Himanshu Singh Sabharwal vs State Of M.P. And Ors on 12 March, 2008

Equivalent citations: AIR 2008 SUPREME COURT 1943, 2008 AIR SCW 2206, 2008 (4) SRJ 35, (2008) 1 CRILR(RAJ) 198, (2008) 2 JCC 1061 (SC), 2008 CRILR(SC&MP) 198, 2008 (2) SCC(CRI) 106, 2008 (2) JCC 1061, 2008 (3) SCC 602, 2008 (4) SCALE 93, 2008 ALL MR(CRI) 38 NOC, (2008) 1 ANDHLD 865, 2008 CRILR(SC MAH GUJ) 198, 2008 CHANDLR(CIV&CRI) 582, (2008) 2 JAB LJ 160, (2008) 2 MAD LJ(CRI) 1422, (2008) 40 OCR 678, (2008) 2 RECCRIR 267, (2008) 2 CURCRIR 144, (2008) 2 ALLCRIR 1649, (2008) 4 SCALE 93, (2008) 2 DLT(CRL) 394, (2008) 63 ALLCRIC 269, (2008) 2 CHANDCRIC 248, (2008) 2 ALLCRILR 465, 2008 (3) ANDHLT(CRI) 183 SC, 2008 (1) ALD(CRL) 865

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Bench: Arijit Pasayat, P. Sathasivam

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           CASE NO.:
Transfer Petition (crl.)  175 of 2007

PETITIONER:
Himanshu Singh Sabharwal

RESPONDENT:
State of M.P. and Ors

DATE OF JUDGMENT: 12/03/2008

BENCH:
Dr.  ARIJIT PASAYAT & P. SATHASIVAM

JUDGMENT:
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J U D G M E N T TRANSFER PETITION (CRL.)NO. 175/2007 (With Writ Petition (Crl.) No. 173 of 2006) Dr. ARIJIT PASAYAT, J

1. Transfer Petition (Crl.) No.175 of 2007 has been filed by one Himanshu Singh Sabharwal who is the son of late Prof. H.S. Sabharwal. The background facts as projected by the petitioner who is also the petitioner in Writ Petition (Crl.) No.173 of 2006 are as follows:

> Late Prof. H.S. Sabharwal was a professor in Government College, Ujjain, M.P. He was brutally beaten up by certain persons, for taking a rigid stand in the college union

> elections. Though the assaults were made in the presence of several police officials, media persons and members of public, attempt has been made to project as if his death was as a result of an accident. Initially, First Information Report was lodged and after investigation charge sheet was filed and charges have been framed against several persons who are respondents 2 to 7 in the Transfer Petition. The trial commenced in the Court of Sessions Judge, Ujjain being Sessions Case No.291 of 2006.

During examination of several witnesses who were stated to be eye-witnesses, such witnesses resiled from the statements made during investigation. There were even three police witnesses who also resiled from their earlier statements. They are Dhara Singh (PW-32), Sukhnandan (PW-33) and Dilip Tripathi (PW-34).

Grievance of the petitioner is that the witnesses have been coerced, threatened and ultimately justice is a casualty. Role of the investigating officer gives ample scope to doubt, impartiality and the sincerity of the investigating agency. Similar is the position of the public prosecutor. It is also highlighted that the trial Court also did not make a serious effort to see that justice is done. In this connection it is pointed out that public prosecutor did not cross-examine the persons who had resiled from their statements made during investigation. This according to the petitioner also shows that the trial Court did not act as is required under law.

By order dated 11.7.2007 the proceedings in the sessions case were stayed. In pursuance of the notice the respondent- State and accused respondents have appeared.

