

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI
LANKA

In the matter of an Application made under and in terms of Section 46 of the Judicature Act No. 2 of 1978 for the transfer of Magistrate's Court Jaffna Case bearing No. BR/189/PC/17

CA (Transfer) Application No: 12/2018

Anurudhdha Lihinikaduwa,
No. 19/14, Uswatta Road,
Moratuwa.

Petitioner

Vs.

1. Sinnaiya Sooriyakumar,
No. 22, Namagal Veethy,
Station Road,
Kokuvil West, Kokuvil, Jaffna.
2. Dharmawardane,
Officer-In-Charge,
Special Crime Investigation Unit,
Police Station, Jaffna.
3. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondents

Before: P. Padman Surasena J, President of the Court of Appeal
Arjuna Obeyesekere J

Counsel: Faiz Mustapha, P.C with Charaka Jayaratne for the Petitioner

B. Thamber for the 1st Respondent

Azad Navavi, Deputy Solicitor General for the 2nd and 3rd
Respondents

Supported on: 30th July 2018

Decided on: 21st September 2018

Arjuna Obeyesekere, J

The Petitioner has filed this application seeking an order to transfer Case No. BR/189/PC/17 pending in the Magistrate's Court of Jaffna to the Magistrate's Court of Colombo or to any other Magistrate's Court that this Court deems fit.

The Petitioner is a director of Electro Automotive Private Limited, a private company engaged in the importation and sale of motor vehicles. On 3rd February 2016, the 1st Respondent had placed an order for an electric motor vehicle with the said company. Having taken delivery and used the vehicle for 4 months, the Petitioner states that the 1st Respondent returned the vehicle as the facilities to charge the said vehicle was not available in Jaffna. The Petitioner states that the 1st Respondent had thereafter ordered a hybrid vehicle. There had been an increase in the rate of the import taxes in May 2016 and the Petitioner had requested the 1st Respondent to bear such increase in taxes, which the 1st Respondent had refused. The Petitioner, while

acknowledging that a total sum of Rs. 5 million had been paid by the 1st Respondent, had proposed to the 1st Respondent that after deducting a sum of Rs. 1,680,000 due to the Petitioner, he would refund a sum of Rs. 3,320,000 over a period of three years¹, a proposal to which the 1st Respondent had not agreed.

Acting on a complaint made by the 1st Respondent that the Petitioner had cheated him, the 2nd Respondent, Officer-in-Charge of the Special Crime Investigation Unit of Jaffna Police had filed a 'B' Report in January 2017 in the Magistrate's Court of Jaffna, bearing Case No. BR/189/PC/17 in relation to the above transaction, alleging the commission of offences under Sections 386, 389 and 403 of the Penal Code. The Petitioner had been named as a suspect in the further report filed in the said case in August 2017. The Petitioner had been arrested in Colombo on 24th August 2017 and produced before the learned Magistrate of Colombo, who remanded the Petitioner.

The Petitioner had been produced before the learned Magistrate of Jaffna on 6th September 2017. The Petitioner claims that he was "advised that unless he made some part payment he will not be granted bail". He claims further that he paid a sum of Rs. 500,000 to the 1st Respondent on the insistence of the learned Magistrate, but that bail had been refused due to the objections raised by the prosecution. The Petitioner claims further that the learned Magistrate "directed him (to) pay the purported balance sum of Rs. 4,500,000 to enable bail to be considered".

¹ This is borne out by the draft agreement annexed to the petition, marked 'X4', which the Petitioner claims he sent to the 1st Respondent.

The Petitioner had paid a further sum of Rs. 500,000 to the 1st Respondent when the case was mentioned on 20th September 2017. Although the Petitioner had been remanded for a further two weeks, he had been enlarged on bail the next day, upon an application made by way of a motion, on condition that he reports to the Magistrate's Court of Jaffna on the last Monday of every month. The Petitioner had appeared in the Jaffna Magistrate's Court on three occasions thereafter and paid a total sum of Rs. 255,000 to the 1st Respondent. The Petitioner states that as the company was undergoing a financial crisis and was not in a position to pay any further sums of monies, the Petitioner, being apprehensive of being arrested, has not attended the Jaffna Magistrate's Court since 8th November 2017.

