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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Reserved on: 21.12.2022
Pronounced on: 05.01.2023

+ **CRL.A. 273/2009**

SUNIL

..... Petitioner

Through: Ms. Gayatri Nandwani
(DHCLSC) with Ms. Mudita
Sharda, Advocate

versus

STATE

..... Respondent

Through: Mr. Naresh Kumar Chahar,
APP for the State with SI
Sandeep Yadav, P.S. Malviya
Nagar

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The present appeal has been filed by appellant under Section 374 read with Section 482 of Code of Criminal Procedure, 1973 ("Cr.P.C.") seeking setting aside of the impugned judgment dated 19.03.2009 and order on sentence dated 30.03.2009 passed by the learned Additional Sessions Judge-01, South, Patiala House Court, New Delhi in the Sessions Case No. 124/07 *vide* which the appellant has been convicted for the offences punishable under Section 399/402 of the Indian Penal Code, 1860 ("IPC") and Section 25 of Arms Act, 1959.

2. The facts upon which the present FIR was registered are that on 11.07.2007, Sub Inspector K.C. Kaushik alongwith other staff consisting of Head Constable Pritam Singh, Constable Ram Saran and Constable Maz Ahmed were on petrolling duty and later, were also joined by Constable Dev Lagan. A secret information was received by SI K.C. Kaushik that in MCD/ACC Park, Panchsheel Park, 5-6 miscreants are sitting intending to commit some crime. The information was passed on to the S.H.O, Police Station Malviya Nagar on telephone. 4-5 passersby were requested to join raiding party but they did not join and left without revealing their names and addresses. Thereafter, SI K.C. Kaushik alongwith raiding team reached at Badarpur Service Lane near Panchsheel Park near MCD/ACC Park at about 10.00 PM. SI K.C. Kaushik had directed the raiding party to go to South West corner carefully and HC Pritam Singh heard the conversation of accused persons and informed him that five accused persons were sitting while one had a country made revolver in his hand. He further revealed that they were talking to each other about tying the guard of one Sabharwal and then taking away the valuables kept in the *kothi*. They were also saying that they will open fire if anyone will raise alarm. Thereafter, the raiding team surrounded the accused persons but they started running in different directions. Four accused named Omkar, Sukhpal, Sunil and Suraj were overpowered. One loaded country made revolver was recovered from accused Sukhpal. One buttondar knife was recovered from accused Sunil. One raxine bag was also recovered from accused Sunil which contained 2.5 metres long plastic rope and a black coloured cloth. One knife was recovered from

accused Omkar, however, fifth accused had escaped who could not be arrested by the police. Thereafter, investigation was carried out. Chargesheet was prepared for offences punishable under Section 399/402 IPC read with Section 25 of Arms Act and charges were framed against four accused persons mentioned above. Vide the impugned judgment, four accused persons were convicted for committing offences punishable under Section 399/402 IPC as well as under Section 25 of Arms Act. As per prosecution story, no arms were recovered from accused Suraj, however, he was convicted for offence punishable under Section 25 of Arms Act.

3. It is argued by learned counsel for accused/appellant that as per mandate of Sections 399/402 IPC, the essential ingredient for commission of offence of dacoity is association of at least five or more persons whereas in the present case, only four persons were arrested, and fifth person could not be arrested. It is also stated that this fifth person could never be found and, therefore, it can be concluded that there was no fifth person present to constitute the offence in question. It is also argued that the accused persons were allegedly preparing to commit dacoity at the house of one Sabharwal by tying his guard, however, there is no investigation qua the existence of such a person or house. It is further argued that a perusal of Trial Court Record also reveals lack of legal assistance rendered to the accused persons including present appellant during the trial.

4. Learned APP for the State, on the other hand, argued that the accused persons have been rightly held guilty of preparation for committing dacoity. It is also stated that the name of the fifth accused is

mentioned in the disclosure statement, though, the said person had run away when the raiding party had reached the spot.

5. The arguments of both the sides have been heard. Records of the case have also been perused.

6. In the present case, it is alleged by the prosecution that Head Constable Pritam Singh had overheard the accused persons making preparation and hatching conspiracy to commit offence of dacoity at house of one Sabharwal after tying his guard. However, a perusal of material on record reveals that neither the place where the accused persons were allegedly preparing to commit the offence in question was identified nor the accused were made to point out the same during investigation. This casts serious doubt on the case of prosecution as to whether such a person or house was actually situated or located nearby or even existed for the commission of offence in question.

