the same matter, the special provisions will be given effect to or prevail. In any view, the order of the learned Sessions Judge is wrong.

4. It is not necessary to go into the question as to whether there are good grounds for transfer of the case from the file of that Additional Sessions Judge to that of another. The reason is that no application for transfer with grounds had been made by the accused persons before this court and the parties did not address as on that in the hearing. If and when such application is made, that may fall to be considered.

In the result, the Rule is made absolute. The order of the learned Sessions Judge dated 19.8.72 in Criminal Misc. Case No. 254 of 1972 is set aside. Let the records be sent back to the learned Sessions Judge as early as possible.

R. Bhattacharya, J. :

5. This revisional application by the Superintendent and Remembrancer of Legal Affairs, Government of West Bengal has been directed against an order, dated 19.8.72 passed by the Sessions Judge, 24-Parganas u/s 526(1-A) of the Code of Criminal Procedure ordering for the transfer of a sessions case from the Court of an Additional Sessions Judge to another Court presided over by a separate Additional Sessions Judge of 24-Parganas.

6. Twenty-four persons were committed to the Court of Sessions, 24-Parganas for trial under sections 148 and 302 read with section 149 of the Indian Penal Code. The learned Sessions Judge distributed the case to a Court of an Additional Sessions Judge, known as 4th Court for disposal. The trial started on 4th August, 1972 and by 7th August, 1972, 7 witnesses for the prosecution were examined and cross-examined. After the examination of the 7th witness on 7.8.72, the learned Additional Sessions Judge at about 5 P.M. cancelled the bail of 7 of the accused persons and directed them to be taken to custody forthwith without taken at custody forthwith without asking the accused to show cause against the proposed order. On the next date before the trial resumed, the said nine accused persons taken to custody filed a petition before the learned Additional Sessions Judge for stay of the trial as they were going to move higher authorities for the transfer of the case to some other court, for they apprehended that they would not get proper justice at his hand on his being biased against the petitioners and for the cancellation of their bails without any reasonable cause. The learned Judge stayed the case so that the petitioners might move the High Court or the Sessions Judge for transfer. Thereafter the petitioners moved the learned Sessions Judge u/s 526(1-A) Cr. Procedure Code for the transfer of the case. The learned Sessions Judge, on hearing both the sides allowed the application and u/s 526(1-A) Cr. P. C. transferred the Sessions Case from the 4th Court of the Additional Sessions Judge to the 2nd Court of the Additional Sessions Judge, 24-Parganas at Alipur. It appears that after the said transfer the transferee Court considered the question whether it had jurisdiction to hold the trial of a case transferred by the Sessions Judge from another Additional Sessions Judge. On hearing the prosecution and the defence, he was satisfied on judicial authority that he was vested with jurisdiction to try the case, as would appear from his order passed on 26.8.72 and fixed dates for trial. Thereafter, the instant Rule was obtained and trial of the session case has been stayed.

7. In the revisional application filed against the order of transfer of the case passed by the Sessions Judge, the following grounds have been taken:

1. For that the learned Session Judge acted illegally and without jurisdiction in passing the impugned order of transfer.

2. For that the learned Sessions Judge's order has caused a gross failure of justice.

3. For that in the facts and circumstances of the case the order passed by the learned Sessions Judge is liable to be set aside.

8. Mr. J. M. Banerji, the learned advocate for the State relies on the first ground mentioned above and his submission is that the learned Sessions Judge has no power or jurisdiction to transfer a session case in which the trial has already commenced, from the file of the Additional Sessions Judge within the same sessions division. His first contention is that there is no provision in any part of section 528 Cr. Procedure Code giving him power to transfer a part-heard case from the court of the Additional Sessions Judge and secondly it has been argued that if any accused, who is being tried by the Additional Sessions Judge, want any transfer of his case to the file of some other Additional Sessions Judge or Sessions Judge himself, he need not file any application before the Sessions Judge u/s 526 (1-A) prior to his moving the High Court u/s 526 Cr. Procedure Code, as the Additional Sessions Judge is not subordinate to the Sessions Judge and that section 526 (1-A) is not meant for any case before Additional Sessions Judge. In this connection a question arose whether the court of Additional Judge, if any, within the same sessions divisions should be regarded as criminal court referred to in section 528(1-C) of the Code of Criminal procedure. The learned Advocate appearing on behalf of the aggrieved accused opposite-party has urged that the learned Sessions Judge has authority to transfer a case from any court of criminal business to another within the same sessions divisions within his jurisdiction, that the court criminal court mentioned in section 528 Cr. Procedure Code and that the Sessions Judge must be moved u/s 526(1-A) as a condition precedent before any party is entitled to come up to the High Court u/s 526 Cr. Procedure Code for transfer.

9. As the points canvassed are inter-related, I do not like to discuss them separately one after another to avoid repetition. I will consider the question of jurisdiction urged involving the points mentioned and deal with the same as the points crop up.

10. For the sake of convenience and for the proper appreciation of the legal position regarding the power of the Sessions Judge in the matter of transfer of a case or appeal, I quoted below only the relevant portions of section 528 of the Code of Criminal Procedure:-

528(1). Any Sessions Judge may withdraw any case or appeal from or recall case or appeal which he has made over to any Assistant Sessions Judges subordinate to him.

(1-A). At any time before the trial case or hearing of the appeal had commenced before the Additional Sessions Judge, any Sessions Judge may recall any case or

appeal which he has made over to any Additional Sessions Judge.

(1-B). Where a Sessions Judge withdraws or recalls a case or appear under sub-section (1) or sub-section (1A), he may either try the case in his own Court or hear the appeal himself, or make it over in accordance with the provisions of this Code to another Court for trial or hearing, as the case may be.

