**Suresh Kumar Vs. State and ors.**

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**Court** : Delhi

**Decided On :** Nov-05-1980

**Reported in** : 1981CriLJ928; 19(1981)DLT212

**Judge** : M.L. Jain, J.

**Acts** : Code of Criminal Procedure (CrPC) , 1973 - Sections 68

**Appeal No.** : Criminal Miscellaneous (Main) Appeal No. 520 of 1980

**Appellant** : Suresh Kumar

**Respondent** : State and ors.

**Advocate for Pet/Ap.** : F. Anthony,; O.P. Soni,; Kamlesh Kumar,;

**Judgement** :

**M.L. Jain, J.**

(1) This is a petition moved by the complainantSuresh Kumar under sub-section (6) of s. 407 of the Code of Criminal Procedure, 1973, for transfer of the case State v. Om Pal Singhand others, under Ss. 364, 365, 342, 506, T.P.C., from the court ofShri P. K. Bahri, Additional Sessions Judge, Delhi, to some other competentcourt.

(2) Upon an F.I.R. lodged with the A. C. Police (Crime) on 21/08/1978, at 10.45 P.M., a case was instituted against the accusedrespondents on the allegations that on 20/08/1978, at about10.30 P.M. in the night, the complainant Suresh Kumar and one MissSushma Chaudhary were going in a car No. Brp 651 towards JamunaBazar within the jurisdiction of P. S. Kashmere Gate, Delhi. Theywere invested by about ten-eleven persons who emerged out of twotaxis and drove them away to a big building on the roadside. Theywere beaten, detained and forced to write some letters and pose forphotographs. The identity of only three abductors could be established.They were,

(1) Om Pal Singh, Office Secretary of the All India KisanSammelan,

(2) K. C. Tyagi, General Secretary of the Yuva Janata,and

(3) A. P. Singh, a Janata (S) worker. The investigation is alsoalleged to have disclosed that the said building was that of a collegein village Patia near Modi Nagar and that Om Pal Singh had been ateacher in 1968 in the said college and several criminal cases havebeen registered against him at Meerut. The challan was filed on 1/12/1978. Shri Soni was engaged by the complainant on 5/12/1978. Upon investigation report of the police and commitment bythe magistrate, charges under Ss. 341, 342, 364, 365 and 506 read with S. 34, Indian Penal Code ., were framed on 3/08/1979, against Om Pal Singhand K. C. Tyagi. The third accused A. P. Singh was absconding. Thecase was being fixed for evidence from November 1979. The proceedings were, however, stayed by this Court on 25/10/1979, at theinstance of the complainant who had filed a revision petition againstthe order of framing of charges. But that petition was dismissed byme on 18/03/1980. The trial commenced before the said Addl.Sessio s Judge on 21/04/1980. On that date, the learned Judgefixed various dates of evidence for various witnesses. The complainantSuresh Kumar had engaged Shri O. P. Soni, Advocate, to appear onhis behalf in the court. The Additional Public Prosecutor has written tosay that he has been conducting the case personally and had nevergiven any instructions or directions to conduct the case on behalf of theprosecution to Shri O. P. Soni. The complainant Suresh Kumar wascalled on 17/07/1980. A summons was issued on 23/04/1980,and it appears that it was received on his address on

27/06/1980.The signatures on the summons look like that of some 'Gupta'. Theprocess server, however, reported that the service had been effected.

(3) On 17/07/1980, since there was a report that service hadbeen effected, and Suresh Kumar was absent, the learned Judge inquired of Shri Soni whether the complainant could come to the court nextday. The court was informed that the complainant was out of station.The court then directed that bailable warrant in the sum of Rs. 500.00be issued for 22/07/1980. A notice under S. 350, Criminal Procedure Code ., be alsoserved on Suresh Kumar for his absence. These proceedings wereprominently reported in the newspapers; in the Hindustan Times of 18/07/1980, the headline was 'Warrants of Arrest Against Suresh'.The bailable warrant was returned unserved with the report that SureshKumar was not available at the address given. On 23/07/1980, anapplication was moved by Shri O. P. Soni for cancelling the warranton the ground that the complainant had been in Bihar since 20/06/1980, but no order was passed. The complainant also moved anapplication for summoning the third accused A. P. Singh. This prayerwas allowed, so that the trial of all the three accused could proceedjointly. A. P. Singh was summoned. He appeared on 26/07/1980,and after the requisite formalities charges were framed against him aswell. On 7/08/1980, the case was adjourned for evidence of theprosecution witnesses to 28/08/1980. and 29, 1980. The Courtrecorded that Shri O. P. Soni stated that the complainant Suresh Kumarwould appear on Aug 28/08/1980. It is now alleged in the presentpetition that this statement was made subject to the availability of the petitioner and issuance of summons to him but the court issued nosummons. In an affidavit filed on 30/09/1980, the versiongiven is that the counsel had said 'why not'. No undertaking wasgiven by the counsel and in fact no counsel could give an undertakingthat his client would appear. It is also complained that the prosecution did at no time apply for issue of summons to the complainant andyet the court resorted to coercive process.

