

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

Reserved on: 30.12.2023
Pronounced on 31.01.2024

TrP (Crl) No. 21/2023

Union Territory of Jammu and
Kashmir through Sr. Superintendent
of Police, State Investigation Agency
(SIA).

.....Appellant(s)/Petitioner(s)

Through: Mr. Mohsin Qadri, Sr. AAG
Mr. Mudassir Zubair, Advocate

..... Respondent(s)

1. Shahid Shafi Mir S/o Mohammad Shafi
Mir R/o Kolipora Khanyar.
2. Zahid Farooq Khan S/o Farooq Ahmad
Khan R/o Shampora Nowhatta,
Srinagar.
3. Mohammad Asif Bhat S/o Gh.
Mohammad Bhat R/o Jogiwan
Amdakadal Lal Bazar.
4. Munir Aziz War @ Qari Munir S/o Ab.
Aziz War R/o Hatmullah Kupwara.
5. Towseef Ahmad Shah S/o Ghulam
Mohammad Shah R/o Parimpora,
Srinagar.

Through: Mr. Anil Raina, Advocate
Mr. Suhail Ahmed Dar, Advocate

Coram: HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE

JUDGMENT

1. "Witnesses are eyes and ears of justice".

-----Bentham.

"A witness is a man whose life and faith are so completely one that when
the challenge comes to step out and testify for his faith, he does so,
disregarding all risks, accepting all consequences"

----- Whittaker Chambers,

2. The Hon'ble Supreme Court of India has quoted Bentham and Whittaker Chambers in case titled, **Mahender Chawla v. Union of India, (2019) 14 SCC 615**, while emphasizing the necessity for ensuring the protection of the witnesses, as good number of cases fail in the courts only because the witnesses for one reason or the other turn hostile. Any misadventure, which is aimed at distorting the vision and impairing the ears of justice, is required to be thwarted.
3. The Union Territory of Jammu and Kashmir filed the present application seeking transfer of the challan No. 5 titled, '*State vs. Shahid Shafi Mir & Ors.*' arising out of FIR No. 62/2020 of P/S Lal Bazar, pending before the court of Special Judge Designated under NIA Act, Srinagar (hereinafter to be referred as 'the trial court') to any other court of competent jurisdiction in District Jammu.
4. It is stated that FIR bearing No. 62/2020 under Sections 307 IPC, 7/27 Arms Act, 16 & 18 ULA(P) Act was registered at Police Station, Lal Bazar as some unknown terrorists fired upon one Advocate, namely, Babar Qadri at his residence Zahidpora, who was shifted in an injured condition to Soura hospital, but later succumbed to injuries. During investigation of the case, six accused persons were found involved in the commission of offence and accordingly, the charge sheet was laid against six accused persons on 05.06.2021. Respondent Nos. 4 and 5 were granted bail by the learned trial court vide order dated 31.01.2022. It is stated that during further investigation, the supplementary statements of the father and brother of the deceased were recorded, wherein they

revealed that the deceased had uploaded one video on his facebook account on the day he was murdered. During the course of further investigation, the said video was taken on record in the case and transcript of audio contents of the said video was prepared wherein the deceased had made serious allegations and comments upon the functioning of the Bar Association. Thereafter, SDPO Zadibal formed a SIT and started further investigation on this aspect of the case to ascertain the role or involvement of any other person in the said heinous terror act. During investigation, search warrants were obtained from the court and searches were conducted at the residential houses and offices of some of the Advocates and various electronic gadgets were seized during search of those premises and the gadgets were sent to FSL, Srinagar for forensic analysis. The report from FSL Srinagar is still awaited. It is further stated that during trial of the case, a motion was laid by the complainant and the learned trial court directed for further investigation in the matter pursuant to the revelation of the material facts by the complainant in respect of conspiracy hatched by few lawyers working in the Kashmir Division. It was also alleged by the complainant that he had not been in a position to engage the services of any lawyer from Kashmir as no lawyer was willing to contest his case due to fear, threat and hostile atmosphere in the valley. The complainant, as such, was forced to engage the services of Advocate based at Jammu, seeking intervention of the trial court. After the order of further investigation was passed by the trial court, the investigation in the case was transferred to State Investigating Agency (SIA) vide PHQ J&K's

order No. 2152 of 2023 dated 20.07.2023, taking into consideration the sensitivity of the case.

