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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 487 OF 2008

Ramchandra Nivrutti Mulak,)
Aged 66 years, residing at)
Chas-Akharwadi, Naharevasti,)
Taluka Khed, Dist. Pune.).. Appellant

Versus

The State of Maharashtra).. Respondent

Ms. Rebecca Gonzalvez for the Appellant.
Mr.P.S. Hingorani, A.P.P. for State.

**CORAM: F.I. REBELLO &
K.U.CHANDIWAL, JJ.**

DATED: JUNE 26, 2008

ORAL JUDGMENT (Per F.I. Rebello.J.):

. The appellant by the judgment dated 5.11.2004 in Sessions Case No. 92 of 2003 has been convicted for the offence punishable under Section 302 and other offences and has been sentenced for imprisonment for life and to pay fine of Rs.100/- in default to suffer simple imprisonment for one day. There is direction for destruction and return of the properties in terms of direction No. 2 of the order. The appellant has preferred the present appeal against his conviction.

2. At the hearing of this appeal, on behalf of the appellant, the learned counsel submits that the appellant was unrepresented before the Sessions

Court, though a lawyer had filed vakalatnama that lawyer had filed a purnis for withdrawing his appearance. The learned Sessions Judge rejected the said request. The lawyer did not turn up for the trial and the matter proceeded without the appellant having services of a legal practitioner during the course of the trial.

3. A right to fair trial which includes right for legal assistance it is submitted is part of the right to life enshrined under Article 21 of the Constitution of India. The accused who is charged for the offences which carries with it the sentence for life and or death, if convicted, could not have been denied the services of the advocate on the ground that he was represented, though in fact the lawyer who had filed vakalatnama did not participate in the proceeding. The leaned counsel in the course of her arguments has taken us through the rules framed under the Legal Services Authorities Act, 1987, Maharashtra Legal and Advice scheme, 1979 and the provisions of the Criminal Manual framed by this court and the judgments of the Supreme court in Suk Das and another Vs. Union Territory of Arunachal Pradesh, 1986, Cri.L.J. 1084 and another, and Khatri and Others Vs. State of Bihar and Others, 1981 Cri.L.J. 470.

4. The question that we have been called upon to answer in this appeal can be framed as under :

"If the lawyer appearing for the accused files application for withdrawal, which is rejected by the court, and the lawyer fails to turn up for trial, is a duty cast on the trial court to ask the accused to make alternative arrangement for appearance by lawyer or appoint a lawyer for the accused under legal aid scheme?"

5. It is now settled law that free legal assistance at state cost is a fundamental right of the person accused of an offence which may involve jeopardy to his life or personal liberty and this fundamental right pre-supposes the requirement of a reasonable, fair and just procedure prescribed under Article 21 of the Constitution of India. See M.H. Hoskot Vs. State of Maharashtra, AIR 1978 SC 1548. It is also well established that the right to free legal services is essential ingredient of reasonable, fair and just procedure for the person accused of offence and is implicit in the guarantee under Article 21. See Hussainara Khatoon's case, AIR 1979 SC 1369. The Supreme Court in Suk Das case (supra), had framed the following question :-

"The question is whether an accused who on account of his poverty is unable to afford legal representation for himself in a trial involving possibility of imprisonment imperiling his personal liberty, is entitled to free legal aid at State cost and whether it is obligatory on him to make an application for free legal assistance for the Magistrate or the Sessions Judge trying him is bound to inform him that he is entitled to free legal aid and inquire from him whether he wishes to have a lawyer provided to him at State cost; if he is not so informed and in consequence he does not apply for free legal assistance and as a result he is not represented by any lawyer in the trial and is convicted, is the conviction vitiated and liable to be set aside?"

. After considering the constitutional provisions and earlier judgments, the court held that the Magistrate or the Sessions Judge before whom an accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the service of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. See

Khatri Vs. State of Bihar (supra). Answering the question the court held that the conviction of the appellant therein where the appellant remained unrepresented by lawyer was clearly in violation of the fundamental rights of the appellant under Article 21 of the Constitution and the trial was accordingly held to be vitiated on account of fatal constitutional infirmity and the conviction and sentence imposed against the appellant was set aside. The court also observed that as a consequence of quashing of the conviction, would be that the appellant would have to be tried again in accordance with the law after providing free legal assistance to them at the State cost. On the facts of that case therein, the Supreme Court was pleased to direct that no fresh trial should be held against the appellant.