It is in the above factual background that the Petitioner has filed this application claiming that the learned Magistrate has erred in law by acting as a recovery court and that in any event, the Magistrate's Court of Jaffna has no jurisdiction as the transaction took place in Colombo. In these circumstances, the Petitioner states that he apprehends that he will not receive a fair and impartial trial in the Magistrate's Court of Jaffna and that it would be expedient for the case to be transferred to the Magistrate's Court of Colombo or any other Magistrate's Court.

The statutory provisions with regard to the power of this Court to transfer a case are found in Section 46(1) of the Judicature Act, which is re-produced below:

“(1) Whenever it appears to the Court of Appeal-

- a) that a fair and impartial **trial** cannot be had in any particular court or place; or
- b) that some questions of law of unusual difficulties are likely to arise; or
- c) that a view of the place in or near which any offence is alleged to have been committed may be required for the satisfactory inquiry into or trial of the same; or
- d) that it is so expedient on any other ground,

the court may order upon such terms as to the payment of costs or otherwise as the said court thinks fit, for the transfer of any action, prosecution, proceeding or matter pending before any court to any other court and accordingly in every such case, the court to which any such action, prosecution, proceeding or matter is so transferred shall, notwithstanding anything to the contrary in this or any other law, take cognizance of and have the power and jurisdiction to hear, try and determine such action, prosecution, proceeding or matter, as fully and effectually to all intents and purposes as if such court had an original power and jurisdiction."

The case filed in the Magistrate's Court of Jaffna is still at the 'B' Report stage. The plaint has not been filed and therefore, the question of there being a **trial** does not arise at the moment. The Petitioner has not placed any material before this Court to demonstrate that he would not receive a fair and impartial

trial, if and when the plaint is filed and the trial starts. To that extent, this application is not only misconceived in law but is also premature.

The basis for the Petitioners application for transfer falls under paragraphs (a) and (d) of Section 46(1). The Petitioner has not directly alleged bias on the part of the learned Magistrate. However, it appears that the Petitioner is claiming that the learned Magistrate is biased in favour of the prosecution and for that reason, he fears that he would not receive a fair and impartial trial.

The issue of bias was considered by this Court in Abdul Hasheeb vs Mendis Perera and others², where Justice G.P.S.De Silva (as he then was), having discussed several English cases, held as follows:

“In the subsequent authorities cited before us, two tests for disqualifying bias have been formulated:-

- (a) The test of real likelihood of bias; and
- (b) The test of reasonable suspicion of bias.

Having cited the judgment of Lord Denning in Metropolitan Properties Co (F.G.C) Limited vs Lannon³, Justice G.P.S.De Silva has proceeded to state as follows:

“It would appear that Lord Denning was inclined to adopt the ‘real likelihood’ test but said that it was satisfied if there were circumstances “from which a reasonable man would think it likely or probable that the

² 1991 1 SLR 243 at 257.

³ 1968 – 3 All ER 304.

justice or the chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other". Lord Denning emphasized that "the court looks at the impression which would be given to other people". "The reason" he said "is plain enough, Justice must be rooted in confidence; and confidence is destroyed when right minded people go away thinking; the Judge was biased."

While the test of real likelihood of bias requires a substantially higher degree of proof, the learned President's Counsel for the Petitioner urged this Court to apply the less stringent of the two tests and argued that the Petitioner has successfully established reasonable suspicion of bias on the part of the learned Magistrate.

With regard to what should be established under this test, this Court has held as follows⁴:

"even on the application of the test of reasonable suspicion, it must be shown that the suspicion is based on reasonable grounds -- grounds which would appeal to the reasonable, right thinking man. It can never be based on conjecture or on flimsy, insubstantial grounds. Adopting the words of Lord Denning in Lannon's case, Mr. Pullenayagam submitted that "bias" in this context would mean, "a tendency to favour one side unfairly at the expense of the other" -- a submission with which I agree."

This Court has carefully examined the material submitted by the Petitioner. The Petitioner's argument that the Magistrate was acting as a recovery court

⁴ Abdul Hasheeb vs Perera (supra) at page 257.

and that he was forced to pay a sum of Rs. 500,000 cannot be believed when one considers the fact that the Petitioner was ready with the said sum of Rs. 500,000 when he was produced before the Magistrate's Court of Jaffna on the very first date. This demonstrates an intention on his part to voluntarily make good, part of the money he had taken from the 1st Respondent. The Petitioner's position that the learned Magistrate insisted that he pay a sum of Rs. 500,000 is contradicted by the Attorney-at-Law who appeared for the Petitioner on 6th September 2017, who has stated in the letter marked 'X7'⁵ that, 'my client admitted the liability out of fear that he would not be enlarged on bail if he contest the case and expressed his willingness to pay a sum of Rs. 500,000.'