5. It is further stated by the applicant that the family of the deceased has been approaching the applicant for protection of their life and liberty and also that the vital witnesses other than the complainant have also been constantly alleging that they are being threatened for not participating in the investigation and as such, there is no possibility of conducting the fair and impartial trial in Srinagar. Precisely, the applicant is seeking transfer of the case from the trial court to any other court of competent jurisdiction at Jammu, on the ground that the witnesses including complainant are being threatened not to participate either in the investigation or depose during the trial.
6. The respondents were put to notice and on 15.12.2023, the learned counsel appearing for the respondents sought time to file objections but the respondents did not file objections but the arguments were addressed by the learned counsels appearing on behalf of the respondents.
7. Mr. Mohsin Qadri, learned Senior AAG has submitted that the fair trial is not possible in Srinagar because the witnesses, more particularly, the father and brother of the deceased are being harassed and threatened to depose in favour of the accused persons and it is substantiated by the fact that no counsel from Srinagar was willing to conduct the case on behalf of the complainant, which necessitated the complainant to engage an Advocate from Jammu for filing the application seeking further investigation. He has also produced the certified copies of the applications

filed by the brother of the deceased. He further submits that in order to ensure fair trial, it is imperative that the challan be transferred from the trial court to any other court of competent jurisdiction at Jammu.

8. *Per contra*, Mr. Suhail Ahmed Dar, Advocate and Mr. Anil Raina, Advocate appearing for the respondents have submitted that the present application has been filed just to delay the proceedings and it is absolutely wrong that the father and brother of the deceased were being threatened to depose in favour of the respondents. They also raised the issue of jurisdiction of the State Investigating Agency (SIA) to further investigate the FIR.
9. Heard learned counsels for the parties and perused the record of the trial court.
10. A perusal of the record reveals that the charge sheet bearing Challan No. 5 arising out of FIR No. 62/2020 under Section 302 IPC, 7/27 Arms Act and 16, 18, 20, 39 ULA(P) Act of Police Station, Lal Bazar was filed against six accused persons including the respondents and one Saqib Manzoor, the alleged active terrorist of banned organization Jaish-e-Mohammad under Section 299 Cr. P.C. The record further depicts that the application was filed by the father of the deceased Advocate for further investigation on the ground that his deceased son had made a declaration recorded in a video made by the deceased himself and it was never investigated, wherein he had mentioned about the perpetrators of terror in and outside the court where the deceased had been practicing for the last 15 years. It was also stated that his family was being harassed by some

unknown persons whenever the complainant intended to raise genuine grievance in the court of law. It was also pleaded in the application that because of threats, he had sold his only residential house and shifted to the rented accommodation. The said application was decided by the trial court vide order dated 17.07.2023 and the Investigating Officer was directed to conduct further investigation and to file the supplementary charge sheet as soon as possible. It is pertinent to note that the learned trial court also directed the Senior Superintendent of Police, Srinagar to re-evaluate the security concerns of the applicant therein, as they were getting threats constantly. It is evident from the record that the Police Headquarters J&K vide order dated 20.07.2023 transferred the investigation in FIR No. 62/2020 of Police Station, Lal Bazar to the State Investigating Agency. Thereafter, vide order dated 24.07.2023, the team comprising six members was constituted for investigation. This Court has also examined the record of the trial court and finds that the brother of the deceased Advocate had filed an application before the learned trial court seeking extension of time for recording the statements of the family members of the deceased on the ground that he was regularly being harassed and threatened from different sources to depose in favour of the accused persons otherwise he along with his family members would be eliminated like his brother. A perusal of the other application reveals that the same was filed by the brother of the deceased for recalling the nonailable warrants and seeking further time for recording the statements of the witnesses in the said case. In the said application also, it was stated that

the applicant therein was regularly harassed and was being threatened to depose in favour of the accused persons, failing which, he would be eliminated like his brother. It was further averred in the application that he had requested the Home Department for providing security so as to enable him to depose before the trial court.