(1-C). Any Sessions Judge, on an application made to him in this behalf, may, if he is of opinion that it is expedient for the ends of justice, order that any particular case be transferred from one Criminal Court to another Criminal Court in the same Sessions division

11. There is no dispute before us and there cannot be any question about the power of the High Court to transfer cases on the grounds mentioned in section 526 Cr. P. C. from a Criminal Court subordinate to its authority to any other such Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction. There can be no doubt that a sessions case may, even if part-heard, be transferred from a Court of another Additional Session Judge to the Court of another Additional Sessions Judge in the same sessions division. Among several grounds of transfer mentioned in that section, we get that the High Court may transfer a case if it appears that a fair and impartial trial cannot be held in any Criminal Court subordinate thereto and also if it is expedient for the ends of justice. In this connection I reproduce sub-section (1A) of section 526 of the Code of Criminal Procedure below:

(1-A) Notwithstanding anything contained in sub-section (1), no application shall lie to the High Court for the exercise of its powers under the said sub-section for transferring any case form one Criminal Court to another Criminal Court in the same sessions division, unless an application for such transfer has been made to the Sessions Judge and rejected by him.

12. Sub-section (1) of section 526 of the Code of Criminal Procedure Speaks about the powers of the High Court for transfer of the case on grounds mentioned therein.

13. From the plain reading of the provisions of section 528 Cr. P.C., it is clear that the Sessions Judge has powers to withdraw or to recall any case already transferred to any Assistant Sessions Judge for disposal, that he has also powers to recall any case already made over to any Additional Sessions Judge if the trial of the case has not commenced and that after recalling or withdrawing the case as referred to in sub-section (1) and (1A), the Sessions Judge may try the case in his own court or may make over the case to another court according to the Court of Criminal Procedure. Mr. Banerji for the State has argued that there is no provision which clearly says that the Sessions Judge can transfer any case made over to the Additional Sessions Judge after the trial of the said case has already started. For this purpose, sub-section (1C) of section 528 is there. This is a residuary provision which embraces a case like this. The legislature cannot anticipate all possible or probable cases that may occur in

future. Sub-section (1C) has, therefore, been enacted for transferring a case by the Sessions Judge from one Criminal Court to another in the same sessions division if it is expedient for the end of justice. This sub-section does not lay down any restriction either as to the time or the stage of the case or proceedings at which the case or proceedings may be transferred by the Sessions Judge. On the face of this express provision, there is no restriction prohibiting the Sessions Judge from transferring any case from the Court of the Additional Sessions Judge on any account. It is to be noted in this connection that sub-section (1) speaks about withdrawing a case and sub-section (1A) relates to recall or withdrawal of a case already made over to an Additional Sessions Judge. They also give powers to the Sessions Judge either to try the case himself or to make over the same to another court after recalling or withdrawing it. They do not speak about transferring a case. Sub-section (1C), however, speaks about transferring a case. The ordinary and dictionary meaning of the words "Withdraw" or "recall" is to bring back which implies that according to sub-sections (1) and (1A) of section 528 Cr. P. C. Code the Sessions Judge is to first bring back the case already made over to another Court to his own file and then according to sub-section (1B) he may again make over the case in question to another Court for disposal. The word "transfer" means "shift from one position or receptacle to another". "Transfer", in sub-section (1C) therefore, implies transmitting a case direct from one Criminal Court to another without bringing it to the file of the Sessions Judge by recall or withdrawal.

14. In order to clearly understand the utility of sub-section (1C) of section 528 Cr. P.C. and for its correct interpretation, we should remember the amendment of the Criminal Procedure Code. Sub-section (1B) of section 526 and sub-section (1C) of section 528 of the Code of Criminal Procedure were born twins by the promulgation of the Indian Parliament Act No. 26 of 1955. One cannot live without the other. The said sub-sections cannot be separated from each other. In the absence of one, the other cannot be of any effect it must be useless. According to sub-section (1A) of section 526 reproduced herein before unambiguously says that any application for transfer of a case from one Criminal Court said section shall not be maintainable unless an application for such transfer has been made to the Sessions Judge and rejected by him. This sub-section is quite general and without limitation, that is to say, before any application u/s 526 Cr. P.C. for transfer of any case from a Court of any Magistrate, or a Court of an Assistant sessions Judge or a Court of an Additional Sessions Judge is filed before the High Court, such an application containing similar grounds must be submitted to the Sessions Judge. If such application is allowed by the Sessions Judge, there can be no occasion for the aggrieved party to approach the High Court for redress. Before the introduction of this sub-section (1A) of section 526, there was no power or jurisdiction of the Sessions Judge to pass order of transfer as contemplated in section 526(1A) Cr. P.C. To cite one instance, it may be stated that previously the Sessions Judge could not transfer a case part-heard in the Court of an Additional Sessions Judge made over by the former though ends of

justice demanded such transfer for fair trial. In order to invest the Sessions Judge with the requisite jurisdiction in consonance with the newly enacted sub-section (1A) of section 526, the legislature wisely and for effective use of that sub-section introduced the sub-section (1C) of section 528 Cr. P.C. by the same Act 26 of 1955. The "Criminal Court" mentioned in both the sub-sections (1A) of section 526 and sub-section (1C) of section 528 Cr. P.C. has not been circumscribed or limited in definition. The courts of the Sessions Judge, Courts of Additional Sessions Judge, Courts of Assistant Sessions Judge and Courts of the Magistrate are all Criminal Courts. In section 528, there are separate mentions of Sessions Judge, Additional Judge. It is to be noted that in section 526 (1A), it has been stated that before coming to High Court with nay application under that section, the party is to submit such application to the Sessions Judge. It is not stated that it should be filed in Sessions Court. Sub-section (1A) of section 526 and sub-section (1C) of section 528 are complementary to each other. One is counterpart to the other. In my view, "Criminal Court" referred to in those two sub-sections include the Court of any Additional Sessions Judge. That the Court of an Additional Sessions Judge is covered by sections 526(1A) and 528(1C) may be evident from the language of section 526(9) which says that "a Judge presiding in a Court of Sessions" shall not be required to adjourn a trial u/s (8), if he finds that the person notifying his intention of making an notifying his intention of making an application u/s 526 including sub-section (1A) has had a reasonable opportunity of making such application and has failed without sufficient cause to take advantage of it.

