

Sunil Kumar Pal

Vs

Phota Sheikh and Others

Criminal Appeal No. 495 of 1980

(P. N. Bhagwati, V. B. Eradi JJ)

13.08. 1984

JUDGMENT

BHAGWATI, J. –

1. This is an appeal by special leave from a judgment of a Division Bench of the Calcutta High Court rejecting an application made by the appellant under Section 401 of the Code of Criminal Procedure, 1973 for leave to appeal against an order of acquittal passed by the Additional Sessions Judge, Nadia in Sessions Case 20 of 1977 filed against respondents 1 to 9. The facts giving rise to this appeal are few and may be briefly stated as follows :
2. The appellant's younger brother, Nishith Pal (hereinafter referred to as the deceased) was murdered in the evening of August 29, 1975 near the entrance of his village Sondanga situate in district Nadia. First Information Report in regard to the murder of the deceased was lodged with the Kotwali Police Station, Krishna Nagar at 8.05 a.m. on August 30, 1975 by Topan Kumar Pal, a distant nephew of the deceased. The allegation of the appellant in that the investigation into the murder of the deceased was carried on by the police in a perfunctory and unfair manner despite repeated representations to various authorities made by the appellant as well as the witnesses to the murder. The reason for which, according to the appellant, no proper investigation was carried on by the police was that the persons accused of the commission of the murder were persons belonging to or at any rate supported by the Communist Party of India (Marxist) which was at the material time the ruling party in the State of West Bengal. Though representations were made to the higher authorities for according protection to the witnesses who were apprehending danger at the hands of the accused and their supporters, nothing substantial was done by way of according such protection to them. The witnesses also pointed out to the appropriate authorities that the accused had threatened them with dire consequences if any of them helped in the prosecution of the accused and they also alleged that the local police was friendly with the accused and it was impossible for them to depose truly and fearlessly in open court in regard to the murder of the deceased. These representations, according to the appellant, fell on deaf ears and no protection whatsoever was given to the witnesses. It appears that on November 4, 1976, fourteen months after the murder, the police submitted charge-sheet against respondents 1 to 9 for offences under Sections 302, 364 and 120-B of the Indian Penal Code.
3. The appellant was living in the United Kingdom, but whenever he came down to India, he repeatedly requested the Government of West Bengal and the appropriate officers of the Government to appoint a special public prosecutor to conduct the prosecution against respondents 1 to 9, but there was no immediate response from the Government or any of these officers. On or about May 15, 1978 the appellant once again came down to Krishna Nagar from the United

Kingdom in connection with the trial for the murder of the deceased. It seems that before coming to Krishna Nagar, the appellant had addressed a registered letter to Shri Umapada Bhattacharya, Public Prosecutor, Nadia from London enquiring about the trial and after coming to Krishna Nagar he also made enquiries from Shri Umapada Bhattacharya but no reply was received by him though the trial was to commence from May 19, 1978. The appellant thereupon tried to meet the District Magistrate, Nadia to find out who was going to conduct the case on behalf of the prosecution but the District Magistrate refused to meet the appellant and referred him to the Superintendent of Police, Nadia. The Superintendent of Police advised the appellant to meet him on May 23, 1978 though he knew fully well that the trial had been adjourned only upto May 22, 1978 and was to commence on that date. Meanwhile, however, the District Magistrate issued an order dated May 20, 1978 appointing Shri S. N. Ganguly, advocate, Krishna Nagar as Special Public Prosecutor and advised the Public Prosecutor, Nadia to direct Shri Nil Kamal Sarkar, Additional Public Prosecutor to assist Shri S. N. Ganguly.

4. Surprisingly, when the trial opened on May 22, 1978 Shri Umapada Bhattacharya, Nadia appeared to defend respondents 1 to 9, though he was the Public Prosecutor of Nadia district. Shri S. N. Ganguly who appeared for the prosecution as Special Public Prosecutor requested for an adjournment of the case in order to enable him to prepare and get ready for the case, but the Additional Sessions Judge trying the case granted adjournment only for a day and the time granted being wholly insufficient, Shri S. N. Ganguly returned the brief. On the same night, that is, the night of May 22, 1978, the District Magistrate, Nadia hurriedly addressed a letter to Shri S. S. Sen, Additional Public Prosecutor who was the junior of Shri Umapada Bhattacharya to conduct the prosecution in place of Shri S. N. Ganguly and he also advised Shri Nil Kamal Sarkar to assist Shri S. S. Sen. Consequently on May 23, 1978 Sri S. S. Sen Additional Public Prosecutor who had received the papers in connection with the case only the previous night appeared for the prosecution alone unaided by any other lawyer while Shri Umapada Bhattacharya, Public Prosecutor, Nadia appeared for respondents 1 to 9. Shri S. S. Sen examined 11 out of 19 prosecution witnesses who were present on that day and he finished their evidence before the lunch recess.