(4) On 28/08/1980, statements of four witnesses were recorded.Suresh Kumar did not appear and the court recorded that, 'On the lasthearing, Shri O. P. Soni Advocate for the complainant had stated thatthe complainant would appear today but complainant has not turnedup. Shri O. P. Soni says that complainant has not

contacted him. Onone of the hearings complainant was stated to have been served butan application was given on behalf of the complainant that in fact hehad not signed the summons. The application hence given by thecomplainant should show that complainant is aware of the proceedingsbeing done in this court and the date fixed in this court. Let bailablewarrants of Rs. 500 of the complainant and summons of Sushma beissued for their appearance for 5-9-1980. Baldev Raj Inspector isdirected to take the processes and get them. served positively for thatdate. Meanwhile, other witnesses shall continue to be recorded andthe proceedings shall continue day to day. The I.Os. shall ensurepresence of all the witnesses.'

(5) It is complained that the Press gave this order She widest publicity in a manner that gave the impression as if the complainant wasthe accused in the case. The reputation of the petiotioner was thusdamaged. It is further complained that the petitioner has reason tobelieve that on both the occasions warrants were issued against the petitioner by the learned trial court out of anger. This belief, it is urged.was fortified by the remarks of the court that the warrant against the petitioner be served for 5/09/1980, no niat'.cr even if the petitioner were to be served in Bihar and the investigating officer were totravel by air and the court would sanction the expenses. The court isfurther alleged to have said that next time non-bailable warrant wouldbe issued. All this was said in great anger. The learned trial court evenremarked further that the court did not possess the power to put thecomplainant's counsel behind the bar for not keeping the word givenby him on the last hearing that the petitioner would come. The useof such words caused great insult and hurt to his counsel but thecounsel kept his calm. This display of anger has reasonably causedapprehension in the mind of the petitioner that in the prevailing mood,it is difficult for the learned trial court to dispense justice. The petitoner's counsel has begun to feel that it is not safe for him to act forthe petitioner in the case in the present situation . The counsel has afeeling that he is treated as a party to the case and not as a counsel.It is for the prosecution to decide in which order the witnesses are tobe produced. The court's duty is to issue process requiring their attendance if an application is made by the prosecution in this behalf. IT is no function of the court to run after the witnesses. The utmost thecourt may do is to draw whatever inference it thinks fit to draw ifimportant

witnesses are produced at the end and not in the beginningof the trial. But, there is hardly any justification to get angry if thewitnesses do nut turn up in the order to the liking of the court. the petitioner was lying ill at Sasaram in Bihar and was under medicaladvice to have complete rest. He had been urgently summoned from there by his counsel who informed him that his coming to Delhi wasvery urgent in view of the conditions created by the learned trial court.The petitioner had reached Delhi on 1/09/1980, againstmedical advice and risk to his life. The order of 28/08/1980,was passed by the trial court without there being any basis for thesame and particularly when the petitioner's earlier application for cancelling the warrant was still pending. The petitioner has no intentionto evade the process of law and he himself is keen to prosecute the accused. His absence from the court was not intentional.

(6) On 29/08/1980, some witnesses were examined but thecross-examination of the taxi driver Kundan Singh (PW 10) wasdeferred on the request of the defense that main witnesses should be inattendance before it disclosed the defense in cross-examination of themain witnesses. Th; Inspector Baldev Raj was directed to effectservice on all she remaining witnesses. Counsel for the complainantwas advised to inform his client to appear in the court on the datealready fixed for his statement.

(7) On 1/09/1980, the court recorded that it had earlierdire led the recording of evidence day to day but on account of grossnegligence on the part of the police officer, the case is not beingdealt with day to day. He gave the prosecution final opportunity foreffecting service on all the remaining witnesses. The case was directed to come up on 5/09/1980.

(8) On 1/09/1980, the advocate of the complainant ShriO. P. Soni did not appear before the learned trial Judge and movedthis application with an affidavit of Suresh Kumar respecting which Ishall have something to comment a little later,

(9) On 5/09/1980, this court directed : (1) comments ofthe trial Judge be called; '(2) the complainant need not appear in thetrial court; and (3) other witnesses may be examined.