6. Section 304 of the Code of Criminal Procedure, is a provision providing for legal aid to the accused at State cost in certain cases. Section 304 pertains to trial by the Court of Sessions where the accused is not represented by a pleader. This court with previous approval of the State Government has made rules under Section 304 which are known as Rules regarding legal aid to unrepresented accused persons in cases before the court of Sessions and have come into effect from 27.10.1982. Under the

Rules, a duty is cast on the Presiding Officer to explain to every unrepresented accused person the provisions of the rules of Legal Aid as soon as he is produced before him for the first time and shall certify under his signature the fact of having done so in the record of the case to that effect. After explaining to such unrepresented accused person if the accused states that his income does not exceed Rs.5,000/- per annum, he shall be asked if he desires to submit an application in the Form specified in the Schedule appended to these Rules. Rule 6 and 7 deals with the panel of legal practitioners and constitution of panel. Rule then deals with the fees payable to legal practitioners. it is not necessary to refer to the other rules.

. This court has also framed rules which read as :

"Engagement of advocate or pleader appointed defence of persons accused of offence punishable with death".

. Under those rules, in all cases tried before a Sessions Judge in which any person is liable to be sentenced to death, the accused shall be informed by the committing Magistrate at the time of committal that unless he intends to make his own arrangements

for legal assistance, the higher court i.e. Sessions Court will engage a legal practitioner at Government expense to appear before it on his behalf.

. In the Legal Services Authorities Act, 1987, Section 12 thereof, sets out the criteria as to persons who are entitled to legal services under the Act. This includes persons in custody. Earlier, Rules had been framed known as Maharashtra State Legal Aid Advice Scheme, 1979. The panel of legal practitioners and how it is to be prepared has been set out. The fees now paid are in terms of notification dated 1.10.1997. It is therefore, clear that pursuant to the judgments of the Supreme Court as also in terms of the rules framed and existing in the State of Maharashtra, either flowing from Section 304 of Code of Criminal Procedure or under the Legal Services Authorities Act, 1987, provisions have been made for providing legal aid.

7. We may now refer to the facts of the present case. Before the Sessions Court, the accused had produced vakalatnama of Mr. R.N. Parchit, Advocate on 23.5.2003. Advocate Parchit did not remain present thereafter and charge against the accused was framed on 20.11.2003. Roznama for that day as recorded shows that Advocate did not remain present. On 7.1.2004 Advocate Mishra filed vakalatnama. The

said Advocate on 5.2.2004 filed an adjournment application. Similarly on 7.9.2004, filed an application for adjournment on the ground of "No instructions". On 1.11.2004, the advocate was absent and he filed no instruction pursis. The same was not accepted by the learned court. The trial however, proceeded without the appellant being assisted by advocate or the court informing the appellant that he could avail of the services of the lawyer under free legal aid scheme.

8. This is, therefore, not a case where the appellant was unrepresented. It is a case where the lawyer applied to be discharged and the learned Judge refused to discharge him and the lawyer inspite of that order did not remain present. The learned Judge proceeded with the trial on the basis that the accused was represented by a lawyer even though that lawyer after his application was rejected choose not to appear. The logic of the learned Judge seems to be that as the lawyer was not allowed to withdraw, the accused continued to be represented. It is perhaps this approach, which resulted in the learned Judge not asking the appellant as to whether he desires to avail the services of free legal aid.

. In our opinion, the case where the accused

is unrepresented and a case where accused is represented and the lawyer seeks to withdraw his appearance by filing purnis and does not attend trial stand on an equal footing. The learned Judge by rejecting the application for withdrawal, at the highest could have taken steps against the concerned lawyer on failure to remain present. The Court did not pose to itself the question whether in such a case the trial could be proceeded with and if proceeded with it would satisfy the mandate of Article 21. Courts cannot play lip service to the right under Article 21. Courts in such a case must play an active role to ensure a fair trial. In the instant case it was clearly an infraction of the appellant's right to a fair trial guaranteed under Article 21 of the Constitution of India. This is not a case where the appellants engaged a Lawyer and the Lawyer choose not to appear on that day or dates. We are not examining the effect of such a situation in the present case. In the instant case, the lawyer filed an application for withdrawal. We, therefore, are only considering a class of cases where appearance is filed on behalf of an accused but before commencement of the trial, the lawyer seeks to withdraw and his application for withdrawal is rejected by the learned Court and the lawyer does not take part in the trial. The right under Article 21 was not satisfied by rejecting the application