15. It is no wonder that there may be an extreme case in which sessions trial has begun in the Court of the Sessions Judge himself. I think even then sub-section (1A) of Section 526 does not create any difficulty for the Sessions Judge. On consideration of the transfer application made, he may allow the prayer for transfer if he feels that the interested party may have reasonable apprehension that he may not get fair trial in that court for certain grounds, for example, during trial, an essential witness known to the Judge is produced by the prosecution for examination and the said witness cannot be avoided. There may be other circumstances. If the application is rejected, the accused may then move the High Court and in that case the reason for rejection of the prayer will be clear to the High Court. However, it is not necessary to decide this question in the present case where we are concerned to see if the Sessions Judge has jurisdiction to transfer any case from the Court of the Additional Sessions Judge to another Court of Additional Sessions Judge.

16. Mr. Banerji's main contention is that the Sessions Judge has no authority u/s 526(1A) Cr. P.C. to transfer any case from the file of any Additional Sessions Judge, as the latter is not subordinate to the former, but of the same status with the former. A question arises in this connection whether the Sessions Judge can transfer any case from the Court of an Additional Sessions Judge of the same session Division, as there can be only one Sessions Court in a sessions division in respect of

one case and, therefore, there can be no question of transferring a case from one Court of the Additional Sessions Judge to another Court of another Additional Sessions Judge.

17. Let us now consider the constitution of Criminal Courts. We are now concerned with the Code of Criminal Procedure. Section 6 of the said Code classifies Criminal Court into five classes as follows :-

I. Courts of Session.

II. Presidency Magistrates.

III. Magistrates of the First Class.

IV. Magistrates of the Second Class.

V. Magistrate of the Third Class.

18. Section 7 Cr. P.C. relates to the Sessions division. Every sessions division shall be a district or consists of districts. There is no dispute that the sessions division with which we are concerned in the case before us consists of one district Viz. District 24-parganas. Section 9 of the Code of Criminal Procedure requires our consideration. Sub-section (1) of this section says that there shall be a Court of sessions for every sessions division and that there shall be a Judge of such court. Sub-section (3) of the section provides for appointments of Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in one or more such Courts.

19. The term "Court" has not been defined in Criminal Procedure Code According to Webster's Seventh New Collegiate Dictionary, "Court" means amongst other things, "a chamber or other place for the administration of justice" and "a justice or judges in session". In Oxford Dictionary, the meaning of the word is given as "body with judicial powers, tribunal, the judge(s) of law court. hall in which court sits". In Osborn's "the Concise Law Dictionary" 4th Edition, we get the meanings of the word "court" as follows:

(1) A place where justice is administered.

(2) The Judges who sit in a court.

(3) An aggregate of separate courts of judges, as the Supreme Court of Judicature.

20. There can be no reason for importing narrow or unreasonable meaning to the word "court". In view of the dictionary meaning and the use of the word by the general public, in my opinion the normal and reasonable meaning of "a Court of Session of a Sessions Division" would be the aggregate or totality of all the courts or judges including Sessions Judge, Additional Sessions Judge and Assistant Sessions Judge exercising the function and jurisdiction of a Court of Sessions within a particular Sessions Division. Each of the such individual courts or judges exercising

jurisdiction of the Sessions Court will also be deemed to be Court of Sessions and each of such Courts of Sessions Judge, Additional Sessions Judge and Assistant Sessions Judge or each of such judges are Criminal Courts within the same sessions division. In other word and in simple language, each of the constituent courts presided over by the Sessions Judge, Additional Sessions Judge and Assistant Sessions Judge forming the Court of Sessions is a Criminal Court within the same sessions division.

21. It is to be particularly noted that sub-section (1A) of section 526 Cr. P.C. mandates that a party, before he approaches High Court, must submit the application for transfer within the same sessions division to the Sessions Judge and not to any Additional or Assistant Sessions Judge. Similarly, special provision is made in sub-section (1C) of section 528 for conferring special jurisdiction upon the Sessions Judge alone and not to Additional or Assistant Sessions Judge for transferring a case and not appeal, from one criminal court to another Criminal Court in the same sessions division. This is a special jurisdiction given to the Sessions Judge only. There is no limited meaning in the words "Criminal Court" used in sections 526(1A) and 528(1C) and the power given to the Sessions Judge for transfer of a case is very wide. In this connection, I may refer to only two cases. Sub-section 8 of section 526 Cr. P.C. speaks about transfer of a case at any stage before the defence closes its case; but in sub-section (1C) of Section 528, there is no such limitation and the Sessions Judge has jurisdiction under sub-section (1C) even after the close of the evidence and the arguments have been heard. In the case of Kannian, reported in 1956 (II) Madras Law Journal Reports at page 429, Mr. Justice Raja Gopalan held. "The learned Sessions Judge apparently overlooked the difference in language between clause (8) of section 526 and clause (1-C) of section 528 of the Criminal Procedure Code. The limitations imposed by clause (8) of section 526 may not all be read into clause (1-C) of section 528, which gives ample discretion to the Sessions Judge to order any particular case to be transferred from one Criminal Court to another Criminal Court in the same sessions division." In this case, the Sessions Judge was of the view that he had no jurisdiction to transfer the case from a Criminal Court, as in that case arguments had been heard after the close of evidence. The Madras High Court, in view of the decision already mentioned, set aside the order of the Sessions Judge.

