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he proceed to complete the enquiry already started and then assess him on the result thereof under section 23 (3) ?”

The Income Tax Commissioner shall pay the costs of the petitioner of these proceedings: Pleader's fees Rs. 64.

A. N. C.

*Application accepted.***MISCELLANEOUS CRIMINAL.***Before Mr. Justice Jai Lal.*

SIKANDAR LAL PURI, Petitioner

*versus*

THE CROWN, Respondent.

**Criminal Miscellaneous No. 215 of 1928.**

*Criminal Procedure Code, Act V of 1898, section 535: Transfer grounds—application made at late stage of the case—Section 476—proceedings under—against a witness—when to be taken—Sentence—measure of—extraneous considerations. Evidence—recording of conflicting statements, Section 363: Demeanour of witness—remarks made regarding substance of deposition—distinction.*

*Held*, that in a petition for the transfer of a case it is not so much the real mind of the Magistrate, as disclosed by his remarks or conduct, which determines the question, but it is the impression that is reasonably created thereby in the mind of the applicant.

*Held also*, that if good grounds for a transfer are made out, the Court ought not to refuse it merely because the case has reached an advanced stage or because the transfer may entail expense and trouble to all concerned.

*Amar Singh v. Sadhu Singh* (1), followed.

*Gopal Singh v. Emperor* (2), *Golam Bari Ghazi v. Yar Ali Khan* (3), and *Sheodhari Rai v. Jhingur Rai* (4), referred to.

(1) (1925) I. L. R. 6 Lah. 396.

(3) 1925 A. I. R. (Cal.) 480.

(2) 1928 A. I. R. (Lah.) 180.

(4) (1925) 28 Cr. L. J. 1249.

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Proceedings under section 476, Criminal Procedure Code, when they relate to the merits of the statement made in Court by a witness, if started before the close of the case, are calculated to seriously affect the case of the party who called him.

*Held further*, that an accused person is entitled to claim that if he be found guilty he shall only be punished for the offence committed (having regard to the circumstances under which it was committed) ; and that no extraneous considerations such as his conduct of the defence or applications for transfer made by him should weigh with the Magistrate in judging his guilt or otherwise and in determining the measure of punishment.

*Held also*, that while sanctioning the recording of remarks about the demeanour of witnesses, section 363 of the Code does not authorise the Magistrate to make or to record remarks or opinions regarding the substance of the deposition of any witness during the course of the trial:

*Nor*, is it permissible for the Magistrate to scratch out the statement of a witness already recorded. If his subsequent evidence conflicts with the former, both statements must be recorded.

*Application under section 526, Criminal Procedure Code, for the transfer of the case from the Court of P. C. David, Esquire, Special Magistrate, Simla, to some other Court.*

B. R. PURI, for Petitioner.

C. H. CARDEN-NOAD, Government Advocate, for Respondent.

#### ORDER.

JAI LAL J.—These are four applications under section 526, Criminal Procedure Code, for transfer of criminal cases pending against the applicants under sections 420 and 161/109, Indian Penal Code, in the Court of Mr. P. C. David, Special Magistrate of Simla and Delhi. The complaints were instituted at

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the instance of the Finance Department of the Government of India, and the trials are so far advanced that the entire evidence for the prosecution and the defence has been recorded and a date is fixed for the hearing of arguments. One therefore feels reluctant to order a transfer which might entail considerable expense and trouble to the Crown, the accused and the witnesses. But if good grounds for a transfer are made out, the Court ought not to refuse it merely because the cases have reached an advanced stage or that the transfer may entail expense and trouble to all concerned.