7. A perusal of the record also reveals that it is mentioned in the FIR that during search of present appellant Sunil, five black masks of cloth as well as plastic rope measuring 2.5 metres were recovered from him, however, the testimony of all the witnesses examined in the Court including the testimony of the Investigating Officer is completely silent on this point. In the testimony, there is nowhere stated that raxine bag, masks and plastic rope were recovered from the possession of appellant Sunil. Though the seizure memo regarding the seizure of bag, plastic rope and masks is on record, the witnesses have neither spoken about it nor has the said case property been produced before the Court or identified by any of the witnesses including the Investigating officer. Since it was not produced before the Court and neither of the witnesses

have spoken about the same despite it being a crucial piece of evidence against the accused persons, it has made the case of the prosecution doubtful. The IO has also not explained in his statement or in the FIR, where the entire proceedings are mentioned, as to how the rope was measured to be 2.5 metres in length which has been mentioned in the seizure memo. The above discussion makes it clear that the learned Trial Court failed to take note of the above said while appreciating evidence.

8. The Court while deciding the present appeal also notes that the learned Trial Court failed to provide effective legal aid to the present accused/applicant. A perusal of the record of the learned Trial Court reveals that total five witnesses were examined in the present case who were police witnesses. None of the witnesses has been cross-examined in this case and it is mentioned, after examination-in-chief was conducted of each witness, that:

“PW1 Ct. Maj Ahmed, 1168 SD, PS Malviya Nagar, ND
On 12.07.07 I was posted as Ct. as PP Sheikh Sarai PS
Malviya Nagar.....

XXXX by accused Sunil.
Nil. Opportunity given.

PW2 HC Pritam Singh, 186 SD, PS Badarpur, ND
On 12.07.07 I was posted as HC as PP Sheikh Sarai PS
Malviya Nagar. On that day, I alongwith SI K.C. Kaushik, Ct.
Maj Ahmad, Ct. Ram Sharan and myself were on patrolling
duty.....

XXXX by accused Sunil.

Nil. Opportunity given.

PW3 HC Charan Singh, 1722 SD, PS Malviya Nagar, ND

On 12.07.07 I was posted as HC as PP Sheikh Sarai PS Malviya Nagar and was working as DO from 12 midnight from 8 AM.....

XXXX by counsel for accused Sunil.

Nil. Opportunity given.

PW4 ASI Gopi Chand, PS Malviya Nagar, ND

On the intervening night of 11/12.07.07 I was posted as ASI at PS Malviya Nagar. On that day the case was marked to me.....

XXXX by counsel for accused Sunil.

Nil. Opportunity given.

PW5 SI K.C. Kaushik, PS Amar Colony, Delhi

On 12.07.07 I was posted as IC PP Sheikh Sarai PS Malviya Nagar. On that day I alongwith HC Pritam Singh, Ct. Maj Ahmed, Ct. Ram Sharan were on patrolling duty.....

XXXX by accused Sunil.

Nil. Opportunity given.

9. This makes it clear that in the present case, opportunity was granted to the accused persons to cross-examine the witnesses as they were not represented by their counsel nor were provided legal aid counsel. But the order dated 03.09.2008 mentions that the accused persons had requested to be provided with legal aid counsel. However, prior to that, all the five witnesses in this case stood examined.