22. The other case, I want to refer to, is Ahmed Maidan Khan and others v. Inspector of "D" Division, reported in 1958(II) Madras Law Journal Reports 123. In that case, the power of Madras Sessions Court to transfer a case from the Presidency Magistrate was in issue. In that connection an occasion arose for the interpretation of section 528(1C) in order to examine the extent of power vested in the Sessions Judge for transferring a case. There, the Division Bench of the Madras High Court held as follows:-

The District Magistrate and the Additional Sessions Judge are not subordinate to the Sessions Judge, and yet he can entertain transfer application regarding them. Indeed, Section 528(1-C), Criminal Procedure Code enables by Sessions Judge to entertain transfer applications regarding a case pending on the file of the one Criminal Court in that Sessions Division.

23. This decision clearly supports the view that the Court presided over by an Additional Sessions Judge is a Criminal Court mentioned in sections 526(1A) and 528(1C) Cr. P.C. and that the Sessions Judge has jurisdiction to transfer a case from the Court of an Additional Sessions Judge to another court of an Additional Sessions Judge within his sessions division.

24. In the Quinquennial Digest 1966-70, Vol. 3 just published by AIR Ltd., Nagpur, head notes of two cases appear u/s 528 Cr. P.C. One relates to a case reported in 1970 All. W.R. (H. C.) 118: 1970 AII. Cri. R. 84 noted in the 2nd column of page 64 of the Digest above mentioned. The Head note reads as follows:

S. 528 (1-C) - "Criminal Court" includes courts of Sessions Judge, Additional Sessions Judge and Assistant Sessions Judge or Additional Sessions Judge - Sessions Judge has however to do so if he finds it expedient for the ends of justice.

25. Again, in right hand column at page 65 of the said Quinquennial Digest we get another reference to a case law which reads as 1970 Raj. L.W. 242 and the head notes run as follows:

S. 528(1-C) - Powers of Sessions Judge under - Additional Sessions Judge is a Criminal Court - within Sessions Division for ends of justice - Sessions Judge has power to transfer case to another - whether Court from which case is sought to be transferred is subordinate to Sessions Judge or not is not material.

26. As the said law reports have not been available, it is not possible to state the facts and circumstances of these two cases and to know the decisions in extenso and the reasoning thereof in details, but they appear to lend support to the view I have taken.

27. It is to be noted that section 193(2) of the Code of Criminal Procedure confers jurisdiction upon the Sessions Judge of a sessions division to make over to distribute sessions cases to Additional Sessions Judge and Assistant Sessions Judge within his sessions division for trial or disposal according to law. This is a sort of administrative authority conferred by the Criminal Procedure Code on the Sessions Judges being at the top of the sessions division for efficient administration of justice. Sub-section (1) and (1A) of section 528 have given power to the Sessions Judge for withdrawing or recalling to his own file, as stated therein, cases which have already been made over to the Assistant Sessions Judge and Additional Sessions Judge as the case may be. Sub-section (1B) empowers the Sessions Judge to try the recalled or withdrawn cases himself, or he may again make them over to another court for trial. The

Sessions Judge has the right to act suo moto according to the provisions of subsections (1), (1A) and (1B) of section 528; but he cannot under law transfer any case suo moto, as stated in subsection (1C) of section 528 Cr. P.C. According to sub-section (1C), a party must be aggrieved relating to a trial or proceedings in a case pending in a Criminal Court for decisions and that the said aggrieved party must file an application to the Sessions Judge for transfer of the case from the Court where the case is pending. If such an application case is filed before the Sessions Judge and if on hearing the parties he feels that it is necessary for proper administration of justice, fair decision and for ends of justice to transfer the case from the Court where it is pending, then he may transfer the case to another Criminal Court with proper jurisdiction. The Sessions Judge, cannot, under sub-section (1C) of section 528 transfer any case suo moto. There must be an application for transfer. Powers under sub-sections (1), (1A) and (1B) and (1C) are additional powers given to the Sessions Judge by the Criminal Procedure Code besides those given in section 193(2).

28. In view of my discussions above, I must hold that the learned Sessions Judge below had power and jurisdiction to transfer the sessions case u/s 526(1A) read with Section 528(1C) of the Criminal Procedure Code from the Fourth Court of the Additional Sessions Judge to the Second Court of the Additional Sessions Judge within the same sessions division Judge within the same sessions division of 24-Parganas. I also find that the Sessions Judge had authority to transfer the case after the examination of seven prosecution witnesses, as it was found expedient for the ends of justice. The Court of the Additional Sessions Judge is a Criminal Court referred to in section 526(1A) and 528(1C) Cr. P.C. and if a party wants to move the High Court u/s 526, it is mandatory that he must file a similar application under sub-section (1A) of Section 526 for transfer of a case, to the Sessions Judge before approaching the High Court.

29. The next question that falls for consideration is whether in the facts and circumstances of the present case, the learned Sessions Judge was right in transferring the case from the Fourth Court of the Additional Sessions Judge. The accused-petitioners were on bail. In all twenty-four persons were on trial under sections 148 and 302 read with section 149 of the Indian Penal Code. On the fourth day of trial after the seventh prosecution witness was examined, the learned Additional Sessions Judge suddenly cancelled the bail of some of the accused persons who are before us as petitioners at the close of the day's work. Admittedly, there was no prayer for cancellation of the bail from the prosecution side. Neither the police, nor the defacto complainant party made any prayer for such cancellation. There was no grievance from any quarter that any of the accused had ever made any slightest attempt to gain over any of the witnesses by bail or threat or to tamper with evidence. Suo moto the learned Additional Sessions Judge cancelled the bail of the petitioners and immediately they were taken to custody. The relevant portion of the order of the learned Judge says -

Seven eye-witnesses have been examined in this case implicating the accused persons who were granted bail by this Court. Considering the evidence and apprehending that the liberty granted may be misused, I cancel the bail granted to all the accused persons (named below). Let them be taken to custody forthwith.