The accused in these cases are G. J. Piper, Sikandar Lal Puri, and Tara Chand. They all alleged that owing to the attitude taken up by the Magistrate with regard to some of their witnesses and the consequent remarks made and the threats held out by him to the witnesses and the accused, they have reason to apprehend that the Magistrate is prejudiced against them and therefore that they do not expect justice in his Court. It is alleged that on the 15th of September, 1928, when Kesar Singh, a defence witness, was being examined, the Magistrate told him: *tum jhuti gawahi de rahe ho* (i.e., you are giving false evidence), that on the 21st of September, 1928, the Magistrate took up a very hostile attitude towards Kirpa Singh, a defence witness, and, after recording his statement, said to the defence counsel in open Court: "Don't you think he is a liar?" and addressing the witness said: *tum ne bahut zulm kia hai* (probably meaning, "you have done a great wrong"); and finally *Bewaquf ka bachcha tum jhut bolte ho, bhag jao* (i.e., son of a fool, you speak falsehood, run away) and then asked Sikandar Lal, accused, whether he did not realise his stupidity in bringing such witnesses. On the same

day it was found that a defence witness, *i.e.*, the Manager, Royal Typewriter Company, Delhi, had not been served, therefore the Magistrate addressing Sikandar Lal said: "If I find you give up the witness afterwards, I can tell you, I shall double your sentence if I find you guilty. I find that the defence has been playing these tactics and I shall certainly take account of this fact when passing orders." It is alleged that on this threat being held out, the defence abandoned their remaining witnesses. Then on the 24th of September, 1928, the accused informed the Magistrate that he intended to move this Court for the transfer of the cases from his Court and it is alleged that the Magistrate remarked: "It is most inconvenient for me. You must remember this is a double-edged weapon." It is on these grounds that the accused apprehend that the Magistrate is prejudiced against them.

Five affidavits have been filed in support of the above allegations. Two are by the accused Sikandar Lal and Piper; the remaining three are by Jaswant Singh, an employee in the Legislative Department of the Government of India, Muhammad Zia, an employee of the Finance Department of the Government of India and Sulakhan Mal *Seth*, a Government pensioner of Simla, respectively. All these affidavits are identical and fully support the allegations of the accused.

The Magistrate has submitted an explanation, With regard to the incident of the 15th of September, 1928, he states that the allegations are not true "as far as I can remember;" he says that a note on the record must have been made if he had disbelieved the witness and as this has not been done, it is unlikely that he disbelieved him. In view of the unsatisfactory

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and vague explanation of the Magistrate as to this incident and having regard to the definite allegations made by the five deponents in their affidavits, I must accept the accused's version to be true.

With regard to the incidents of the 21st and the 24th of September, the Magistrate admits that in substance he used the words imputed to him, but he states that in the case of Kesar Singh after he had remarked to the defence counsel " I think you will agree with me that the man is a liar " and after having spoken to the accused Sikandar Lal as alleged, he called the witness Kirpa Singh before him, after the day's proceedings in the case had been finished, with a view to consider the question of making a complaint against him for giving false evidence, but on being questioned Kirpa Singh asked for forgiveness; it was then that the Magistrate told him that " It was *zulm* for him to speak a lie in Court " and it was on this occasion that he called Kirpa Singh a " *Bewaquf ka bachcha,*" " for laying himself open to prosecution in this way."

With regard to the incident relating to the Manager of the Royal Typewriter Company, the Magistrate admits that after some preliminary conversation he " pointed out to Puri that out of the 28 witnesses named by him in his list he had been giving up from 1 to 3 at each hearing and this might be considered as savouring of deliberate intent to delay and that, if this were found to be so, no Court could overlook such tactics, but would be bound to take such conduct into account in awarding punishment, if it eventually found the accused to be proved guilty even to the extent of doubling the sentence." The Magistrate says that this was purely an advice given by him for the petitioners' own good.

Now, with regard to what happened on the 29th of September, 1928, the Magistrate admits that he did observe to the defence counsel that "transfer would be a double-edged weapon in this case." He then goes on to explain what he meant by the "transfer being a double-edged weapon."

It would thus appear that, except with regard to the incident relating to Kirpa Singh, there is no substantial difference as to what was said by the Magistrate on the 21st and 24th of September. Even with regard to Kirpa Singh the Magistrate merely differs from the accused as to the occasion on which the words complained of were used by him. I will assume that the version of the Magistrate is substantially correct as to these incidents.