(10) On 5/09/1980, the bailable warrant of Suresh Kumarreturned unexecuted with the report that his address of Bihar wasnot known and efforts to find out the address of Suresh Kumar from the Secretary of his father Shri Jagjivan Ram had proved futile. Thecase was then adjourned to 8/09/1980.

(11) On 6/09/1980, an application was moved by thecounsel of the accused, Shri M. L. Srivastava, that having come toknow of the petition mov.cd in the. High Court by the complainant,they consider it their duty to apprise this Court of the mischief andtricks to secure conviction of the accused by unfair and foul methodsand by influencing the authorities to achieve that end. The complainant was represented by a counsel who watched his interest, and appeared on all the dates of hearing but was unable to have any information about his client. The complainant is not interested toappear along with his friend Sushma. A serious conspiracy appearsto have been hatched to prevent a fair trial. But, they failed tosucceed in their plan before the honest and uncommitted Judge, indelaying the proceedings. Hence, this transfer application on false,frivolous and ill-cooked grounds has been moved in this Court. It wasprayed that the transfer petition be dismissed so that the complainantand his girl friend Sushma are prevented from abusing the processof the court by making allegations offending judicial decorum. Thisapplication was accompanied by an affidavit of one Ram Chander,who is a clerk in the office of the counsel of the accused. It appearsthat the contents of this application too were published in the newspapers

(12) up to September 23, 198, about 27 witnesses had been examined.

(13) On 30/09/1980, an affidavit was filed by SureshKumar complaining that the said application was filed by the learnedcounsel without an affidavit of the accused but with an affidavit ofhis own clerk with the object no other than of earning publicity as aprofessional man and of creating an atmosphere prejudicial to thecomplainant. He charged that copies of the petition were circulatedto the Press by the counsel in advance long before it came for hearingon 23/09/1980. It received extensive coverage in the leadingnewspapers appearing on that date. The petition was filed mala fidein view of the fact that an application of the complainant for cancellation of the warrant was pending in the trial court. The

learnedcounsel has tried to mobilise public opinion against the complainant.The publicity given to the petition tends to poison the public mindgenerally; it has a tendency to create bias in ..he mind of the trialcourt and it will become impossible for the court to decide any application in a free atmosphere and without prejudice. The complainantwas in Sasaram, Bihar, from 20/06/1980, and was not in Delhion 27/06/1980. He was unaware if any summons was brought tohis residence at 6, Krishna Menon Marg, New Delhi. It was in theknowledge of the learned counsel of the accused that the complainantdid not receive any such summons, nor did he sign it. The learnedcounsel by filing a photostat copy of the summons tried to create animpression on the public mind that the complainant was duly servednd that his application for cancellation of the warrant was false. Healso alleged that his counsel Shri O. P. Soni had informed him that hegave no undertaking to the trial court for securing his attendance.It had been told by his counsel when the court asked him whetherthe complainant would be avaisserver ever served him and obtained his signature on any processissued by the trial court. According to the High Court Rules andOrders, Vol. Vi, Part A-l No. 11, it is obligatory that the return ofsummons be accompanied by an affidavit of the process server in theprescribed form. In this case, there was no affidavit of the processserver, and yet a warrant was. issued against him. He alleged that hehad strong grounds to believe that the trial court is annoyed with him.On 8/09/1980, after the transfer application was filed, ShriGopal Krishna Gupta (PW 21) appeared as a witness in the case.His evidence was to be confined to the fact that the car in which thecomplainant was traveling with his friend Miss Sushma on the nightof the occurrence belonged to Shri Gupta and that he had given it tohim for his temporary use. But a lengthy cross-examination of thewitness was allowed. Irrelevant and scandalous questions concerningthe members of the family of the complainant and in no way concerning the case were permitted to be put. Most of these questions relatedto the acquisition of the said car. The witness has informed him thatat one stage the learned trial court inquired of the defense counselas to why such questions were being asked and the defense counselreplied, 'he was trying to dig out a big scandal'. It was not fair andproper for the trial court to allow the defense counsel to do furtherexercise in this direction but the court allowed the cross-examinationto go on. The whole cross-examination was irrelevant. The