11. This Court has perused the trial court record and finds that the learned trial court vide order dated 25.02.2023 had issued non-bailable warrants against Zafar Qadri i.e. the brother of the deceased and on 11.03.2023, Zafar Qadri, who happened to be the prosecution witness No. 1 appeared before the court and filed an application thereby stating that he was getting calls from anonymous person not to make statement in the case. The learned trial court vide order dated 03.04.2023 allowed the prayer of Zafar Qadri and granted him time for making statement in the court and simultaneously, APP was directed to take up the matter with SSP, Srinagar for providing adequate security to the witness under rules. The applicant has also placed on record the application submitted by the father and brother of the deceased to transfer the case before any appropriate court in Jammu and in the said application, the brother and father of the deceased have reiterated that their family is facing very hostile situation in the court at Srinagar apart threats advanced to them from various quarters against pursuing their legal remedies.
12. It is evident that the father and brother of the deceased Advocate have been making complaints to the trial court as well as the applicant against threats advanced to them from various quarters so as to dissuade them

from prosecuting the case and to force them to depose in favour of the accused persons.

13. In **Abdul Nazar Madani v. State of T.N., (2000) 6 SCC 204**, the Apex Court has observed as under:

7. The purpose of the criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. When it is shown that public confidence in the fairness of a trial would be seriously undermined, any party can seek the transfer of a case within the State under Section 407 and anywhere in the country under Section 406 CrPC. The apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary, based upon conjectures and surmises. If it appears that the dispensation of criminal justice is not possible impartially and objectively and without any bias, before any court or even at any place, the appropriate court may transfer the case to another court where it feels that holding of fair and proper trial is conducive. No universal or hard and fast rules can be prescribed for deciding a transfer petition which has always to be decided on the basis of the facts of each case. Convenience of the parties including the witnesses to be produced at the trial is also a relevant consideration for deciding the transfer petition. The convenience of the parties does not necessarily mean the convenience of the petitioners alone who approached the court on misconceived notions of apprehension. Convenience for the purposes of transfer means the convenience of the prosecution, other accused, the witnesses and the larger interest of the society.

(emphasis added)

14. For a fair and impartial trial of a criminal case, it is imperative that the witnesses are in a position to depose in an atmosphere, which is free and not hostile. Because of this reason only, appropriate measures have been put in place to ensure the protection of the witnesses, more particularly in criminal cases. It is also borne from the record that the applicant is investigating the matter in respect of the video uploaded by the deceased Babar Qadri wherein, he had leveled certain allegations against some Advocates. Normally, this Court would have directed the applicant to provide security to the witnesses but it is also borne from the record that

the complainant could not lay a motion before the learned trial court for seeking further investigation as no lawyer from Srinagar was willing to render legal assistance to him, due to involvement of some influential lawyers based at Srinagar. The father of the deceased Advocate had also pleaded that he was forced to sell his house and shift in rental accommodation because of threats and hostile situation. This court does not have even an iota of doubt that the fair trial of the case is not possible in Srinagar.

15. In view of the peculiar facts and circumstances of the case as mentioned above, this Court is of the considered view that once the material witnesses are facing threats for deposing in favour of the accused persons and no counsel was willing to render legal assistance to them in court at Srinagar, the present application deserves to be allowed for fair, transparent and impartial trial. It needs to be noted that the respondents have been causing appearance before the learned trial court through virtual mode, as respondent Nos. 1 and 3 are lodged in Rajouri Jail, respondent No. 2 is lodged in Udampur Jail, respondent Nos. 4&5 are lodged in Jhajjar Jail. The accused No. 6 has been reported to be dead as is evident from order dated 30.08.2023.
16. Accordingly, the present application is allowed and the challan No. 5 titled, '*State vs. Shahid Shafi Mir & Ors*' arising out of FIR No. 62/2020 of Police Station, Lal Bazar, pending before the court of Special Judge Designated under NIA Act, Srinagar is transferred to the court of Special Judge Designated under NIA Act, Jammu for trial in accordance with law.

The Special Judge Designated under NIA Act, Srinagar shall send the record of the charge sheet to the transferee court forthwith. Copy of this order be sent to both the courts for compliance.

17. Disposed of.

(RAJNESH OSWAL)
JUDGE

Jammu
31.01.2024
Neha-II

Whether the order is speaking: Yes/No
Whether the order is reportable: Yes/No