10. Order sheet dated 18.02.2008 only mentions that counsel for accused was present with the accused. The name of the counsel is not mentioned and interestingly, two material witnesses i.e. PW1 Constable Maz Ahmed and PW2 HC Pritam Singh were examined on the said date. The evidence so recorded on that day does not mention the presence of their counsel but mentions that opportunity was given to the accused to cross-examine the witness (evidence mentions “XXXX by accused. Nil. Opportunity given”). The non cross-examination of the major witnesses, thus, makes it clear that no counsel was present on that day as in case the counsel would have been present, it was the duty of counsel to cross-examine the material witness and in case they were not examined, it was essential for the learned Trial Court to have mentioned the name of the counsel and the fact that though the witnesses were tendered for cross-examination, the counsel for accused did not avail the said opportunity. Similar is the fact regarding the examination of PW-3 HC Charan Singh and PW-4 ASI Gopi Chand. That on the day when PW-5 Investigating Officer was examined, there is no mention even of the word “accused present with counsel”. The order sheets, thereafter, do not mention the presence of the counsel when PW-5 was examined. It is, therefore, clear that it was only on 03.09.2008 when the accused persons requested that they are unable to engage a lawyer, that Sh. Mittal was appointed as Amicus Curie for accused persons at State’s expenses. In a nutshell, except at the time of recording of statement under Section 313 Cr.P.C. and hearing arguments on sentence, the Amicus Curie was not present, even on the day when final arguments were heard as his presence is not marked. It

is also not mentioned that he had addressed arguments when the final arguments were heard on 07.03.2009. Thus, learned Amicus Curie was not present on the dates fixed for final arguments and also prior to that. On 04.12.2008, when it is recorded that the accused persons, who had earlier expressed their desire to lead defence evidence, stated before the learned Court that they did not want to lead defence evidence, the learned Amicus Curie was not present. It is, thus, a case where the accused remained unrepresented and unaided during the entire effective stages of trial.

11. Even the Constitution of India guarantees certain fundamental rights to the accused which stand unfettered during the trial as well as imposes certain duties upon the State, which are reproduced herein below:

Article 21 reads as under:

“21. Protection of life and personal liberty.— No person shall be deprived of his life or personal liberty except according to procedure established by law.”

Article 22 reads as under:

“22. Protection against arrest and detention in certain cases.— (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice...”

Article 39A reads as under:

“39A. Equal justice and free legal aid.—The State shall secure that the operation of the legal system promotes

justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.”

12. The trial in this case for a heinous offence which attracts punishment upto 10 years was, therefore, conducted in most casual manner. The Trial Court did not deem it appropriate to appoint any counsel to defend the appellant/accused, neither when the counsel engaged by him did not appear at the commencement of the trial (which is not clear from the order sheets unfortunately), nor at the time of recording of evidence of the prosecution witnesses. The accused, therefore, did not have legal aid of a counsel in real sense, at any stage of trial. Needless to say, the accused was entitled to such legal aid during the entire period of trial. As already mentioned above, the appointment of the Amicus Curie was at a much later stage after the entire evidence had been recorded and even thereafter, learned Amicus Curie appeared only twice. This Court notes with regret that even at the stage of final arguments, he was not present to defend the appellant who he had been asked to defend at the State's expense. There is no doubt that right of cross-examination to any accused in a criminal case to discredit the witnesses and to test veracity of the statement is the most vital part of a criminal trial.

13. In the case of *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569, the Constitution Bench of Hon'ble Apex Court explained the purpose and importance of cross-examination of a witness. The relevant observations are as under:

“278. Section 137 of the Evidence Act defines what cross-examination means and Sections 139 and 145 speak of the mode of cross-examination with reference to the documents as well as oral evidence. It is the jurisprudence of law that cross-examination is an acid-test of the truthfulness of the statement made by a witness on oath in examination-in-chief, the objects of which are:-

- (1) To destroy or weaken the evidentiary value of the witness of his adversary;
- (2) To elicit facts in favour of the cross-examining lawyer’s client from the mouth of the witness of the adversary party;
- (3) To show that the witness is unworthy of belief by impeaching the credit of the said witness;

And the questions to be addressed in the course of cross-examination are to test his veracity; to discover who he is and what is his position in life; and to shake his credit by injuring his character”.

14. The aforesaid view was further reiterated by the Apex Court in *Jayendra Vishnu Thakur v. State of Maharashtra* (2009) 7 SCC 104, wherein it was observed that:

“24. A right to cross-examine a witness, apart from being a natural right is a statutory right. Section 137 of the Evidence Act provides for examination-in-chief, cross-examination and re-examination. Section 138 of the Evidence Act confers a right on the adverse party to cross-examine a witness who had been examined in chief, subject of course to expression of his desire to the said effect. But indisputably such an opportunity is to be granted. An accused has not only a valuable right to represent himself, he has also the right to be informed thereabout. If an exception is to be carved out, the statute must say so expressly or the same must be capable of being inferred by necessary implication. There are statutes like the Extradition Act, 1962 which excludes taking of evidence vis-à-vis opinion.”