30. It appears that, as the witnesses examined implicated the petitioners, on consideration of the said evidence, the learned Judge apprehended that the liberty granted by bail might be misused. This so called apprehension is imaginary, as there is no basis for such guess. There can be no just reason for thinking that the liberty granted by bail might misused in the absence of any basis or material, simply because some evidence has been adduced in course of the trial, though all the witnesses have not been examined. It is curious to note that without giving any opportunity to the petitioners to show cause why their bail would not be cancelled and even without hearing the petitioners or their lawyer, the learned Additional Sessions Judge cancelled the bail and directed the petitioners to be taken to custody. This manner of passing an order to the prejudice of the accused offends the elementary principles of criminal jurisprudence and ethics and goes against the principles of natural Justice. The order was passed by the learned Judge in undue haste. The learned Sessions Judge in passing the order for transfer of the case u/s 526(1A) Cr. P.C. considered the circumstance and though it fit to get the case transferred as prayed for by the case transferred as prayed for by the petitioners. I quote below some relevant portions of his findings :-

In the circumstances, I cannot but hold that the petitioners may have some apprehension that the learned judge has already, before examination of other witnesses and the conclusion of the hearing, made up his mind regarding the merits of the case... There is nothing on record to show that there was any apprehension that the concerned accused persons would misuse the liberty granted to them. The learned A.P.P. for the State could not refer to any such material as would show that there was any apprehension that the accused persons were misusing or would misuse the liberty granted to them... there is nothing on record at the stage at which the bail was cancelled showing that the accused did conduct themselves in any such fashion as would require the cancellation of bail which was granted by the learned judge himself....

31. I agree with the learned Sessions Judge below that there was no reasonable basis or ground to apprehend that the accused might misuse the liberty granted. It is very reasonable to hold that an unreasonable bias had crept into his mind and that, as a result thereof, the learned Additional Sessions Judge imagined without any just cause that the petitioners would misuse the liberty under bail. He does not, however, say how and in what manner the liberty would be misused. He has no idea about the alleged misuse.

32. In the facts and circumstances of this case, any ordinary man placed in the position of the petitioners must have apprehended that the trying judge was already

biased against them, that the judge had formed an adverse opinion against them and that the judge would not be able to do justice by deciding the case with open, fair and impartial mind. Not only is it necessary that the mind of the judge should be fair and impartial, but it is also essential that the conduct of the Judge must be such as would not give rise in the mind of the accused a feeling that either the judge is biased against him or that a fair trial and a just decision may not be expected. Justice should not only be done in fact, but it must as well appear to the concerned litigants and the public that justice is being done and that the court has been making a sincere endeavour to do justice with open, fair and impartial mind. In the present case I have no doubt to hold that the present case I have no doubt to hold that the apprehension of the petitioners, that they would to get a fair trial in the Court of the Additional Sessions Judge in question, is justified and it is a fit case to be transferred to another court for trial. The order of transfer of the case passed on 19.8.72 by the learned Sessions Judge u/s 526 (1A) is quite legal and proper.

33. Even if it is assumed for the sake of argument that the order of the Sessions Judge was without jurisdiction, the High Court has the power u/s 526(3) of the Code of Criminal Procedure, suo Moto to direct trial of any case by any Criminal Court found fit, though neither of the parties has applied for any transfer and without acting on any report of the lower court. Here, of course, we get the view of the learned Sessions Judge. In the instant case, I believe, it is expedient for the ends of justice and for proper decision, the sessions case in question should be transferred to some other competent court in the sessions division of 24-Parganas. I hold that the transfer of the case to the Second Court of the Additional Sessions Judge, 24-Parganas is legal and should be maintained. The order challenged before this Court has not caused any failure of justice and the same is not liable to be set aside as prayed for in the application before us. The contentions raised in support of the Rule have no substance.

With great respect to my learned brother, I cannot agree with him and hence I deliver my separate judgment.

In my view, as indicated above, the instant revisional application is to be rejected.

.....

Present:

Mr. Justice A.K. De.

And

Mr. Justice R. Bhattacharya.

34. As we are divided in our opinion, let the case with out divided opinions be laid before the Hon"ble the Chief Justice for order u/s 439(1) read with section 429 of the Code of Criminal Procedure.

The matter was thereafter placed before N. C. Talukdar J. who delivered the following judgments.

Talukdar, J.:

35. This is a Reference u/s 429 read with section 439(1) Criminal Procedure Code whereby the present case is laid before me for my opinion, upon a difference of opinion between my learned brothers, A. K. De and R. N. Bhattacharyya, JJ., arising over the question of jurisdiction of the learned Sessions Judge of a District to transfer a Sessions Trial from the Court of the Learned Addition Sessions Judge where it had already commenced, to another Court. No other point, however, excepting that of jurisdiction appears to have been specifically raised by either side during the hearing of the Rule before my learned Brothers and no such point also constitutes the subject-matter of the Reference, requiring my consideration.

36. Before I deliver my opinion and the judgment and order following the same, the point arises as to whether I should merely concur with the opinion of either of my learned Brothers without giving any reasons therefore or should give the steps of my reasoning in support of such opinion for the ultimate agreement or disagreement with either of them. Section 429 Criminal Procedure Code overrides clause 36 of the Letters Patent and according to one view, on a difference of opinion between the learned Judges composing the court of appeal or revision, the whole case is laid before the learned Third Judge and not merely the points of difference. A reference in this context may be made to the case of Md. Illias vs. the King, reported in (1949) 1 Cal. 43, wherein the learned Third Judge, Biswas J., on a difference of opinion between Roxburgh and Majumdar, JJ., observed at page 44 that "There can be no doubt upon the wording of the section that the whole case is now before me, which means not only that I am at liberty, but that it is also my duty to examine the whole of the evidence for myself and come to a final Judgment." The Supreme Court, however, in a latter decision, viz., in the case of [Bhagat Ram Vs. State of Rajasthan](#), held otherwise. H. R. Khanna, J. delivering the judgment of the Court, observed on the powers of a Third Judge that he can deal only with the matter in difference and has no power to reopen the whole case and convert an order of acquittal into one of conviction. The learned Third Judge, following the delivery of his opinion, however, is competent to pass final orders.