witnesshad further told him that on the resumed date of cross-examination,he was harassed and bro-beaten and that he felt i!l during the recording of his statement and had to be hospitalised. At the time ofcross-examination on 17/09/1980. the court irself had recorded that, 'witness was feeling uneasy. He states that he is apatient of heart disease and is not in a position to continue the statement. I also notice that the witness is looking somewhat pale, so isallowed to go with the direction that he should appear on 23/09/1980, for further cross-examination'. By then, the cross-examination had already run into 12 pages (typed), although the examination-in-chief was of 32 lines only. He further complained that thebailable warrant directed to be issued on 28/08/1980, was The result of anger. He had no knowledge that he was required to giveevidence in the case on 28/08/1980. His previous applicationfor cancellation of earlier warrant had yet to be disposed of. It wasunjust for the trial court to jump to the conclusion that since he hadmade an application for cancellation of warrant, he must be knowingthe next date of hearing. The court has acted illegally in permittingirrelevant and scandalous cross-examination of Gopal Krishna Guptaand that has confirmed the apprehension that he would not get a fairtrial in the court. The learned counsel for defense and his clerkhave prayed up the matter of warrants knowingly and mtentionally.The counsel and his clerk have thereby co:n.mi:tcd gross contempt ofthe court of Shri P. K. Bahri, Additional Sessions Judge. They haveinterfered with the due course of proceedings. In a separate para/isreply, while denying the allegations in the petition of the accused, itwas prayed that contempt proceedings be initiated ngainsi Shri M. ISrivastava, Advocate, and his clerk Shri Ram Chander.

(14) The learned Additional Sessions Judge sen! his fomments with hisletter of 6/09/1980. He states that he had a' and petitioner the absenceof in completed be not could statement his underexamination was 10 Witness Public because of absence account majournedon again is case that so may he wherever complainant serve to try should directed officer heinvestigating I anger. out made were orders denied learnedJudge The stopped. trial progress see courtwas anxiety only person. accused an as treatingthe question no There same. offence any take didnot for counsel sure way acasual but anger remark this omissionbut bar behind put counselfor words used had He date. last on him by counseltaken totaken taken petitoner remarked veinhe lighter a time at date next appealed the

petitioner ensure directions prosecutionwanted remembered, far dictated, being thisorder When 1980. 09 1 served bailablewarrant get present who Raj Baldev appear.Inspector did counsel, given been undertakinghaving spite against 500.00 ofRs. warrant bailable issue passed thesecircumstances, In continuously. cross-examined effectively they attendanceso witnesses main until cross-examine want concluded theexamination examined four 1980, 08 28 On complaiant. summons office petitioner, learned undertaking view parties. anyof 07 23 moved application reference No en appear would Kumar Suresh Soni Shri 7 adjourned witnesses, those issued directedto warrants Bailable service. up turn some date, said 4 wasadjourned witness one 29 werefixed. recording dates when summoned accused, thethird framed charge After Prosecutor Additional notice Eventhen deferred. evidence matter beenissued, third time, anyorder pass occasion there As cancelled. againstSuresh behalf wasmade discharged. Thewitnesses accused. appearance 26 heard Singh P. A. summon-ing evidence, fixed 1980,the 22 issued. onwhich day 17 forcancellation . Code Procedure Criminal 350, S. under except which otherorder effected service serverthat process report presence point assertionon categorical But served. petitionerhad perhaps ashe statement, vague Only petitioner. summonswere appearing signatures categorial day. following thepresence procu?-c inability expressed advocate thefollowing cou?d whether PSoni O.

(15) Before I deal with the petition for transfer, I would tike todeal with the request of the petitioner for initiating contempt of courtproceedings against Shri M. L. Srivastava. the learned counsel for therespondents, and his clerk. Though the report that has appeared inthe papers of his application, has not been placed on record but itwas shown to me and there is no doubt that the papers did report I hesubstance of the application of Shri Srivastava dated 2/09/1980. May be. that the contents of this report may create some sortof an impression with respect to the petitioner's conduct with regardto the process by which he was being compelled to appear in thecourt but it does not mean that the re-production of the contents ofthe application can amount to contempt of court so as to prejudicethe transfer application or the application for cancellation of warrant which is alleged to be pending before the learned Additional Sessions Judge. In our country, the Press enjoys a great amount oF freedom.It is everywhere, and always there where

it smells any sensation inwhich a large number of their consumers they think are likely to getamused or interested. This is a case which from its very nature hasa potential for sensation especially because the petitioner is the sonof a known politician and the accused are alleged to be connectedwith the group of politicians which are not of the same hue. One,therefore, need not be extra sensitive in the report that appeared inthe Press and I do not think that there has been any scurrilous desireor attempt on the part of Shri Srivastava in making available the contents of his application to the Press, if he ever did so. This is notgoing to affect the course of the trial or the rate of the pending application for cancellation of the warrant which had long ago becomeinfructuous when the calling of the witnesses had been interrupted bythe emergence of the abconding co-accused. I, thereforee, see noreason to institute any proceedings for contempt of the court againstShri Srivastava or his clerk.