2. Mr. Soli J. Sorabjee, learned senior counsel appearing for the State of M.P. stated that in the larger interest of justice and transparency, the State has no objection in case the Sessions case is transferred to some other State. But according to him this should not be construed to be acceptance of the allegations made by the petitioner about the impartiality of the investigating agency or the public prosecutor or the manner of trial. According to him, if any person is guilty he has to be punished and State never had or has any intention to protect any guilty person. Similar stand was also adopted by Mr. U.R. Lalit, learned senior counsel appearing for the accused respondents. To show their bona fides, it was stated that even the police officials PWs 32, 33 and 34 may be recalled for cross examination even without any application in terms of Section 311 of the Code of Criminal Procedure, 1973 (in short the 'Code') being filed.

3. Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying existence of Courts of justice. The operating principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involves a delicate judicial balancing of competing interests in a criminal trial, the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences.

4. In 1846, in a judgment which Lord Chancellor Selborne would later describe as "one of the ablest judgments of one of the ablest judges who ever sat in this court". Vice-Chancellor Knight Bruce said:

> "The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination.. Truth, like all other good things, may be loved unwisely
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> - may be pursued too keenly - may cost too much."

The Vice-Chancellor went on to refer to paying "too great a price... for truth". This is a formulation which has subsequently been frequently invoked, including by Sir Gerard Brennan. On another occasion, in a joint judgment of the High Court, a more expansive formulation of the proposition was advanced in the following terms: "The evidence has been obtained at a price which is unacceptable having regard to prevailing community standards."

5. Restraints on the processes for determining the truth are multi-faceted. They have emerged in numerous different ways, at different times and affect different areas of the conduct of legal proceedings. By the traditional common law method of induction there has emerged in our jurisprudence the principle of a fair trial. Oliver Wendell Holmes described the process:

> "It is the merit of the common law that it decides the case first and determines the principle afterwards ... It is only after a series of determination on the same subject-matter, that it becomes necessary to "reconcile the cases", as it s called, that is, by a true induction to state the principle which has until then been obscurely felt. And this statement is often modified more than once by new decisions before the abstracted general rule takes its final shape. A well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest is to resist it at every step."

6. The principle of fair trial now informs and energises many areas of the law. It is reflected in numerous rules and practices. It is a constant, ongoing development process continually adapted to new and changing circumstances, and exigencies of the situation - peculiar at times and related to the nature of crime, persons involved - directly or operating behind, social impact and societal needs and even so many powerful balancing factors which may come in the way of administration of criminal justice system.

7. As will presently appear, the principle of a fair trial manifests itself in virtually every aspect of our practice and procedure, including the laws of evidence. There is, however, an overriding and, perhaps, unifying principle. As Deane J put it:

> "It is desirable that the requirement of fairness be separately identified since it transcends the content of more particularized legal rules and principles and provides the ultimate rationale and touchstone of the rules and practices which the common law requires to be observed in the administration of the substantive criminal law".

8. This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crimes being public wrongs in breach and violation of public rights and duties, which affect the whole community as a community and harmful to the society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interests of society is not to be treated completely with disdain and as persona non grata. Courts have always been considered to have an over-riding duty to maintain public confidence in the administration of justice - often referred to as the duty to vindicate and uphold the 'majesty of the law'. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a Court of law in the future as in the case before it. If a criminal Court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.

9. The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the Courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning Nelson's eyes to the needs of the society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.

10. While dealing with the claims for the transfer of a case under Section 406 of the Code from one State to another this Court in Mrs. Maneka Sanjay Gandhi and Anr. v. Ms. Rani Jethmalani (1979 (4) SCC 167), emphasised the necessity to ensure fair trial, observing as hereunder:

"Assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini-grievances. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment, is necessitous if the Court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. We have to test the petitioner's grounds on this touchstone bearing in mind the rule that normally the complainant has the right to choose any court having jurisdiction and the accused cannot dictate where the case against him should be tried. Even so, the process of justice should not harass the parties and from that angle the court may weigh the circumstances. A more serious ground which disturbs us in more ways than one is the alleged absence of congenial atmosphere for a fair and impartial trial. It is becoming a frequent phenomenon in our country that court proceedings are being disturbed by rude hoodlums and unruly crowds, jostling, jeering or cheering and disrupting the judicial hearing with menaces, noises and worse. This tendency of toughs and street roughs to violate the serenity of court is obstructive of the course of justice and must surely be stamped out. Likewise, the safety of the person of an accused or complainant is an essential condition for participation in a trial and where that is put in peril by commotion, tumult or threat on account of pathological conditions prevalent in a particular venue, the request for a transfer may not be dismissed summarily. It causes disquiet and concern to a court of justice if a person seeking justice is unable to appear, present one's case, bring one's witnesses or adduce evidence. Indeed, it is the duty of the court to assure propitious conditions which conduce to comparative tranquility at the trial. Turbulent conditions putting the accused's life in danger or creating chaos inside the court hall may jettison public justice. If this vice is peculiar to a particular place and is persistent the transfer of the case from that place may become necessary. Likewise, if there is general consternation or atmosphere of tension or raging masses of people in the entire region taking sides and polluting the climate, vitiating the necessary neutrality to hold detached judicial trial, the situation may be said to have deteriorated to such an extent as to warrant transfer. In a decision cited by the counsel for the petitioner, Bose, J., observed :

.... But we do feel that good grounds for transfer from Jashpurnagar are made out because of the bitterness of local communal feeling and the tenseness of the atmosphere there. Public confidence in the fairness of a trial held in such an atmosphere would be seriously undermined, particularly among reasonable Christians all over India not because the Judge was unfair or biased but because the machinery of justice is not geared to work in the midst of such conditions. The calm detached atmosphere of a fair and impartial judicial trial would be wanting, and even if justice were done it would not be "seen to be done". (G. X. Francis v. Banke Behari Singh, AIR 1958 SC 309) Accepting this perspective we must approach the facts of the present case without excitement, exaggeration or eclipse of a sense of proportion.

> It may be true that the petitioner attracts a crowd in Bombay. Indeed, it is true of many controversial figures in public life that their presence in a public place gathers partisans for and against, leading to cries and catcalls or 'jais' or 'zindabads'. Nor is it unnatural that some persons may have acquired, for a time a certain quality of reputation, sometimes notoriety, sometimes glory, which may make them the cynosure of popular attention when they appear in cities even in a court. And when unkempt crowds press into a court hall it is possible that some pushing, some nudging, some brash ogling or angry staring may occur in the rough and tumble resulting in ruffled feelings for the victim. This is a far cry from saying that the peace inside the court has broken down, that calm inside the court is beyond restoration, that a tranquil atmosphere for holding the trial is beyond accomplishment or that operational freedom for judge, parties, advocates and witnesses has creased to exist. None of the allegations made by the petitioner, read in the pragmatic light of the counter-averments of the respondent and understood realistically, makes the contention of the counsel credible that a fair trial is impossible. Perhaps, there was some rough weather but it subsided, and it was a storm in the tea cup or transient tension to exaggerate which is unwarranted. The petitioner's case of great insecurity or molestation to the point of threat to life is, so far as the record bears out, difficult to accept. The mere word of an interested party is insufficient to convince us that she is in jeopardy or the court may not be able to conduct the case under conditions of detachment, neutrality or uninterrupted progress. We are disinclined to stampede ourselves into conceding a transfer of the case on this score, as things stand now. Nevertheless, we cannot view with unconcern the potentiality of a flare up and the challenge to a fair trial, in the sense of a satisfactory participation by the accused in the proceedings against her. Mob action may throw out of gear the wheels of the judicial process. Engineered fury may paralyse a party's ability to present his case or participate in the trial. If the justice system grinds to a halt through physical manoeuvres or sound and fury of the senseless populace the rule of law runs aground. Even the most hated human anathema has a right to be heard without the rage of ruffians or huff of toughs being turned against him to unnerve him as party or witness or advocate. Physical violence to a party, actual or imminent, is reprehensible when he seeks justice before a tribunal. Manageable solutions must not sweep this Court off its feet into granting an easy transfer but uncontrollable or perilous deterioration will surely persuade us to shift the venue. It depends. The frequency of mobbing manoeuvres in court precincts is a bad omen for social justice in its wider connotation. We, therefore, think it necessary to make a few cautionary observations which will be sufficient, as we see at present, to protect the petitioner and ensure for her a fair trial.

11. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth

and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial and not by an isolated scrutiny.

12. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty stage-managed, tailored and partisan trial.

13. The fair trial for a criminal offence consists not only in technical observance of the frame and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice.

14. "Witnesses" as Benthem said: are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control to speak the truth in the Court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by Courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingenuously adopted to smoother and stifle truth and realities coming out to surface rendering truth and justice, to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the Court and justice triumphs and the trial is not reduced to mockery. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who has political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in Court the witness could safely depose truth without any fear of being haunted by those against whom he has deposed. Some legislative enactments like the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short the 'TADA Act') have taken note of the reluctance shown by witnesses to depose against dangerous criminals-terrorists. In a milder form also the reluctance and the hesitation of witnesses to depose against people with muscle power, money power or political power has become the order of the day. If ultimately truth is to be arrived at, the eyes and ears of justice have to be protected so that the interests of justice do not get incapacitated in the

sense of making the proceedings before Courts mere mock trials as are usually seen in movies.

15. Legislative measures to emphasise prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day. Conducts which illegitimately affect the presentation of evidence in proceedings before the Courts have to be seriously and sternly dealt with. There should not be any undue anxiety to only protect the interest of the accused. That would be unfair as noted above to the needs of the society. On the contrary, the efforts should be to ensure fair trial where the accused and the prosecution both get a fair deal. Public interest in the proper administration of justice must be given as much importance if not more, as the interests of the individual accused. In this courts have a vital role to play.

16. The Courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that ultimate objective i.e. truth is arrived at. This becomes more necessary where the Court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The Court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and Courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

17. The power of the Court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e

(i) giving a discretion to the Court to examine the witness at any stage and (ii) the mandatory portion which compels the Court to examine a witness if his evidence appears to be essential to the just decision of the Court. Though the discretion given to the Court is very wide, the very width requires a corresponding caution. In Mohan Lal v. Union of India (1991 Supp (1) SCC 271) this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the word such as, 'any Court' 'at any stage', or 'any enquiry or trial or other proceedings' 'any person' and 'any such person' clearly spells out that the Section has expressed in the widest possible terms and do not limit the discretion of the Court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow any discretion but obligates and binds the Court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case - 'essential', to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the Section is to enable the Court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor

the defence, if the Court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth.

18. We are echoing the view succinctly stated in Zahira Habibulla H. Sheika and Anr. v. State of Gujarat and Ors. (2004 (4) SCC 158).

19. We appreciate the fair stand of the State as presented by Mr. Sorabjee and learned counsel for the accused persons. Without, therefore, examining the correctness of the allegations made, we direct that the case in question i.e. Sessions Case No.291 of 2006 pending in the Court of Sessions Judge, Ujjain be transferred to the Court of Sessions Judge, Nagpur, Maharashtra. It shall be open to the learned Sessions Judge to either deal with the case himself or to allot it to an appropriate Court. The trial will commence from the stage at which it was when the order of stay was passed by this Court. The petitioner who is the son of the deceased in the peculiar facts of the case is permitted to suggest two names to function as public prosecutor. Similarly, two names shall be given by the respondent-State. It shall be for the learned Sessions Judge, Nagpur to appoint a public prosecutor from the names to be suggested. The fees and other expenses of the public prosecutor shall be borne by the State of M.P. It shall be open to the public prosecutor to be appointed to seek recall of any witness already examined in terms of Section 311 of Code. This shall be in addition to PWs. 32, 33 and 34 about whom directions have been given earlier in this order.

20. The Transfer Petition is accordingly disposed of. In view of the orders passed in T.P.(Crl.) 175 of 2007, no further order is necessary to be passed in W.P.(Crl.) 173 of 2006 and same is accordingly disposed of.