1997 M L D 1130

[Lahore]

Before Muhammad Asif Jan, J

MUHAMMAD HASHIM RAZA --- Petitioner

versus

THE STATE---Respondent

Criminal Miscellaneous No. 126-T of 1996, heard on 20th October, 1996

(a) Criminal Procedure Code (V of 1898)---

----Ss. 526 & 340(1)---Constitution of Pakistan (1973), Art. 10(1)---Lahore High Court Rules and Orders, Vo1.III, Chap. 24, R. 2---Penal Code (XLV of 1860), S.302---Transfer of case---Principles---Right to be defended by a counsel---Trial Court despite having judicial notice of the fact that the accused was not represented by a counsel did not provide a counsel to him at State expense and commenced the trial and recorded statements of five prosecution witnesses who were not subjected to cross-examination as the accused was not represented by a counsel---Subsequently, however, accused engaged a counsel of his choice who moved an application before Trial Court to re-summon the witnesses already examined by the prosecution and requested for a reasonable time to inspect the record in order to assist the Court properly which was declined leading to the institution of the transfer application---Held, the concept of a fair trial necessarily included the right of an accused person to be defended by a counsel of his choice if he could afford one---Basic principle was that justice should not only be done but manifestly be seen to have been done and where on account of any attending circumstances a suspicion or distrust had occurred resulting in a loss of confidence in the administration of justice which was essential to social order and security, it was better that it should be done by a Court whose impartiality could not be doubted and was above suspicion---Case pending in the Trial Court against the accused was consequently transferred to other Court of competent jurisdiction for de novo trial.

Miranda v. Orizona 384 US 436 (1966); Abdul Aziz and another v. The State 1984 PCr.LJ 530; Niaz Ahmad v. The State 1984 PCr.LJ 1054 and Muhammad Nawaz v. Ghulam Kadir and 3 others PLD 1973 SC 327 ref.

(b) Constitution of Pakistan (1973)---

----Art. 10---Criminal Procedure Code (V of 1898), S.340(1)---High Court Rules and Orders, Vol. III, Chap. 24, R.2---Right of accused to be defended by a counsel---Concept of fair trial includes the right of an accused person to be defended by a counsel of his choice if he can afford one.

Syed Zafar Hussain for Petitioner.

Rizwan Ahmad Wasti for Respondent.

Date of hearing: 20th October, 1996.

JUDGMENT

Muhammad Hashim Raza petitioner has brought this petition under section 526, Cr.P.C. seeking transfer of a case arising out of F.I.R. No.243 dated the 18th of September, 1995, under section 302, P.P.C. registered at Police Station Alpa of District Multan and pending in the Court of Rao Shafay Ali Khan, an Additional Sessions Judge of Multan to any other Court of competent jurisdiction at Multan, on the grounds, inter alia, that serious prejudice has been caused to him on account of which he does not expect a fair trial.

2. The final report commonly known as a challan regarding the case registered vide F.I.R. No. 243 of the 18th of September, 1995, under section 302 P.P.C. pertaining to Police Station Alpa of Multan was submitted in the Court of a local Magistrate who passed an order on the 19th of February, 1996 that the final report (challan) be submitted in the Court of the Sessions Judge of Multan and directed the accused to appear before the said Court on the 4th of March, 1996. On the 4th of March, 1996 the learned Sessions Judge of Multan was pleased to send the case for trial to the Court of Rao Shafay Ali Khan, an Additional Sessions Judge of Multan and the petitioner was directed to appear before the said Court on the 12th of March, 1996.

3. On the 12th of March, 1996, copies of the statements of witnesses of the prosecution which were recorded during the investigation under section 161 Cr.P.C. were handed over to the petitioner who was brought from jail and the case was fixed for framing of the charge on the 20th of March, 1996. The petitioner was not represented by counsel and although this fact was in the judicial notice of the learned trial Court, a counsel was not provided to the petitioner at State expense. The charge was framed against the petitioner on the 20th of March, 1996 and the trial commenced without the petitioner being represented by counsel. On the next date of hearing i.e. on the 8th of May, 1996, the learned trial Court recorded the statement of five prosecution witnesses who were not subjected to cross-examination because the petitioner was not represented by counsel. On the next date of hearing i.e. the 4th of June, 1996 Mr. Arshad Azhar, Advocate was appointed as counsel for the petitioner at State expense. However, on the next date of hearing i.e. the 7th of October, 1996, the petitioner engaged a counsel of his choice who appeared in Court and made an application to re-summon the witnesses already examined by the prosecution and requested for a reasonable time to inspect the record in order to assist the Court properly which request was declined, leading to an application by the petitioner under section 526(8), Cr.P.C. intimating the trial Court that the petitioner is making a transfer application before this Court.