15. This Court also notes that it has been laid down by the Hon'ble Apex Court in catena of judgments that right to a fair trial is included in the spirit of right to life and personal liberty of a person. The very object of providing effective legal aid to a person undefended or unrepresented is to ensure that he gets free, fair and just trial in a criminal case. The Hon'ble Apex Court in the case of *Zahira Habibullah Sheikh(5) v. State of Gujarat, (2006) 3 SCC 374*, has explained the concept of fair trial to an accused and that it was central to the administration of justice and the cardinality of protection of human rights. The observations of Apex Court read as under:

“35. 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, crime being public wrong in breach and violation of public rights and duties, which affects the whole community as a community and is harmful to 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. Interest of society is not to be treated completely with disdain and as persona non grata. The courts have always been considered to have an overriding 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. The 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.

36. 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 the 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 a Nelson eye to the needs of 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 an 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.

37. 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 to a fact or relevant facts which may lead to the discovery of the fact in 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.”

16. In *M.H. Hoskot v. State of Maharashtra*, (1978) 3 SCC 544, the Hon’ble Supreme Court had expressed as under:

"14. The other ingredient of fair procedure to a prisoner, who has to seek his liberation through the court process is lawyer's services. Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise; and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side. Our judicature, moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer power for steering the wheels of equal justice under the law. Free legal services to the needy is part of the English criminal justice system. And the American jurist, Prof. Vance of Yale, sounded sense for India too when he said:

"What does it profit a poor and ignorant man that he is equal to his strong antagonist before the law if there is no one to inform him what the law is? Or that the courts are open to him on the same terms as to all other persons when he has not the wherewithal to pay

the admission fee?"

17. Similarly, the observations of Hon'ble Apex Court, on right to fair trial and effective legal aid, in *Mohd Hussain v. State (Govt. of NCT of Delhi) (2012) 2 SCC 584* are reproduced herein-under:

"13. It will, thus, be seen that the trial court did not think it proper to appoint any counsel to defend the appellant/accused, when the counsel engaged by him did not appear at the commencement of the trial nor at the time of recording of the evidence of the prosecution witnesses. The accused did not have the aid of the counsel in any real sense, although, he was as much entitled to such aid during the period of trial. The record indicates, as I have already noticed, that the appointment of learned counsel and her appearance during the last stages of the trial was rather proforma than active. It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case, to confront the witnesses against him not only on facts but also to discredit the witness by showing that his testimony-in-chief was untrue and unbiased.

16. In my view, every person, therefore, has a right to a fair trial by a competent court in the spirit of the right to life and personal liberty. The object and purpose of providing competent legal aid to undefended and unrepresented accused persons are to see that the accused gets free and fair, just and reasonable trial of charge in a criminal case.

24. In the present case, not only the accused was denied the assistance of a counsel during the trial and such designation of counsel, as was attempted at a late stage, was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard. The Court ought to have seen to it that in the proceedings before the court, the accused was dealt with justly and fairly by keeping in view the cardinal principles that the accused of a

crime is entitled to a counsel which may be necessary for his defence, as well as to facts as to law. The same yardstick may not be applicable in respect of economic offences or where offences are not punishable with substantive sentence of imprisonment but punishable with fine only. The fact that the right involved is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our judicial proceedings. The necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of a counsel was a denial of due process of law. It is equally true that the absence of fair and proper trial would be violation of fundamental principles of judicial procedure on account of breach of mandatory provisions of Section 304 of Cr.P.C.

42. While holding the appellant guilty the trial court has not only relied upon the evidence of the witnesses who have been cross-examined but also relied upon the evidence of witnesses who were not cross-examined. The fate of the criminal trial depends upon the truthfulness or otherwise of the witnesses and, therefore, it is of paramount importance. To arrive at the truth, its veracity should be judged and for that purpose cross- examination is an acid test. It tests the truthfulness of the statement made by a witness on oath in examination-in-chief. Its purpose is to elicit facts and materials to establish that the evidence of witness is fit to be rejected. The appellant in the present case was denied this right only because he himself was not trained in law and not given the assistance of a lawyer to defend him. Poverty also came in his way to engage a counsel of his choice...”