5. When the witnesses were giving evidence in the case, there were a number of hostile supporters of the Communist Party of India (Marxist) in the court compound and the witnesses on seeing them naturally became apprehensive about their safety and they became further apprehensive when they found that the Public prosecutor, Nadia was defending respondents 1 to 9. The complainant accordingly made a prayer to the Additional sessions Judge to adjourn the trial in order to enable him to move the High Court for transfer of the case. The learned Additional Sessions Judge granted and adjournment and a petition was thereupon moved before the Calcutta High Court on behalf of the appellant and the complainant for transfer of the case to some other district in West Bengal. The High Court issued a rule on the petition but on November 21, 1978, a Division Bench of the Calcutta High Court discharged the rule with a direction to the learned Additional sessions Judge to take all necessary steps to see that none of the prosecution witnesses are in any way intimidated or threatened by respondents 1 to 9 or by their friends or relatives and further directed that in case any of the prosecution witnesses were threatened or intimidated by any of respondents 1 to 9, the learned Sessions Judge should consider whether their bail should be immediately cancelled. Though this direction was given by the Division Bench of the Calcutta High Court, intimidation of the witnesses continued and nothing was done to protect them.

6. The trial was thereafter fixed on May 2, 1979. It appears that on April 23, 1979 a few days before the date fixed for the resumption of the trial, an application was made to the learned Additional Session Judge on behalf of the complainant for calling some material witnesses and the tape-

recorded statement of one Hyder Ali, but the application was rejected by the additional Sessions Judge on April 25, 1979 observing that the application could not be considered unless the same was filed on behalf of the prosecution and moved either by the Public Prosecutor or the Additional Public Prosecutor. The complainant preferred a revision application against this order to the Calcutta High Court but the revision application was rejected by the Calcutta High Court on May 4, 1979. Meanwhile, the appellant who was once again back in Krishna Nagar filed an application before the Additional Sessions Judge on May 2, 1979 just before the resumption of the trial, drawing the attention of the Court to the fact that since Shri Umapada Bhattacharya, Public Prosecutor, Nadia was appearing for respondents 1 to 9 who were the accused, it had emboldened respondents 1 to 9 to continue threatening the witnesses and their relatives with the result that out of four witnesses summoned only one was present and he too after examination had to be declared hostile. This application was also rejected by the learned Additional Sessions Judge.

7. Thereafter the trial went on and on May 7, 1979, Shri S. S. Sen, Additional Public Prosecutor who was conducting the case on behalf of the prosecution produced only two witnesses out of a list of 12 submitted to the learned Additional Sessions Judge on April 23, 1979 and refused to call the appellant and other witnesses in spite of the fact that the appellant was fully aware of the facts and circumstances leading to the murder of the deceased and was therefore a material witness. The result was that the material witnesses were not examined on behalf of the prosecution. Those witnesses who were examined turned hostile because of fear for their life. It appears that there were no proceedings after May 7, 1979 until May 10, 1979 when the appellant made an application before the learned Additional Sessions Judge for calling him as a court witness. This application was however rejected by the learned Additional Judge. Another application was thereupon filed by the appellant on May 11, 1979 for stay of the proceedings in order to enable him to move the Calcutta High Court against the order dated May 10, 1979 but this application was also rejected by the learned Additional Sessions Judge. The learned Additional Sessions Judge thereafter pronounced his order on May 12, 1979 finding respondents 1 to 9 not guilty of the offences charged against them and acquitted them of those charges.