(16) Now, the transfer application. Shri Srivastava has raisedtwo preliminary objections. The first one is that under the provisoto sub-section (2) of S. 407 of the Code of Criminal Procedure, noapplication lies to the High Court for transfer of a case from one crimmal court to another court in the same sessions division unlessan application for such transfer has been made to the Sessions Judgeand rejected by him. Since the petitioner has not approached theSessions Judge in the first instance, this application is not maintainable. Shri Frank Anthony, the learned counsel for the petitioner, replies that the 'criminal court' in the proviso to subsection (2) of S. 407, does not include the court of an Additional Sessions Judge which has the same powers as that of the Sessions Judgeand is a court of co-ordinate jurisdiction. The Sessions Judge cannot transfer a case from a court of co-ordinate jurisdiction under. 408, Criminal Procedure Code . Moreover, according to Ss. 6 and 9 of the Code, theCourt of session is a criminal court and there can be only one suchcourt in a sessions division. And the High Court appoints Addl. Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in acourt of session. Thus, the court of the Additional Sessions Judge is nota separate court but a part of the court of session or the court ofsession itself. The Sessions Judge, thereforee, cannot transfer a casefrom his own court. Transfer can be directed from a lower court only.Support is sought from sub-section (2) of S. 408, Criminal Procedure Code . which provides that the Sessions

Judge may act either on the report of the lowercourt, or on the application of a party interested, or on his own initiative. That indicates that the Sessions Judge cannot transfer a casefrom the court of the Additional Sessions Judge which is not'a lower court. And it cannot either withdraw a case from such courtunder S. 409, Criminal Procedure Code ., after the trial, as in this case, has begun.It was, thereforee, contended that the proviso to S. 407, Criminal Procedure Code ..does not apply in this case.

(17) No authorities were cited at the bar in support of the rivalcontentions. But, I have been able to find two, which appear to bethe nearest relevant. In Rag. v. Gulabdas Kuberdas (1874) (11)B.H.C.R. 98, West, J., did observe that in one sense, no doubt,the- Sessions Judge, the Joins Judge and the Assistant Judge may heregarded as one court of session but for purposes of S. 473 of the;1861 Code (S. 345 New), it is a separate court. Now, four aspectsdeserve to be noticed. One is that, an Add). Sessions Judge may betreated as a separate court for some purposes, vide Reg. v. GulabdasKuberdas (sup'a). The second is, that the power to transfer a casehas not been given to the court of session but to the Session, Judgewho prevides over the entire court of session manned by Assistant and/orAddl. Sessions Judges. The third is, that S. 407(1)(ii) while dealingwiih the powers o.f the High Court to transfer a case speaks of transferfrom a criminal court subordinate to if. But, S. 408 in case of a Sessions Judge does not use these words. The fourth is, that Ss. 408 and 409, Criminal Procedure Code ., deal with two separate types of powers of theSessions Judge to transfer, and to withdraw or recall cases respectively.The former is to be exercised in the interests of justice and the lattermay inter alias cover a simple administration of business. Distinctionbetween these two powers has to be spelt out. In Bhabutmal v. theState. 1970 Rlw 242, Ber. J., clater on Chief Justice. while discussing the corresponding provisions in the old Code pointed out thatthe intention of the legislature seems to be as gathered from the plainlanguage of S. 528(1-0 (old Code), [S. 408(1) (new Code)], thatwithin a sessions division for the ends of justice, the Sessions Judgehas the power to transfer a case from one criminal court to anotherregardless of the fact whether the court from which the case is soughtto he transferred is subordinate to the Sessions Judge or not. Subsections (1-A) and (1-B) of S. 528 (old Cede), [S. 409(1) and (2)(new Code)], advisedly

employ the word' 'recall' as distinguished from the word 'transfer'. He held that a case can be recalled but thatmust be a case which has been made over by the Sessions Judge tothe Additional Sessions Judge and the trial must not have commenced therein. He further hold that a Sessions Judge can transfer a case fromone criminal court to another criminal court in the same sessions division and that the court of .sn Additional Sessions Judge is a criminal courtand further that a Session Judge must be moved in the first instanceif the case is sought to be transferred from one criminal court to another criminal court ^n the same sessions division. I am in respectfulagreement with these views and I do not think that the addition ofsub-section (2) to S. 403 on the lines of S, 407(2) Criminal Procedure Code . makesany change in this position. The objection of Shri Srivastava is, thereforee, upheld.