4. The concept of a fair trial necessarily includes the right of an accused person to be defended by a counsel of his choice, if he can afford one.

Section 340 (1), Cr.P.C. provides that:------

> "Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader. "

The High Court Rules and Orders, Volume III, Chapter 24, Rule 2 provides that:--

> "If the accused is unrepresented and cannot afford to engage counsel, the Sessions Judge shall make arrangements to employ counsel at Government expense, and he may also appoint counsel, if he thinks fit, even when the Committing Magistrate has considered that the accused has means enough to engage counsel himself. Counsel in such cases should be appointed in time to enable him to study necessary documents which should be supplied free of cost ...."

5. In Miranda v. Orizona 384 U.S. 436 (1966) the Miranda Rule was formulated as follows:--

(i) If a person is to be subjected to interrogation, the officers must inform him in unequivocal terms that he has a right to remain silent.

(ii) There must be a warning that anything that the suspect says, can and will be used against him in a Court of law.

(iii) The suspect has a right of counsel even during the investigation.

(iv) If a person cannot afford a counsel, he must be provided one even during investigation, by the State.

The above formulation is known as the "Miranda Warning".

Article 10(1) of the Constitution of the Islamic Republic of Pakistan embodies the "Miranda Rule" and lays down that:----

> "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice."

6. In the case of Abdul Aziz and another v. The State reported in 1984 PCr.LJ page 530 (Karachi) a Division Bench was pleased to hold that where a counsel had been appointed to represent two accused persons who pleaded not only different but diametrically opposed defenses, the appointment of two Advocates separately for each accused was necessary and that serious prejudice had been caused to the accused tantamounting to miscarriage of justice and, therefore, their conviction and sentence was set aside and the case was remanded to the trial Court for de novo proceedings.

7. In the case of Niaz Ahmad v. The State reported in 1984 PCr.LJ 1054 (Lahore) it was held that the appointment of a counsel at State expense to defend the accused should be made well within time to enable such counsel to study the necessary documents and that a counsel of whatever high calibre he may cannot be expected to prepare defence in a murder case without sufficient time and the necessary material. It was, therefore, held that the apprehension of the accused that he might not get a fair trial was not altogether unfounded. It was, therefore, ordered that the case be made over to any Additional? Sessions Judge functioning in the District for trial.

8. In the matter of transfer of a criminal case from one Court to another under section 526, Cr.P.C. and the principles governing disposal of transfer applications in the High Court, my lord Mr. Justice Hamoodur Rahman, the then Chief Justice of Pakistan has enunciated the same in the case of Muhammad Nawaz v. Ghulam Kadir and 3 others reported in PLD 1973 Supreme Court page 327 as follows:----

> "The transfer of a criminal case from a Court of competent jurisdiction is justified only if there is a reasonable apprehension in the mind of the party concerned that the Court would not be able to act fairly and impartially in the matter. It is of paramount importance that parties arraigned before Courts should have confidence in their impartiality. It is one of the important duties of a High Court to create and maintain such confidence, and this can be done only by ensuring that, so far as practicable, a party will not be forced to undergo a trial by a Judge or Magistrate whom he reasonably regards as being prejudiced against him. What is a reasonable apprehension must be decided in circumstances; and the Court must endeavour, as far as possible, to place itself in the position of the applicant seeking transfer, and look at the matter from his point of view, having due regard to his state of mind and the degree of intelligence possessed by him. Nevertheless, it is not every incident regarded as unfavourable by the applicant which would justify the transfer of the case. The test of reasonableness of the apprehension must be satisfied, namely, that the apprehension must be such as a reasonable man might justifiably be expected to have."

The basic principle is that justice should not only be done but manifestly be seen to have been done and where on account of any attending circumstances a suspicion or distrust has occurred resulting in a loss of confidence in the administration of justice which is so essential to social order and security, it is better that should be done by a Court whose impartiality cannot be doubted and is above suspicion.

9. Resultantly this petition is accepted. It is ordered that the case entitled The State v. Muhammad Hashim Raza pending in the Court of Rao Shafay Ali Khan, Additional Sessions Judge, Multan be sent back to the Court of the learned Sessions Judge of Multan who may either try the same himself send it to any other Court of competent jurisdiction who shall try the same do novo.

N.H.Q./M-206/L???
Case transferred.

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