10. The appellant thereupon preferred an application under Section 401 of the Code of Criminal Procedure, 1973 for leave to prefer an appeal against the order passed by the learned Additional Sessions Judge acquitting respondents 1 to 9. But this application was rejected by a Division Bench of the Calcutta High Court on April 28, 1980. The appellant thereupon preferred the present appeal with special leave obtained from this Court.

9. The order passed by the learned Additional Sessions Judge acquitting respondents 1 to 9 obviously suffers from a serious infirmity and we do not think it is possible to sustain it on any view of the matter. There can be little doubt that the trial culminating in the acquittal of respondents 1 to 9 was appallingly unfair so far as the prosecution is concerned and was heavily loaded in favour of respondents 1 to 9. It is difficult to understand how consistently with ethics of the legal profession and fair play in the administration of justice, the Public Prosecutor of Nadia could appear on behalf of respondents 1 to 9. The appearance of the Public Prosecutor, Nadia on behalf of the defence does lend support to the allegation of the appellant that respondents 1 to 9 were supported by the Communist Party of India (Marxist) which was at the material time the ruling party in the State of West Bengal and this would naturally give rise to apprehension in the minds of the witnesses that in giving evidence against respondents 1 to 9, they would be not only incurring the displeasure of the Government but would also be fighting against it. Moreover, it cannot be disputed that when the trial was going on and the witnesses were giving evidence, there were a large number of supporters of the Communist Party (Marxist) who were allowed to assemble in the court compound and who

created a hostile atmosphere by shouting against the prosecution and in favour of the accused. Though the appellant and the complainant as also the witnesses were intimidated, no steps were taken for according protection to them so that they may be able to give evidence truly and fearlessly in proper atmosphere consistent with the sanctity of the court. It is significant to note that quite a few witnesses turned hostile and that obviously must have been due to the fact that they apprehended danger to their life at the hands of respondents 1 to 9 and their supporters. It is also regrettable that though at the time when the trial commenced on May 22, 1978, Shri S. N. Ganguly, who was appointed Special Public Prosecutor to conduct the prosecution, asked for an adjournment of the trial in order to enable him to prepare the case particularly since he was appointed only on May 20, 1978, the trial was adjourned only for one day, with the result that S. N. Ganguly had to return the brief. Then late in the evening of May 22, 1978 Shri S. S. Sen, Additional Public Prosecutor was asked to conduct the prosecution and he had to begin the case on the very next morning on May 23, 1978 without practically any time for effective preparation. We have no doubt that under these circumstances the trial could not be regarded as fair and just so far as the prosecution was concerned. The entire course of events shows that the conduct of the trial was heavily loaded in favour of respondents 1 to 9. The trial must in the circumstances be held to be vitiated and the acquittal of respondents 1 to 9 as a result of such trial must be set aside. It is imperative that in order that people may not lose faith in the administration of criminal justice, no one should be allowed to subvert the legal process. No citizen should go away with the feeling that he could not get justice from the court because the other side was socially, economically or politically powerful and could manipulate the legal process. That would be subversive of the rule of law.

10. We therefore allow the appeal, set aside the judgment and order of the learned Additional Sessions Judge acquitting respondents 1 to 9 as also the order passed by the High Court rejecting the application of the appellant and direct that there shall be a re-trial of respondents 1 to 9 on the selfsame charges for which they were tried before the learned Additional Sessions Judge. It is necessary in the interest of justice that the trial should not be conducted in Krishna Nagar because the atmosphere there appears to be surcharged against the appellant and the complainant and we would accordingly direct that the sessions case shall stand transferred to the City Civil and Sessions Court, Calcutta and it shall be tried by a City Civil and Sessions Judge to be appointed by the Chief Judge of the City Civil and Sessions Court. We would also direct that in order that there should be fair yet effective prosecution, the State Government should appoint a senior advocate practising on the criminal side in the City Civil and Sessions Court, Calcutta as Special Public Prosecutor in consultation with the appellant and the complainant and any suggestion made by the appellant or the complainant shall be taken into consideration in making such appointment. The trial shall commence within a period of four months from today and as far as possible, it shall be completed within a further period of three months. Respondents 1 to 9 shall be arrested and produced by the police before the Chief Judge of the City Civil and Session Court and it will be for the learned Chief Judge or any other Judge of the City Civil and Sessions Court to whom the session case may be assigned to decide whether bail should be granted to respondents 1 to 9 or not.

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