The question then is whether the above facts are sufficient to raise a reasonable apprehension in the mind of the accused that the Magistrate is prejudiced against them. In *Gopal Singh v. Emperor* (1) a learned Judge in Chambers of this Court transferred a case on the ground that the Magistrate started proceedings against a witness of the accused, immediately after his statement had been recorded and before the case against the accused had been concluded, with a view to file a complaint for giving false evidence under section 476, Criminal Procedure Code. It was held that the action of the Magistrate was likely to create an apprehension in the mind of the accused that he had prejudged the case against him as the action under section 476 amounted to an expression of opinion that the witness had given false evidence. The learned Judge followed a judgment of a Division Bench of the Calcutta High Court in *Golam Bari*

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*Ghazi v. Yar Ali Khan* (1) where a case was transferred from the Court of a Magistrate because he had made a remark at the close of the testimony of a witness as follows:—"The witness falters and from his demeanour it appears that he has not told the truth." Before me reference was also made to a judgment of the Patna High Court in *Sheodhari Rai v. Jhingur Rai and others* (2), in which a transfer was ordered because in the course of the examination of the prosecution witnesses the Magistrate trying the case had made observations which went to show that he was not favourable to the prosecution.

It is no doubt true, as contended by the learned Government Advocate, who appeared to oppose the application for transfer, that section 363, Criminal Procedure Code, makes it incumbent on the Magistrate to record remarks, if any, as he may think material respecting the demeanour of a witness whilst under examination, but in my opinion it is quite a different thing to record a remark about the *demeanour* of the witness and to make or record a remark or opinion about the substance of the deposition of that witness. The parties are entitled to claim that, unless expressly provided to the contrary by law, the Magistrate shall not prejudge their cases or form an opinion about the respective merits of their cases or about the depositions of the witnesses till they have been fully and finally presented to the Magistrate by counsel, if any, in their concluding arguments and after the entire evidence has been recorded. Any opinion formed and expressed by the Magistrate at the earlier stage of the case is bound to be prejudicial to the party concerned. Proceedings under section 476,

(1) 1925 A. I. R. (Cal.) 480.

(2) (1925) 26 Cr. L. J. 1249.

Criminal Procedure Code, when they relate to the merits of the statement made in Court by a witness, if started before the close of the case, are calculated to seriously affect the case of the party who called him, as they are bound to frighten the remaining witnesses who must assume them as an indication of the treatment that they themselves are likely to receive if they make a similar statement in Court.

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I have considered the question whether, as the learned Government Advocate urged, these were not really ill-advised and premature observations made by the Magistrate without properly weighing their import and therefore they did not represent his finally considered opinion which would be formed after the arguments of counsel have been heard. The remarks were certainly ill-advised and premature, but I am unable to take the view which the learned Government Advocate wishes me to take of these incidents. It was on more than one occasion that the Magistrate expressed his opinion about the testimony of the witnesses. His threat to the accused regarding the sentence and the effect of his application for transfer is an indication of his attitude towards them which at that stage appears to have become hostile. It is hardly necessary for me to observe that the use of the words "*Bewaquf ka bachcha*" to one of the witnesses by the Magistrate is indefensible, but that would by itself be no ground for the transfer of the cases. At the same time, it must be taken into consideration along with the other incidents.

Be that as it may, even if I assumed that the Magistrate's remarks were hasty and did not represent his real and considered opinion of the case of the accused and that his threats about the sentence were not intended to be made seriously and that by describ-



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ing an application for transfer as a double-edged weapon the Magistrate meant something else than was understood by the accused, though I feel that I would be assuming too much under all the circumstances disclosed, it is not so much the real mind of the Magistrate that determines the question but it is the impression that is reasonably created in the mind of the accused by the remarks and the conduct of the Magistrate. In this respect I cannot do better than quote the following remarks from the judgment of the learned Chief Justice in *Amar Singh* versus *Sadhu Singh* (1):—

“ It is at the same time clear that in dealing with an application for transfer what the Court has to consider is not merely the question whether there has been any real bias in the mind of the presiding Judge against the applicant, but also the further question whether incidents may not have happened which, though they may be susceptible of explanation and may have happened without there being any real bias in the mind of the Judge, are nevertheless such as are calculated to create in the mind of the applicant a justifiable apprehension that he would not have an impartial trial. As observed by Lush J. in *Serjeant v. Dale* (2), “ the law has regard, not so much perhaps to the motives which might be supposed to bias the Judge, as to the susceptibilities of the litigant-parties. One important object, at all events, is to clear away everything which might engender suspicion and distrust of the tribunal, and so to promote the feeling of confidence in the administration of justice which is essential to social order and security.”