37. It is pertinent in this context to refer to the provisions of the relevant section as well as the imprimatur of judicial decisions thereupon. Section 429 Criminal Procedure Code provides as follows:

When the Judges composing the Court of appeal are equally divided in opinion, the case, with their opinion thereon, shall be laid before another Judge of the same

Court, and such Judge, after such hearing (if any) as the thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion.

The said section also applies to revision as is abundantly clear from the provisions of section 439(1) Criminal Procedure Code lying down as follows :-

In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court, may, in its discretion, exercise any of the powers conferred on a Court of appeal by sections 423, 426, 427 and 428 or on a court by section 338, and may enhance the sentence; and, when the judges composing the court of revision, are equally divided in opinion, the case shall be disposed of in manner provided by section 429.

38. The point that arises for consideration in the backdrop of the provisions referred to above, accordingly is whether the learned Third Judge, within the bounds of section 429 read with section 439(1) Criminal Procedure Code is merely to concur with either of the opinions of the learned differing Judges or may deliver his opinion with detained reasons. There was some cloud raised on the point at one state but, by and large, the same has been lifted by a series of decisions of the different High Courts. A reference in the first instance may be made to the case of Durga Das, Plaintiff-Appellant vs. Nalin Chandra Nandan and Ors. - Defendants-Respondents, reported in 38 C.W.N. 771, which was a reference to a Third Judge under clause 36 of the Letters Patent. Buckland, A.C.J., on a difference of opinion between Lord Williams and M. C. Ghose, JJ. was the Third Judge before whom the differing opinions were laid under clause 36 of the Letters Patent and he agreed with his learned brother, Lord Williams, J. that the appeal should be summarily dismissed under Order 41, Rule 11 C. P. C. The terms of clause 36 of the Letters Patent are overridden by the relevant provisions of sections 429/439(1) Criminal Procedure Code but as to the manner of expressing concurrence there is no difference. A reference may also be made to the decision of the Supreme Court, viz., [Babu and Others Vs. State of Uttar Pradesh](#), wherein it was held by Hidayatullah, J. (as His Lordship then was) that

there seems to be some misapprehensions about the manner in which the Third Judge is required by law to proceed when there is a difference of opinion between the two learned Judges of a High Court in the decision of an appeal.....In our judgment it was sufficient for Takru, J. to have said on the question of F.I.R. that he did not on the question of F.I.R. that he did not consider it necessary to decide the point but he was in agreement with all that Mathur, J. had said". It is clear, therefore, that the Supreme Court did not disapproved of a mere concurrence by the learned Third Judge with which he was agreeing. There is quite a large number of cases bearing on the other view, namely, of giving detailed reasons for such concurrence and without multiplying the instances a reference may be made to the cases of [Granade Venkata Ratan Vs. The Corporation of Calcutta](#), wherein on a difference of

opinion between Chitty and Smither, JJ. the matter was laid before the Third Judge, Woodroffe, J. Yusuf Sk. and others.. Appellants vs. The State reported in 1954 Cal. 258, wherein there was a difference of opinion between J. P. Mitter and S. K. Sen, JJ. and the matter was laid before a Third Judge, viz., K. C. Das Gupta, J. (as His Lordship then was); and the case of [Jugal Kishore More Vs. Chief Presidency Magistrate Calcutta and Others,](#) wherein on a difference of opinion between Amaresh Roy and Alak Gupta, JJ. the case was referred to Third Judge, viz., Bijayesh Mukherji, J. In all these cases referred to above, detailed reasons have been given for the ultimate opinion by the learned Third Judge for agreement with one of the two differing Judges. On a consideration of the aforesaid decisions and also the provisions of the statute, I hold that the legislature enjoins the delivery of the opinion by the learned Third Judge and in delivering such opinion if he wholly agrees with one of the two differing opinions he may not have to give the steps of his reasoning. But otherwise if he ultimately agrees with the conclusion substantially on the reasons given by one of the differing Judges but not wholly so, it is better that his opinion, as recorded in the order passed by him, is a speaking order helping those going through the same to follow the steps of his reasoning. Each case however must depend on its own facts and principles laid down in the two different schools of view, referred to above, are not on ultimate analysis discordant but can be dove-tailed into each other, depending on the exigencies of the case and the facts and circumstances thereof.

39. I will now turn to the facts leading on to the present Reference and the same can be put in a short compass. A revisional application was made, being Criminal Revision No. 710 of 1972, by the Superintendent and Remembencer of Legal Affairs, Government of West Bengal, against an order dated 19.8.1972 passed by the learned Sessions Judge, 24-Parganas u/s 526 (1-A) of the Criminal Procedure Code directing the transfer of a Sessions Case pending before Shri P. Dutta, Additional Sessions Judge, 4th Court, Alipore, District 24-Parganas, to the Second Court of the Additional Sessions Judge for disposal. The backdrop of the sessions trial, bereft of all verbiage, is that 24 persons were committed to the Court of Session, District 24-Parganas, for trial under sections 148/302 read with section 149 Indian Penal Code. The case was distributed by the learned Sessions Judge, Alipore to the learned Additional Sessions Judge, 4th Court, Alipore, for disposal. The trial started on 4.8.72 and by 7.8.72 seven witnesses for the prosecution were examined and cross-examined and one prosecution witness, viz., P.W.4, was recalled for further cross-examination and discharged. After the examination of P.W.7 the learned Additional Sessions Judge cancelled the bail of 7 of the accused persons and directed them to be taken into custody forthwith. On the next day before the trial commenced the accused persons, whose bail was cancelled, filed a petition before the learned Additional Sessions Judge for a stay of the trial as they were going to move the higher Court for transferring the case to some other court. the petitioners thereafter moved the learned Sessions Judge u/s 526(1A) for the transfer of the case and learned Sessions Judge, on hearing both the sides, allowed the application and

