

Nirma and ors. Vs. the State

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Court : Himachal Pradesh

Decided On : Jul-01-1953

Reported in : AIR1953HP126

Judge : Chowdhry, J.C.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Section 526 and 526(1)

Appeal No. : Criminal Misc. Petn. No. 4 of 1953

Appellant : Nirma and ors.

Respondent : The State

Advocate for Def. : L.N. Sethi, Govt. Adv.

Advocate for Pet/Ap. : K.C. Pandit, Adv.

Disposition : Application allowed

Judgement :

ORDER

Chowdhry, J.C.

1. This is an application by three men, Nirma, Jango and Phurkhu, under Section 526, Cr. P. Code, for the transfer of a case pending against them for an offence under Section 435, I. P. C., in the Court of the Magistrate, 1st Class at Theog on

the ground that they do not expect a fair and impartial trial at the hands of the said Magistrate.

2. The allegations of the petitioners are that the Challan was submitted before the Court at about 6.15 p. m. on 11-5-1953, that the Magistrate took up the case immediately at that late hour despite the request of the petitioners to adjourn the case so as to have the opportunity of calling from Simla Sri K. C. Pandit Advocate to defend them; that a local pleader Sri B. D. Suri, whom the petitioners had to engage at the spur of the moment, did not have the requisite opportunity of preparing himself before the production of the prosecution evidence on that evening, and his oral request for a copy of the first information report, which he had had no opportunity of looking into, was rejected; that the case was adjourned late that evening to the following day in spite of protests of the petitioners that the aforesaid Advocate would not be able to attend owing to being engaged in a case in this Court; and that on 12-5-1953 again the Magistrate framed a charge against them after turning down their request for the postponement of the case in order that they may have the opportunity of the aforesaid advocate addressing the Court before the framing of the charge.

3. The learned Magistrate has in his explanation denied that a prayer for adjournment at any stage was made by or on behalf of the petitioners, although he admits that he was apprised by Sri B. D. Suri on the evening of 11-5-1953 that Sri K. C. Pandit, the counsel engaged by the accused, could not be present in person for certain reasons. It is admitted by the learned Magistrate that the case was taken up at 5.30 p. m. on 11-5-1952 and continued till 7.35 p. m. In reply to the specific allegation that the Magistrate took up the case immediately after receiving the challan, the learned Magistrate replies that the challan had been presented 'sometime previously on that day'. He makes no reply to the allegation that the oral request of Sri B. D. Suri pleader for a copy of the first information report was not accepted by him.

While denying the allegation that the petitioners requested him to give them an opportunity for the said Advocate appearing on their behalf to address him before framing the charge, the learned Magistrate remarks that he had already informed

the accused at the close of the case on 11-5-1953 that on the following day the statement of the accused will be recorded and charges framed against them. While submitting his explanation, the learned Magistrate has also sent a statement on oath of Sri B. D. Suri pleader Theog wherein the lawyer has denied the petitioners' allegation regarding prayer for adjournment.

There are two observations which I would like to make before dealing with the present application on merits. Firstly, the learned Magistrate was asked to submit his explanation with regard to the allegations contained in the petitioners' application for transfer. In reply he professes to make comments on that application. He must however remember that a comment is not the same thing as an explanation. Comment connotes criticism while explanation means giving account of one's conduct. Regard being had to the fact that in making an application for transfer of a case from the Court of a Magistrate the accused make, as they have done in the present case, allegations regarding the conduct of the Magistrate, it is an explanation, and not a comment, that is demanded from a Magistrate and that a Magistrate is expected to offer. The attention of the learned Magistrate is invited in this connection to Rule 9 in Chapter 1-A (b) of Vol. V of the Punjab High Court Rules and Orders, which have been made applicable in this State also, where there is reference to

'explanations called for by the High Court from himself (meaning District Magistrate) or the Magistrate concerned with regard to the allegations contained in the petitions for transfer'.

It is hoped that in future in similar circumstances the learned Magistrate will offer explanation and not comment on an application for transfer.

4. Secondly, all that the learned Magistrate was required to do was to offer an explanation and not to produce evidence in support of the same. He was therefore not justified in sending along with his explanation a statement on oath of Sri B. D. Suri pleader Theog. It is not possible moreover to attach any value to the said statement of Sri B. D. Suri since it was recorded by the learned Magistrate in absence of the present petitioners. In future, the learned Magistrate should only submit his explanation and not oral evidence in support of his explanation unless

specifically called for.