(18) The second preliminary objection is with regard to the affidavit filed under sub-section (3) of S. 407, Criminal Procedure Code in support ofthe transfer application. Section 297, Criminal Procedure Code lays down that affidavitstobe used before any cour under this Code may be swornor affirmed before any Judge, Magistraterate, Oath Commissioner cr NotaryPublic, and shall be confined to and shall state separately suchfacts as the deponent =s able to prove from his own knowledge andsuch facts as he has reasonable ground to believe to be true and inthe latter case the deponent shall clearly state the grounds of suchbelief. The contention is that ihe application for transfer was made.by the counsel but the affidavit is that of the cllent Suresh Kumar.Suresh Kumar solemnly affirm^ and decllared '.at he had read andunderstood the contents of the petition and whatever was containedthercin was true to his knowledge and the legal picas contained thereinwere believed by him to be tf? on information received. He furtherverified the affidavit that it i', tn'e to his knowledge, it conceals nothingand that no part of it is false. The transfer application is solelybased upon the knowledge of the counsel and thereforee, the deponentSuresh Kumar could not claim that the contents, judge's anger inparticular, are true to hi:; knowledge for the simple reason that byhis very absence, he could not have known what transpired in tliecourt room. thereforee, it was incumbent upon him to state that hebad reasonable ground to believe the contents to be true and also tostate the grounds of such belief. The learaned counsel for the petitioner draw my attention to certain affidavits which are

filed in theSpecial Leave Petitions in the Supreme Court. I do not think thatthe provisions of S. 297 are applicable to the procedure for SpecialLeave Petitions before the Supreme Court. The affidavits that are requiredto be filed in the court under the Code of Criminal Procedurehave to be governed by the provisions of S. 297 thereof. Since noevidence is recorded in case of transfer applications, the importanceof an affidavit conforming to title provisions of S. 297, is not capableof over-exaggeration. thereforee, an application for transfer cannotbe entertained if it is not accompanied by an affidavit and an affidavitif not covered by S. 297 is not legal evidence, vide Sant Ram andothers v. State 1952 Cri. L.J. 1223(3), Ujagar Singh v. State 37(1936) Cri. L. J. 510(4); and Nem Chand v. the State, : AIR1953 All99 . The object of an affidavit in support of an applicationfor transfer is that there is a prims facie evidence hi supportof the allegations contained in the application and th.it these allegationsare not made recklessly. I am unable to subscribe to the remarksmade in Bishan Lal Verma v. State and another A.T.R. 1954H. P. 57, that where a material allegations for transfer containedin the application has been admitted by the court concerned in its Explanationnand not controverter by any of the respondents, the absenceof an affidavit, to say nothing of the affidavit being defective, wouldbe immaterial. These observations are against the mandatory provisions of S. 407(3) which bar at the very threshold an applicationfor transfer. It admits of only one exception and that is an application made by the Advocate General. The second objection alsosucceeds.

(19) The transfer of the case is sought on the ground that the petitioner has a reasonable apprehension that a fair and impartial inquiry cannot be had before the learned Additional Sessions Judge. Hisreasons are :

(1)That the Court could not issue process against SureshKumar unless the prosecution applied for it and it didnot and yet the court resorted to coercive process, ShriAnthony contended that it is the look out of the prosecution to produce or not to produce witnesses or to determine their precedence and number and the court couldnot take upon itself this job of the prosecution. He basedhis submissions on S. 230, Criminal Procedure Code ., which provides that If the accused refuses to plead or does not plead or claimsto be tried or is not convicted under S. 229, the Judgeshall fix a date for the examination of witnesses, and

