

Court No. - 89

Case :- TRANSFER APPLICATION (CRIMINAL) No. - 20 of 2021

Applicant :- Vipin Tiwari

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Rajendra Prasad Mishra, Mithilesh Kumar Ojha

Counsel for Opposite Party :- G.A., Khwaja Shamshad Ahmad, Mohammad Belal, Noor Ahmed, Om Prakash

with

Case :- TRANSFER APPLICATION (CRIMINAL) No. - 62 of 2021

Applicant :- Shailendra Nath Pathak

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Rajendra Prasad Mishra, Surendra Kumar

Counsel for Opposite Party :- G.A., Kamlesh Kumar Tiwari

with

Case :- TRANSFER APPLICATION (CRIMINAL) No. - 63 of 2021

Applicant :- Rohit Kumar

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Raghvendra Prakash

Counsel for Opposite Party :- G.A., Kamlesh Kumar Tiwari

Hon'ble Anil Kumar Ojha, J.

Heard learned counsel for the parties, learned A.G.A. for the State and perused the record.

In all the above three Transfer Applications case sought to be transferred is same, hence, for the sake of convenience, all the three Transfer Applications are being decided together.

Applicants have filed this Transfer Application with a prayer to transfer the S.T. No. 3628 of 2020 (Registration No. 732 of 2020) (CNR No. UPJS01-003982-2020) (Case Crime No. 590 of 2020), under Section 376-D, 395, 386, 323, 354, 354-A, 354-B, 354-D, 34, 412 I.P.C. and Section 5, 6, 9 & 10 of P.O.C.S.O. Act and Section 67 and 67A I.T. Act, P.S. Sipri Bazar, District Jhansi (State v. Bharat Kumar and others), pending in the court of Special Judge (POCSO) Jhansi from District Court Jhansi to the court of competent jurisdiction to either District Kanpur or Banda or Fatehpur or Prayagraj.

Submission of the learned counsel for the applicants is that victim's father is a practicing advocate in District Jhansi and therefore, no advocate is ready to appear on behalf of applicants in the District Court Jhansi. Applicants have constitutional right to engage lawyer of their

due to the influence of the father of victim. Allegation against the applicant Vipin Tiwari and Rohit is that they shot video in mobile while the victim being raped, allegation against applicant Shailendra Nath Pathak is that he took Rs. 1000/- from victim and also taken Rs. 2000/-, and there is no allegation except this.

Per contra, learned counsel for opposite party no. 2, learned A.G.A. vehemently opposed the transfer application and drew attention of the Court towards the Vakalatnama filed on behalf of applicant Vipin Tiwari by Sri Jaydeep Mishra Advocate and on behalf of applicant Shailendra Nath Pathak by Sri Ashutosh Samadhiya, Advocate in District Court Jhansi which falsifies the averment of learned counsel for the applicants that no advocate is ready to appear on behalf of applicants at District Jhansi. However, no Vakalatnama has been filed on behalf of applicant Rohit Kumar.

Further submitted that the matter in the case sought to be transferred is heinous and relates to gang rape, therefore, it should be rejected.

In ***Harita Sunil Parab v. State (NCT of Delhi), (2018) 6 SCC 358***, the Hon'ble Supreme Court has held as follows:

"7. In Gurcharan Dass Chadha v. State of Rajasthan, AIR 1966 SC 1418 dealing with the issue for transfer of a case, it was observed:

"13....The law with regard to transfer of cases is well-settled. A case is transferred if there is a reasonable apprehension on the part of a party to a case that justice will not be done. A petitioner is not required to demonstrate that justice will inevitably fail. He is entitled to a transfer if he shows circumstances from which it can be inferred that he entertains an apprehension and that it is reasonable in the circumstances alleged. It is one of the principles of the administration of justice that justice should not only be done but it should be seen to be done. However, a mere allegation that there is apprehension that justice will not be done in a given case does not suffice. The Court has further to see whether the apprehension is reasonable or not. To judge of the reasonableness of the apprehension the State of the mind of the person who entertains the apprehension is no doubt relevant but that is not all. The apprehension must not only be entertained but must appear to the Court to be a reasonable apprehension."

8. The apprehension of not getting a fair and impartial enquiry or trial is required to be reasonable and not imaginary, based upon conjectures and surmises. No universal or hard and fast rule can be prescribed for deciding a transfer petition, which will always have to be decided on the facts of each case. Convenience of a party may be one of the relevant considerations but cannot override all other considerations such as the availability of witnesses exclusively at the original place, making it virtually impossible to continue with the trial at the place of transfer, and progress of which would naturally be impeded for that reason at the transferred place of trial. The convenience of the parties does not mean the convenience of the petitioner alone who approaches 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

9. In *Mrudul M. Damle v. CBI*, (2012) 5 SCC 706, it was noticed that early conclusion of the trial becomes much more difficult involving more expenses for the prosecution by it having to bear travelling expenses of official and non-official witnesses and all of which ultimately causes the trial to linger on for years."

In view of the aforementioned principle of law enunciated by Hon'ble Supreme Court, the cases of applicants are being analyzed.

It is a case of gang rape wherein victim happens to be the daughter of a practicing advocate at Jhansi. If case is transferred from Jhansi to other districts, victim will have to travel other district which may ultimately result into hardship and mental agony to the victim. Not only this, all other witnesses who are the residents of Jhansi except the formal witnesses, will have to travel to other district where the case will be transferred.

If the case is transferred from District Jhansi to any other district, it will be inconvenient for the victim, witnesses, prosecution and for the society as a whole because the case sought to be transferred relates to gang rape. If case is transferred, it will add insult to injury to the victim.

Justice is not for the accused only, justice should also be done with victim also and in the present case the victim has been subjected to gang rape.

During course of argument, it transpires that the bail applications of the applicants have been rejected by the this High Court. Applicants are detained in jail. Vakalatnama on behalf of two applicants Vipin Tiwari and Shailendra Nath Pathak has been filed. However there is no Vakalatnama filed on behalf of applicant Rohit Kumar. Applicants have every right to contest the case through lawyer of their choice. So far as the influence of victim's father who is practicing lawyer in Jhansi is concerned, there is no evidence on record.

Considering the law laid down by Hon'ble Supreme Court in *Harita Sunil Parab (Supra)* and keeping in view the entire facts and circumstances of the case, it would not be appropriate to transfer the aforesaid case from District Jhansi to the court of competent jurisdiction to either District Kanpur, Banda, Fatehpur or Prayagraj.

Accordingly, aforesaid three Transfer Applications are **rejected**.

However, District Magistrate shall monitor the progress of the case and ensure that proper legal assistance is provided to the applicants during trial. District Magistrate/S.S.P. Jhansi are also directed to ensure production of witnesses before the court on the date fixed.

As the case sought to be transferred relates to gang rape, it is expected from District Judge, Jhansi to monitor the progress of trial in monitoring cell meeting ensuing in every month and ensure the early disposal of the case.

Order Date :- 28.4.2022VPS