transferred the Sessions Trial from the 4th Court of the Additional Sessions Judge to the 2nd Court of the Additional Sessions Judge at Alipore District 24-Parganas and the same was fixed for trial before the learned transferee Judge. there after the Superintendent and Remembrancer of Legal Affairs, Government of West Bengal, obtained the present Rule and the sessions trial was stayed. The Rule came up for hearing before the Division Bench consisting of A. K. De and R. N. Bhattacharyya, JJ., who were however divided in their opinions and delivered their orders accordingly on 25.3.73. A. K. De, J. held that the Rule should be made absolute and the matter should go back to the learned Sessions Judge for disposal as early as possible, while R. N. Bhattacharyya, J., held that the Rule should be discharged and the impugned order should be upheld. As they were divided in their opinion, the case with the divided opinions was put up before the Hon"ble the Chief Justice for passing necessary orders under Sections 439(1)/429 of the Code of Criminal Procedure and it was ultimately laid before me for my opinion.

40. Having heard the learned Advocates for the respective parties, I will now proceed to consider the point of difference. The point of difference between the two learned Judges is whether on an application made to him u/s 528(1)(c), the Sessions Judge can transfer the case from the Court of the learned Additional Sessions Judge to another court. Mr. Justice De on an interpretation of sections 528(1) and (1A) and also of Section 9 of the Code of Criminal Procedure held that the order for transfer passed by the learned Sessions Judge transferring the case form the court of the learned Additional Sessions Judge, 4th Court, Alipore, District 24-Parganas, has been bad and improper and in that view the Rule should be made absolute. Mr. Justice R. Bhattacharyya, however, held on a consideration of the relevant provisions that section 528(1C) is an independent provisions where under the Session Judge, in a fit and proper case, may transfer a particular case from one criminal court to another in the same sessions divisions and accordingly the order of transfer from the court of the learned Additional Sessions Judge has been a proper one. For a proper consideration of the point at issue it is necessary to refer to the provisions of section 528(1), (1A) and (1C) as well as of section 528(2) of the Code of Criminal Procedure. Section 528(1) provides as follows :-

Any Sessions Judge may withdraw (any case or appeal) from, or recall (any case or appeal) which he has made over to, any Assistant Sessions Judge subordinate to him.

The sine qua non are that the case in question sought to be transferred is form the court of the Assistant Sessions Judge and that the same must have been made to the learned Assistant Sessions Judge under the provisions of section 193(2) of the Code of Criminal Procedure. Sub-section (1A) refers to a transfer from the court of the Additional Sessions Judge and the condition precedent thereof is that the trial of the case in question or hearing of the appeal concerned had not commenced and that the said case or appeal had been made over to the learned Additional Sessions

Judge by the learned Session Judge u/s 193(2) of the Code of Criminal Procedure. Sub-section(1C) deals with a position which appears to be unfettered and untrammelled excepting in the last part of the provisions referring pointedly to "from one Criminal Court to another Criminal Court in the same sessions division." Mr. Justice Bhattacharyya has interpreted "from one Criminal Court to another Criminal Court in the same sessions division" as being the same as from one Additional Sessions Judge to another. The reported decisions on the point are not many and a reference may be made to the case of State of Uttar Pradesh Applicant v. Khurkhundi and others Opposite-Parties, reported in 1971 AII L.J. pp. 362 wherein Mr. Justice J.M.L. Sinha observed at pp. 365 that "for transferring a case from one Additional Sessions Judge to another Additional Sessions Judge, acting can be taken by the Sessions Judge only u/s (1-A) of Section 528 of the Code and that too before the trial has commenced.

41. I will now proceed to consider the various provisions u/s 528, Criminal Procedure Code for the correct position. Section 528(1) Criminal Procedure Code clearly refers to the Assistant Sessions Judge who is subordinate to the Sessions Judge and the transfer of the case must be with regard to one which has been made over to the Assistant Sessions Judge by the learned Sessions Judge u/s 193(2) Criminal Procedure Code. This section does not therefore apply to the point at issue. The relevant provisions relating to a transfer from the Additional Sessions Judge are those contained in sub-section (1A) and the sine qua non thereof are (a) before the trial of the case or the hearing of the appeal has commenced; (b) the case to be recalled is one which was made over to the Additional Sessions Judge himself. It is significant that the word "subordinate" does not find place in sub-section (1A). If sub-section (1A) to section 528 be construed to relate to cases of transfer from the Additional Sessions Judge's court the present case could not have been transferred in law and therefore the ultimate order passed by the learned Sessions Judge transferring the case on the 19th August, 1972 would be bad and repugnant. If however sub-section (1C) applies, as held by Mr. Justice Bhattacharyya, such a transfer would be quite within the bounds of the statute and a pertinent order. It is necessary, therefore, to consider the provisions of sub-section (1C). In sub-section (1C) the conditions precedents are (a) expedient for the ends of justice; and (b) transfer in question is from one criminal court to another criminal court in the same sessions division. It is significant that neither the words "Assistant Sessions Judge" nor the words "Additional Sessions Judge" have been used by the legislature. Is it therefore an independent provisions apart from the specific provisions of sub-sections (1) and (1A) covering all the different courts starting from Additional Sessions Judge, Assistant Sessions Judge and Magisterial Court, or do that provisions only relate to the Magisterial Court? The answer to that would be the answer to this case bringing to light difference between my learned Brothers. While construing the provision of sub-section (1C) to find out the real intention of the legislature it should not be overlooked that the legislature in its wisdom has left out the words "which he