This admission by the Attorney-at-Law for the Petitioner confirms that it was the Petitioner who volunteered to pay a sum of Rs. 500,000 and that the said sum of money was not paid on the insistence of the learned Magistrate. The Petitioner's claim that he was 'advised that unless he made some payment he will not be granted bail' certainly did not come from the learned Magistrate. In any event, this 'advise' was not correct as the learned Magistrate refused bail on the objections of the prosecution, inspite of Rs. 500,000 being paid on 6th September 2017.

In these circumstances, can it be said that a reasonable right thinking man would think the learned Magistrate has favoured the prosecution at the expense of the Petitioner or that the Petitioner would not receive a fair and impartial trial? This Court does not think so. The accusation made against the

⁵ 'X7' is a letter sent by the Attorney-at-Law who appeared for the Petitioner in the Magistrate's Court of Jaffna on 6th and 20th September 2017.

learned Magistrate, with a view to demonstrating bias on his part, is therefore unfounded. Thus, even if the less stringent of the test is applied, the Petitioner has failed to establish a reasonable suspicion of bias on the part of the learned Magistrate. In these circumstances, this Court rejects the argument of the Petitioner that he would not receive a fair and impartial trial, before the Magistrate's Court of Jaffna.

Before proceeding to consider the next ground urged by the learned President's Counsel for the Petitioner, this Court would like to refer to the Order of this Court in **Marcus vs Attorney General**⁶. The complaint in that case was that the learned High Court Judge, in the course of the proceedings had remarked that, 'in this case, there is hardly anything to be inquired into'. It had been the position of the petitioner in that case that this remark, 'deeply disturbed him and left him the impression that the learned High Court Judge had already taken a particular view of the case adverse to him and that he would not get a fair hearing.'⁷ On the basis that the learned High Court Judge is biased against the petitioner, a transfer had been sought under Section 46(1)(a) of the Judicature Act.

This Court, having referred to the two tests laid down in **Abdul Hasheeb's** case, held as follows:

"To allege bias against a judicial officer is a serious matter and this Court would not lightly entertain such an allegation. There is no material whatever to suggest that the High Court Judge 'had already taken a particular view of this case adverse to the petitioner' as alleged in the

⁶ Sri Skantha Law Reports Volume 2 Page 131.

⁷ Ibid., page 132.

petition. In our view, the words complained of are innocuous and cannot possibly form the basis of an allegation of bias.”

In this regard, the following passage from the judgment in Abdul Hasheeb’s case would also be relevant:

“it seems to me that the facts set out in the petition are too remote and too tenuous in character to found an allegation of bias on the part of a judicial officer, who it must be remembered, is one with a trained legal mind.”

This Court is in full agreement with the position taken by this Court in the said cases.

This Court would now consider if it is ‘expedient’ to transfer this case on any other ground⁸. What is expedient has been considered in Subramaniam vs Subramaniam⁹, where this Court has held as follows:

“A party to an action who seeks a transfer of a pending action from the court in which it is pending to another court must adduce sufficient grounds to satisfy us that it is expedient to make order for its transfer. ‘Expedient’ in this context, in my view, means fit or proper. A transfer would not be ordered on light grounds.”¹⁰

⁸ Vide Section 46(1)(d) of the Judicature Act.

⁹ 1980 2 SLR 58.

¹⁰ Cited with approval by Justice Malalgoda, P/CA (as he then was) in CA/TR/93/2015 CA Minutes of 29th April 2016.

This Court in Abdul Hasheeb's case agreed with the submission of the Counsel for the Respondent that the expression "expedient" in the context means, advisable in the interests of justice. In the circumstances of this case, is it fit and proper or is it advisable in the interests of justice to transfer this case? This Court does not think so. The Petitioner has not adduced any material to demonstrate that the interests of justice would not be served by proceeding with the case in the Magistrate's Court of Jaffna or that it would be fit or proper to transfer the case. Therefore, this Court does not see any basis to transfer this case on the ground of expediency.

In all the circumstances of this case, this Court sees no legal basis to issue notices on the Respondents or order the transfer of Magistrate's Court of Jaffna Case No.BR/189/PC/17. This application is accordingly dismissed, without costs.

Judge of the Court of Appeal

P. Padman Surasena, J/ President of the Court of Appeal

I agree.

President of the Court of Appeal