18. Despite there being catena of judgments emphasizing the need and importance of legal aid, no effective legal aid was provided to the accused persons in present case. Order sheets were written in most indifferent manner by the learned Trial Court. At most places, the name

of the counsel is not mentioned in the order sheets. The name, presence or absence of the counsel was not mentioned in any of the evidence recorded. The problem does not end here. The present case was being tried for an offence of preparation of dacoity which attracts punishment upto 10 years. No legal aid was available to the accused almost throughout the trial, most glaringly, at the time of final arguments and recording of evidence. The Trial Court itself should have realized the duty cast on it to provide effective legal aid to an accused who is poor and marginalized and could not defend himself. The Courts are the guardians of a person's liberty and are duty bound by Constitution as well as their oath to ensure fair trial to an accused which is the constitutional goal set by the Indian Constitution itself.

19. Vast sums of money are disbursed to establish legal aid centres, and State Legal Services Authorities to help those who fail to hire the best lawyers due to their poverty. Lawyers are empanelled and paid to prosecute and defend those who are unable to hire lawyers to defend themselves. Needless to say, lawyers in criminal Courts are absolute necessity and not luxury.

20. The right to fair trial is a fundamental right. This noble goal will fail in case if poor man charged with an offence is unable to defend himself without lawyer to assist him. As already mentioned above, the more serious offence, the likely consequences are greater. The Court should have kept in mind the decision of the Hon'ble Apex court in *Hussainara Khatoon (4) v. State of Bihar (1980) 1 SCC 98*. The right of free legal services is essential ingredient of reasonable, fair and just procedure for a person accused of an offence and same has been held

implicit in the guarantee of Article 21. It is most unfortunate that despite such mandate, at times, as in the present case, there is utter disregard of the decision of the highest Court as well as the constitutional mandate.

21. It has been held in the case of *Khatri (2) v. State of Bihar (1981) 1 SCC 627* that “legal aid would become merely a fake promise and it would fail of its purpose, if it were to be left to a poor ignorant and illiterate accused to ask a for free legal services. The Magistrate or the Sessions Judge before whom the accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State.”

22. In the present case, the absence of cross-examination has resulted in gross miscarriage of justice and the Court has to guard against such an eventuality. It is to be remembered that in India, the absence of fair and proper trial is not only violation of fundamental principles of judicial procedure and constitutional mandate, but also violation of mandatory provisions of Section 304 Cr.P.C. The assistance of a legal counsel, in a meaningful way, was absent throughout the trial. Judiciary has a crucial role to play in ensuring enforcement of human rights and has to meet the great challenge towards making justice accessible in practical terms to the poor in the country.

23. It is important to understand the reality of disadvantage of an individual and ensure proactive steps to prevent injustice by providing effective legal aid in order to deliver equality in justice. The constitutional guarantees of free and fair trial should remain meaningful

to the poor of the country and the judiciary has to remain vigilant to protect the interest of the disadvantaged groups also.

24. This is a classic case where all cannons of justice were kept aside while passing the impugned judgment as the accused was not provided legal aid which he was entitled to get under the Constitution of India as well as under Cr.P.C. The accused has faced trial for last 15 long years. At times, though the agony of a person undergoing trial is not mentioned on the paper while a Judge writes a judgment, the trial which has been prolonged beyond 15 years is an agony itself. The stress of facing a criminal trial is punishment unannounced in a case, as the present one.

25. Considering the overall facts and circumstances of the case, this Court's judicial conscience does not permit to now remand back the matter and direct the learned Trial Court to again conduct a fresh trial. In view thereof, the accused is acquitted of all the charges since the trial in itself was vitiated due to non-assistance of accused by legal aid counsel, besides existence of several inconsistencies and lacunae in the case of prosecution before the learned Trial Court.

26. Bail bond, if any, stands cancelled. Surety stands discharged.

27. Accordingly, the appeal is allowed in above terms.

28. A copy of this judgment be circulated by learned Registrar General of this Court to all the District Courts in Delhi and be also sent to the learned Director (Academics), Delhi Judicial Academy for doing the needful.

SWARANA KANTA SHARMA, J

JANUARY 05, 2023/ns