has made over" or in other words the condition precedent is that the case in question had been made over u/s 193(2) Criminal Procedure Code. Section 528(1C) in the first blush, therefore, refers to cases which have not been so transferred and the emphasis is on matters originating before the Magistrate and similar causes. The dropping of the word "appeal" is another noteworthy feature that should be taken into consideration within the bounds of section 528(1C). The provision of sub-section (2) again pinpoints that section 528(1C) was added by the amending Act 26 of 1955 because of the provision of sub-section (2) relating to District Magistrate or sub-Divisional Magistrate having powers to withdraw any case or recall the same which have been made over to the Magistrate subordinate to them. Some meaning and effect must be given to the words "one Criminal Court to another Criminal Court in the same sessions division" and for a proper appreciation thereof one has to refer to the material provisions of section 7, 9, 17 and 31 of the Code of Criminal Procedure. The Code of Criminal Procedure is an uninterrupted and logical chain and any link thereof when missed would result any link thereof when missed would result in redundancy. Section 7 in the context of Lex Loci relates to territorial division and lays down as follows:-

7(1) - Every State (excluding the presidency-towns) shall be a sessions divisions, or shall consist of sessions divisions : and every sessions division shall, for the purposes of this Code, be a district or consist of districts.

Section 9 relates to Court of Session wherein the State Government shall establish a Court of Session for every sessions division and appoint a judge of such Court. a reference is not necessary to the provision of section 17 relating to the subordination of Magistrates and of Assistant Sessions Judge to Sessions Judge. Sub-section (3) lays down as follows :-

All Assistant Judges shall be subordinate to the Sessions Judge in whose Court they exercise jurisdiction, and he may, from time to time, make rules consistent with this code as to the distribution of business among such Assistant Sessions Judges.

42. To complete the tally, a reference must be made to section 31 relating to sentences. Section 31(2) says that a Sessions Judge or Additional Sessions Judge may pass any sentence..etc. It is abundantly clear, therefore, that the Sessions Judge and Additional Sessions Judge has the same power and in view of the preceding provision it is abundantly clear also that in a sessions division there is one Sessions Court although there may be many criminal courts. Applying the said yardstick for interpreting the words "from one Criminal Court to another Criminal Court in the same sessions division," the intention of the legislature is no longer clouded under the words which are not in any way redundant. On a consideration of the provisions laid down under the Code of Criminal Procedure reflecting the intention of the legislature, I hold that some meaning and effect must be given to the words "from one Criminal Court in the same sessions division." The intention of the legislature is, quite clear and the said provisions deal with the Magisterial or the original Court

and neither the Additional Sessions Judge's Court or the Assistant Sessions Judge's Court.

43. The point involved may now be considered in accordance with the principles of interpretation of statutes. Section 528 consists of several steps starting with the Assistant Sessions Judge, reaching the step of the Additional Sessions Judge; and ultimately culminating into "one criminal court to another criminal court in the same sessions division". As was observed in Maxwell "On Interpretation of Statutes," that "A statute is the will of the legislature and the fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of them that made it. If the expansive interpretation sought to be given to sub-section (1C) of section 528 is given effect to, it would only attribute redundancy to the preceding sub-sections (1) and (1A) of the same section 528; and it is well-known that the principles of interpretation of statute rule out redundancy. As was observed by Lord Sumner in the case of Quebec Railway Light, Heat and Power Co. Ltd. v. Vandry, reported in AIR 1920 P.C. 181 at 186 that "Effect must be given if possible to all the words used, for the legislature is deemed not to waste its words or to say anything in vain." Mr. Justice Subbarao (as His Lordship then was) also observed in the case of [Ghanshyam Das Vs. Regional Assistant Commissioner of Sales Tax, Nagpur](#), that "a construction which would attribute redundancy to a legislature shall not be accepted except for compelling reasons." I respectfully agree with the same and I hold that the principles laid down above rule out the interpretation sought to be given to the provisions of sections 528(1C), seeking to invest the same with a wider meaning than the legislature ever intended. I ultimately hold, therefore, on the principles of interpretation of statutes that to give the expansive meaning as sought to be put to section 528(1C) would be to travel beyond the bounds of the statute on a voyage of discovery. Each of these sub-sections dove-tails into the scheme of the provisions of section 528. One is concordant with the other and not discordant. On a consideration of the provisions contained in the statute and also of the cardinal rules of interpretation, I hold that a transfer of a case from the Additional Sessions Judges to some other court sought to be made by the learned Sessions Judge would come within the ambit of section 528(1A) and in the facts of the case under consideration the trial having already proceeded and no less than seven witnesses having been examined, the point reached was the point of no return or in other words, the point of no-transfer. The Additional Sessions Judge is to be equated with the Sessions Judge in sessions division and does not form really a different sessions Court. Although not an imaginary line like the Equator, it is also not separate entity to the extent that it constitutes different courts having different powers.

44. I have considered the point at issue at some length because of the importance thereof and the illumining way in which it was approached by my Learned Brothers. On the steps of reasoning referred to above, I ultimately agree with the opinion of my Learned Brother, Mr. Justice De, I only make it clear that I have not disposed of

the matter on a consideration of the merits for such transfer or the merits of the grounds taken on behalf of the opposite-parties for a transfer, the same having not been raised before the learned differing Judges and considered by them, and as such, being wholly outside the realm of the point of difference in the Reference in question.

45. In the result, the Rule is made absolute; the impugned order dated the 19th August, 1972 passed by the learned Sessions Judge, Alipore, district 24-Parganas u/s 526(1A) of the Code of Criminal Procedure is hereby set aside; and I direct that the case shall go back to the learned Additional Sessions Judge, 4th Court, Alipore, district 24-Parganas, for being tried expeditiously and in accordance with law, from the stage reached on the 7th August, 1972.

46. The record shall go down as early as possible.