for withdrawal filed by the lawyer. Such rejection was an empty formality as the lawyer did not put in his appearance and the trial proceeded and concluded without his appearance. Article 21 is not merely to be read from a textbook, it must breathe life in a Court.

9. The mandate of Article 21 therefore, is not dependant whether a Vakalatnama is filed or not. Though when a Vakalatnama is filed and the lawyer appears the mandate of Article 21 is satisfied. Once a lawyer applies to withdraw and chooses not to appear, there is burden cast on the courts to inform the accused either to engage another lawyer or to inform him that he is entitled to free legal aid if he so desires. It is only in the event that the accused does not seek to engage the services of the Lawyer after being informed and declines assistance under free legal aid scheme, can the trial proceed. The trial, therefore in the instant case ought not to have proceeded with in the absence of the accused being informed of his right to be represented by lawyer. In our opinion, therefore, on the facts of this case, the trial was in contravention of the appellant's right to fair trial as enshrined under Article 21 of the Constitution of India. The conviction and sentence of the appellant for the offences for which he has been charged, convicted

and sentenced will have to be set aside.

10. We may only mention that the State no doubt has made provisions for free legal aid. By merely fixing some fees, the State has not discharged its burden of providing free legal aid. The fees as framed must be reasonable so as to enable competent lawyers to be empanelled. Empanelling advocates who are not conversant with criminal procedure and or of Evidence Act or Indian Penal Code would be defeating the very object behind Section 304, considering the ratio of the judgments of the Supreme Court, which have held that right to free legal assistance is a right guaranteed under Article 21 of the Constitution of India. From the records also we find that the fees were last revised on 1.10.1997. Ten years have elapsed since the fees were revised. In so far as the person who has been tried for the offence punishable with death or imprisonment of seven years or more, under rule 6 of Rules regarding legal aid to unrepresented accused persons the learned Judge when the accused seeks free legal aid, is bound to appoint a Senior Advocate with a junior Advocate from the Panel. Under Rule 10, Senior Advocate is not to be paid fees but to work as amicus curiae. The junior advocate has to be paid fees in terms which are notified. When the Supreme Court directed that free legal aid should be

provided to accused, it did not mean that the Senior Lawyers would always work as amicus curiae. This can not be described as legal aid at State expenses. We have come across cases, where the Senior counsel of this court have agreed to appear as amicus curiae in some cases. Similarly other lawyers in the Sessions Court. Considering the number of matters of unrepresented accused and panel of lawyers prepared that Senior lawyers should be called upon to work as amicus curiae in several matters is not acceptable. The object behind providing free legal services in such matters would be defeated. Most of the time, the rule itself is not being followed. It would therefore, be appropriate for the State Government to reconsider the rules for grant of legal aid and also to fix proper remuneration for the advocates under the legal aid scheme. This court on its administrative side has also to reconsider the rules made under Section 304 of the Code of Criminal Procedure.

11. For the aforesaid reasons we set aside the conviction and sentence imposed on the appellant. We remand the matter to the trial court for de novo trial after the stage of framing of the charge. We make it clear that all proceedings after 12.11.2003 are treated as null and void. We further make it clear that the witnesses will be examined afresh.

The trial to commence on the writ being served on the court and the court appointing a lawyer under the legal aid scheme for the appellant. On the lawyer being appointed, the trial to commence within four weeks and to be completed within four weeks thereafter. We further make it clear that the lawyer to be appointed considering the gravity of the charge should be one who has conducted trials for the offence punishable under Section 302 of Indian Penal Code.

. A copy of this judgment be forwarded to the Chief Secretary, State of Maharashtra for necessary compliance. A copy be also forwarded to the Registrar General, to place the matter before the learned Chief Justice for appropriate directions.

(K.U.CHANDIWAL, J.)

(F.I.REBELLO, J.)