5. Coming to the merits of the application, this much is in any case admitted by the learned Magistrate that he took up the case against the petitioners late in the evening of 11-5-1953 at least an hour after the close of Court hours, and that it continued till 7.35 p. m. In doing so he clearly transgressed Rule 8 of Chapter 1-A of Vol. III of the aforesaid Rules and Orders, which lays down that the hearing of a case taken up before 4 p. m. or whatever may be the closing hours of the Court may, if necessary, be continued for a short time after that hour: but no new case should be taken up after the hour when the Court is timed to rise. The learned Magistrate did not therefore act properly in taking up the case at 5.30 p. m. and continuing it till 7.35 p. m. The learned Government Advocate was not prepared to say that such is the usual practice of this learned Magistrate. If so, the course adopted by the learned Magistrate in the present case was by itself sufficient to raise an apprehension in the minds of the petitioners; for they would naturally have been unable to find any reason for the Magistrate making an exception in their case and taking up the case in such hot haste at such a late hour of the day.

6. Again, as adverted to above, the learned Magistrate has replied only indefinitely to the allegation of the petitioners that the case was taken up at a late hour on the evening of 11-5-1953 immediately after the presentation of the challan. That being so, the petitioners' allegation must be accepted as correct, and it follows therefore that neither the petitioners nor their counsel knew what the accusation against the petitioners was before their counsel was suddenly required to cross-examine the prosecution witnesses. There is, of course, nothing in the Criminal Procedure Code against the procedure adopted in this case by the learned Magistrate, but a trial in which such a procedure is adopted cannot on the face of it be said to be a fair trial since it does not afford the accused necessary opportunity to defend themselves properly.

It is for this reason that Rules 5 and 6 of Chapter 1-A of Vol. III of the said Rules & Orders stand in effect superseded by the instructions contained in Notification No. III-G/XII-Z. 10, dated 5-1-1948, issued by the Punjab High Court and published in East Punjab Gazette Part III, dated 9-1-1948, which lays down, 'inter alia', that

witnesses should not be produced on the date of presentation of the chalan but should be bound over by the police under Section 170, Criminal P. C. to appear three or four days later, an exception being made in cases the trial of which should be completed forthwith and should not be delayed even for three or four days, as for instance, the case of a pick-pocket caught red-handed in a fair. Obviously, the present case does not come under that exception.

It has been pointed out by the learned Magistrate, and the learned Government Advocate also argued, that the petitioners had already been served with summonses for 11-5-53. That is no doubt true, but all that was stated therein was that they were to be prosecuted for an offence under Section 435, I. P. C. That did not give the petitioners any ' indication as to what actually the prosecution case was. In the circumstances, even though the petitioners or their counsel may not have asked for an adjournment, it is manifest that the case was taken up at a late hour on the evening of 11-5-1953 immediately after the presentation of the chalan and therefore without giving them any opportunity of knowing what the case against the petitioners was.

7. The above are however not the only circumstances. Another circumstance which would raise a reasonable apprehension in the mind of any accused against his having a fair trial appears in the aforesaid reply which the learned Magistrate has made to the allegation that they were not allowed an opportunity that Sri K. C. Pandit Advocate might address the Court before the framing of the charge. The learned Magistrate has no doubt denied the allegation that any such request was made to him, but, at the same time, he has admitted that at the close of the case on 11-5-1953 he informed the accused not only that their statements would be recorded on the following day but also that the charges would be framed against them. It would appear therefore that, even before knowing what the statements of the accused would be, the learned Magistrate had already made up his mind to frame charges against them.

8. Before I conclude, I would refer to one other fact although that may not affect the present application on its merits, and that is the fact of the learned Magistrate having denied the allegation of the petitioners that an application for inspection of

the record had been made by their Advocate, Sri K. C. Pandit, on 9-5-1953. That allegation was made in support of the contention that even on 9-5-1953 the petitioners were not in a position to know what the case against them was. This allegation really loses its force in the teeth of the subsequent allegation (which has been found to be correct) that the chalan was presented before the Court immediately before the case being taken up late in the evening of 11-5-1953.

What I wish to say here is that the learned Magistrate's denial with regard to the presentation of the application for inspection has, in any case, been rashly made. He says that there was no record available in his office to indicate that the application in question had been made on 9-5-1953. Sri K. C. Pandit for the petitioner has however showed to me the said application in original which appears to have been returned to him after endorsement thereon of the learned Magistrate's order of the said date. I think that the application should not have been returned to the party or his counsel but consigned to the proper record. What is germane to the point under consideration, is however that the learned Magistrate himself endorsed the order on the application that it be registered. A record was therefore available in the office of the learned Magistrate, i.e., the register in question, from which he could have ascertained that the application had been preferred before him on 9-5-1953. He should not therefore have given the said reply without consulting the register.

8a. While I do not doubt that the learned Magistrate had no bias of any kind against the petitioners, the circumstances pointed out above are such as were likely to raise a reasonable apprehension in the minds of the petitioners that they cannot have a fair trial. The application is therefore allowed, and it is hereby ordered that the case pending against the petitioners in the Court of the Magistrate 1st class Theog be transferred to the Court of the District Magistrate with the direction that the District Magistrate should either himself try the case or transfer it for trial to any other competent Magistrate subordinate to him at Kasumpti. The petitioners are hereby directed to appear before the District Magistrate for hearing necessary orders on 21-7-1953.