Applying the above test to the facts of this case I have no doubt that the accused have a reasonable

(1) (1925) I. L. R. 6 Lah. 396.

(2) (1877) 2 Q. B. D. 558.

apprehension that they will not be fairly dealt with by the Magistrate. They are entitled to claim that if they are found guilty they should be punished for the offence committed by them and having regard to all the circumstances under which it was committed; and they are equally entitled to claim that no extraneous considerations such as their conduct of the defence or the applications for transfer made by them should weigh with the Magistrate in judging of their guilt or otherwise and in determining the measure of their punishment. Yet this is the threat that they reasonably apprehend has been held out to them by the Magistrate.

The learned Government Advocate commenced his arguments by stating that the attitude of the Magistrate was in fact unduly favourable to the accused and unfavourable to the prosecution, in so much that in recording the statement of some of the defence witnesses the Magistrate scratched out the statements made by them earlier in the cross-examination when such statements had been contradicted by the prosecution by documentary evidence. As an instance of this he read out the statement of a witness who had made a different statement earlier but when the Crown counsel confronted him with some documents he admitted that what he had stated before was stated under some misapprehension. The Magistrate instead of recording his statement as given later scratched out the earlier statement and substituted therefor the one made later. This of course is an inexcusable irregularity and no Magistrate who knows his work ought to be guilty of it. The learned Government Advocate stated that those concerned with the prosecution of the cases in the Court below were not satisfied with the conduct of the cases by the Magistrate, and

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that a transfer would be advantageous to the prosecution but he could not ask for one. The result is that before me both the Government Advocate and the counsel for the accused adversely criticised the impartiality of the Magistrate and his grasp of proper procedure and the correct rules of evidence. The cases are important both from the point of view of the prosecution and the accused and it is desirable that they should be heard by a more competent Magistrate in whom both parties have confidence.

I, however, felt reluctant to transfer the cases at this stage, but Mr. B. R. Puri, who appeared for the applicants, stated that if the cases were transferred, his clients would not ask for *de novo* trials under section 350, Criminal Procedure Code, but they would only ask that two witnesses for the defence be examined, *i.e.*, the Manager of the Royal Typewriter Co. and one Mr. M. C. Mehta. This would obviate the difficulty that I felt in transferring these cases at this stage. The prosecution is not entitled to claim a *de novo* trial, but a discretion is given to the Magistrate under section 350 to act either on the evidence recorded by his predecessor or partly recorded by his predecessor and partly by himself.

In view of what I have stated above, I consider that these are cases in which a transfer is desirable in the interests of justice. I have considered the question of the place where the cases should now be heard. The Government of India are about to move to Delhi soon. I think it will, under the circumstances, be convenient and less expensive both to the prosecution and the accused if the cases are heard in Delhi. I accordingly withdraw the cases from the Court of Mr. P. C. David, Special Magistrate, and transfer them to the Court of Mr. P. J. Anderson, Additional District

Magistrate, Delhi. I do not think that there is any question as to the jurisdiction of Mr. P. J. Anderson to try these cases, but if there is any such question, I have no doubt that the Government will issue the necessary notification conferring the requisite powers on him. With the exception of recording the statements of the Manager, Royal Typewriter Co., and Mr. M. C. Mehta, if the accused so desire, the Magistrate shall not hold a *de novo* trial at their instance. I do not, of course, wish to fetter the discretion of the Magistrate under section 350 of the Criminal Procedure Code, to recall any witness whose evidence, which has already been recorded, he may find himself unable to follow or whom he may desire to call or recall.

N. F. E.

*Petition accepted.*  
*Case transferred.*

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