may,on the application of the prosecution, issue any processfor compelling the attendance of any witness or the production of any document or other thing. He further rereferred to S. 231 which lays down' that on the date sofixed, the Judge shall proceed to take all such evidenceas may be produced in support of the prosecution. Hesays, no application for issue of process was made by theprosecution.(2) According to S. 87 of the Code of Criminal Procedure,a warrant can be issued only when the person on whomsummons is proved to have been duly served in time toadmit of his appearing in accordance therewith and - noreasonable excuse is offered for such failure, but in thiscase the summons was not 'duly served' on the petitioner and it was brought to the notice of the learnedJudge that it did not appear to have been served on the petitioner. It was not accompanied by an affidavit of theprocess server in the prescribed form and in accordancewith the High Court Rules and Orders, Vol. Vi, Part A-1,No. 11, yet the learned Judge issued a warrant and further when an application for cancellation of the warrantwas made, the learned Judge simply allowed the application to pend without any disposal thereof.(3) The second time also the learned Judge had no justification for issuing the bailable warrant without first havingissued a summons.(4) It was no duty of the counsel nor can a counsel bs compelled, to produce his client in the court and the learnedJudge wrongly recorded that Shri O. P. Soni had given anassurance that the petitioner would appear on the datefixed for evidence. No counsel does or can ever give suchassurance.(5) Next, it was urged that the court had no business to iuakean offensive observation that it could not issue warrantagainst the counsel for the petitioner.(6) The subsequent conduct exhibited by allowing lengthy andunjustified cross-examination of the prosecution witnessone Shri Gupta further displayed the inclination of thelearned Judge.

(20) It is upon these grounds it is said that the petitioner entertains a reasonable apprehension that he will not be able to get justiceat the hands of the learned Judge who has as the circumstances detailed above show, acted in anger, rather great anger.

(21) According to clause (a) of sub-section (1) of S. 407, a case maybe transferred from a criminal court subordinate to its authority to anyother such criminal court of equal or superior jurisdiction whenever it* is made to appear to the High Court that

a fair and impartial inquiryor trial cannot be had in any criminal court subordinate thereto. Thequestion that falls for determination is whether a situation has arisenwhere on account of an alleged attitude of the court, there is a reasonable apprehension that the applicant will not have a fair and impartial inquiry or trial. The two inseparable principles of justice are (1) justice should in fact be done; and (2) justice should be seento be done. Either of the two is not in itself sufficient to create theconfidence needed for the courts in the performance of their job. Forthe transfer of a case a mere allegation that there is apprehension thatjustice will not be done, does not suffice. Though the party is not required to demonstrate that justice will inevitably fail but it has to showthat its apprehension is reasonable. To judge the reasonableness ofthe apprehension the state of mind of the person who entertains theapprehension is no doubt-relevant but that is not all. The apprehension must not only be entertained but must appear to the court to bea reasonable apprehension; see Gurcharan Dass Chadha v. State ofRajasthan, : 1966 CriLJ1071 . In Mrs. Maneka SanjayGandhi and another v. Miss Rani Jethmalani, : 1979 CriLJ458 , the Supreme Court observed ttini the criterion is not the hypersensitivity of a party. Something more substantial from the point of view of public justice and its attendant environment is necessitous if the court is to exercise its power of transfer.

(22) The first four grounds urged by Shri Anthony are without anymerit. Section 170(2) and Form No. 29 in the Second Schedule tothe Criminal Procedure Code . require that while forwarding the accused the S.H.O. shahrequire the complainant and other witnesses to execute a bond toappear and prosecute or give evidence as the case may be. 'This wasnot done but from a perusal of the report made under S. 173 Cr.P. C., it is evident that the prosecution requested the learned Judgeto summon the witnesses. That apart, even where the prosecutionmakes no such application, it is the duty of the court to see that allwitnesses of the prosecution which the prosecution wants to produceand which the court wants to be examined should be made to appear.The jurisdiction of the magistrate to compel the attendance of thewitnesses is not dependent upon a request made by the prosecution inthat behalf. Where the prosecution fails to produce any witness orfails to ask for process, and the court is of the opinion that such witness should be examined, I would rather consider it a duty cast uponthe court to direct coercive

process to compel the attendance of thewitnesses. Merely because the prosecution is lethargic and neglectful,it does not follow that the courts sit back in despair and not compelthe attendance of the witnesses. This is such a simple proposition forwhich no one need search any precedent but if one is not satisfiedwithout it, then, the Public Prosecutor v. Gundu Rao, 1976 Cri. LJ.1835(9), may profitably be referred to. thereforee, it was not necessary for the prosecution to make further application for compelling theattendance of the witnesses at the time the Judge had fixed a datefor examination thereof. The court was legally and factually justifiedin issuing the summons to the witness. It is true that the summonsthat was issued was not personally served upon the complainant andthe court was also informed that the complainant was out of stationand was perhaps lying ill in Bihar, but the learned Judge thoughtthat service had been effected. It was not necessary that the summonsshould have carried an affidavit prescribed per Form Ii, Vol. Vii, A-1, of the High Court Rules and Orders, because that form ismeant for civil cases only. However, an affidavit as required by S. 68 was not there and only a report of service was there. Such affidav IT is a proof of service but it does not mean that if there is no affidavitthere has been no service. The learned Judge no doubt could haverepeated the summons and should have ordinarily issued the warrantonly if it was proved that the summons was duly served but it wasdisobeyed without any reasonable excuse. But it should be notedthat S. 87 and Fora 9 do empower the court to issue a warrant evenin the first instance. The circumstances of this case were peculiar.The witness that was being summoned was not other than the complamant himself who was keen to prosecute and engaged a lawyer toact and watch for him. thereforee, it was the duty of either of themto keep in touch with each other and that should have been so. Itshould be taken for granted that whether any process was issued ornot, the petitioner complainant knew that he was to appear for evidence on a particular date. It is difficult for me to believe that whatwas transpiring in the court, the learned counsel did not convey to hisclient. thereforee, even if one were to say that there was no justification for issuing even a bailable warrant-' for compelling the attendance of the witness and the learned Judge in his desire to expeditethe trial wanted the main witness to appear first as early as possible, issued such a warrant (and directed a notice under S. 350 Cr.P. C. which too does not appear to

have been served), it cannot reasonably create any apprehension that the trial will not be fair and impartial. Since the warrant had returned unserved, there- was no casefor making an application for cancellation of the warrant unless a freshwarrant was being issued. The application for cancellation or thewarrant was thereforee, unnecessary 'and did not call for any formaldisposal.

(23) Second time when the case was fixed for evidence on 28/08/1980, the learned Judge took the precaution of asking the counselwhether it was possible for his client to appear on the next date, butthe learned counsel appears to have said that he would do so. Now,the stand taken is that he did not commit and only said, 'Why not'.All the same, it only means that it was not possible for the counsel toconvey or advise his client that he should appear on the date fixednor was he sure that his client would so appear. In these circumstances, if the learned Judge issued a bailable warrant instead of a summons. I do not think he has adopted any procedure which shouldcreate an impression that the complainant would not be examined IN a proper manner. I am not at all impressed by the suggestion thatall this was done out of any anger. At best, it can be said to be anextra precaution to see that the witness appears and the trial whichhad admittedly generated wide publicity could come to an expeditioustermination.

(24) As regards the contention that a leflgthy cross-examination wasallowed of Shri Gupta, Shri Anthony did not lay much stress on it andwas even good 'enough to concede that it was the court's discretion topermit any relevant cross-examination and it was for the witness toseek protection if he felt he was being harassed by the counsel for thedefense.

(25) Now remains the question with regard to the observation ofthe learned Judge that he made certain disparaging remarks respectingthe- dignity of the counsel for the complainant. The learned Judgehas admitted that he did ass the remarks that the counsel could notbe taken to task for his 'inability to make the petitioner appear incourt as undertaken by him on the last date and the counsel could notbe put behind the bar for that omission. These observations are saidto have been made casually and in a lighter vein, and at that time nooffence was taken by the learned counsel to these remarks but nowhe complains that these remarks have created

an apprehension that fair and impartial trial was no more possible in that court. Reliance isplaced upon Pran Nath v. the State (1968) 70 P.L.R.D. 237(10),wherein it was observed that expression of opinion by the court thatthe accused was delaying the trial may justifiably raise an apprehensionin the mind of the accused that his case may not be dealt with by thetrial court with the requisite Judicious detachment, objectivity andimpartiality. It is of paramount importance that the parties arraignedbefore the courts and particularly criminal courts should have implicitconfidence and faith that courts deal with the evidence and come tojust and correct decisions. The courts should not do anything whichmay be suggestive of bias in their mind against any party which isnot judicially , from the material on the record. But oneis not unaware that remarks in lighter vein are sometimes made bothby the bar and the bench without meaning any aspersion to anyone.Moreover, what the court said was only a fact that a warrant cannot be served upon the counsel and no offence could be taken to thisstatement, and indeed none was taken there and then, yet the PresidingOfficer should have been on his guard in a case which for various reasons is peculiar in nature, to have refrained from making any remarkswhich were not strictly called for in the performance of his duties.'But from these remarks it does not seem reasonable to conclude that they could create a reasonable apprehension in the mind of a seasonable and seasoned advocate like Shri Soni, so that he had to send anS.O.S. to his client who on hearing from him all about the matterasked the counsel to move this application. From what I bear of theconduct of the learned trial Judge towards the Bar and from whateverlittle I know of the polite manners of Shri Soni, I am sure that courtesyand confidence due to each other shall be in display in great measureand the trial shall proceed in proper decorum.

(26) Having considered all the aspects of the case, I am not inclined to hold that a case of reasonable apprehension of not having afair and impartial trial is made out. Consequently, I reject this application. No costs.