

**Case :-** CRIMINAL REVISION No. - 1393 of 2019

**Revisionist :-** Shadaan Ansari

**Opposite Party :-** State Of U.P. & 2 Others

**Counsel for Revisionist :-** Bipin Kumar Tiwari

**Counsel for Opposite Party :-** Govt. Advocate

**Hon'ble Rajeev Singh, J.**

1. Heard learned counsel for the revisionist and Shri Aniruddh Kumar Singh, learned A.G.A.
2. This revision has been filed for quashing of the order dated 21.09.2019 passed by Additional Sessions Judge/Special Judge (POCSO Act), Faizabad in Special Session Trial No. 78 of 2018, arising out of F.I.R. No. 76 of 2018, under Sections 376, 506, 377 I.P.C. and Section 3/4 POCSO Act, P.S. Cantt., District Faizabad.
3. Learned counsel for the revisionist submitted that after investigation, charge sheet was filed by the Investigating Officer in F.I.R. No. 76 of 2018 (supra), on which cognizance was taken by the court below and thereafter the case was registered as S.S.T. No. 78 of 2018. After framing of charges, prosecution was allowed to produce the witnesses before the trial court. Learned counsel for the revisionist further submitted that since the revisionist was not in a position to engage lawyer, as a result, Amicus Curiae, for defending the revisionist, was provided by the trial court at the State expenses. Examination-in-chief of the witnesses of P.W. 1 to P.W. 9 was conducted before the trial court, but since the opportunity to cross examine them was not availed by the Amicus Curiae, as a result, it was closed by the trial court. He has further submitted that though in another case, Amicus Curiae cross-examined the witnesses, but the same was not real and effective. In such circumstances, application under Section 311 Cr.P.C. was moved by the revisionist for recall of the witnesses to cross-examine them, but the same was rejected by the court below vide impugned order dated 21<sup>st</sup> September, 2019 with the observation that the Amicus Curiae denied the cross-examination of the prosecution witnesses on the advise of the revisionist.
4. Next submission of the learned counsel for the revisionist is that Section 304 Cr.P.C. provides that where, in a trial before the Court of Session, the

accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State. Learned counsel for the revisionist submitted that the intention of Section 304 Cr.P.C. is for providing real and effective aid to an accused and it is the duty of the trial court to ensure proper compliance of the requirement as the accused also has the right to fair trial. In support of his submissions, learned counsel for the revisionist placed reliance on the decision of the Hon'ble Apex Court in the case of **Mohd. Hussain & Julfikar Ali Vs. The State (Govt. of NCT) Delhi, 2012 (9) SCC 408.**

5. Placing reliance on the decision of a Division Bench of this Court passed in Criminal Appeal No. 1460 of 2003 (Manglu Vs. State of U.P.), he further submitted that if the adequate legal aid has not been provided to the accused during trial, same is violative of Article 21 of the Constitution of India. It has, thus, been submitted that the impugned order is bad in the eyes of law and is liable to be set aside. The revisionist may be permitted to cross-examine the witnesses after recalling them.

6. Learned A.G.A., Shri Aniruddh Kumar Singh while opposing the prayer of the revisionist submitted that there is no illegality in the order passed by the court below in rejecting the prayer to recall the witnesses, as the opportunity to cross-examine them had already been given to the Amicus Curiae appointed by the trial court.

7. I have considered the arguments advanced by the learned counsel for the parties and gone through the record.

8. It is evident from the impugned order dated 21.09.2009 itself that the court below while rejecting the application of the revisionist, observed that the prosecution witnesses were examined during the course of trial and opportunity was given to the Amicus Curiae appointed on his behalf to cross-examine them, but on the advise of the revisionist, he denied for the same. However, by means of the application moved under Section 311 Cr.P.C., revisionist sought recall of the prosecution witnesses on the ground that he was not aware about the cross-examination of the prosecution witnesses.

9. It is also evident that the revisionist was informed that in all the three cases, Amicus Curiae was appointed by the trial court, at the expenses of the State to do effective pairvi for him, but in the present case, Amicus Curiae did not cross-examine the prosecution witnesses and it cannot be presumed that he did so on

the advice of the revisionist.

10. Section 303 and 304 of the Code of Criminal Procedure read with Rule 37 of General Rules (Criminal), 1977 framed by Allahabad High Court clearly provides for providing legal aid to defend the accused, which must be real and effective aid to an accused and it is the duty of the trial court to ensure proper compliance of the requirement to fair trial. Now, it is a fundamental right under Article 22(1) of the Constitution of India that the accused has a right to be defended by the competent practitioner. Hon'ble Apex Court in the case of **Mohd. Hussain & Julfikar Ali** (supra) has clearly held that it is the duty of the trial court to ensure proper compliance of the requirement to fair trial as the accused as a right of being provided the real and effective legal aid.

11. In the case of **Manglu Vs. State of U.P., 2018 SCC OnLine All 5751**, a Division Bench of this Court already considered the provisions of Sections 303 and 304 Cr.P.C., Rule 37 of the General Rules (Criminal), 1977 framed by Allahabad High Court as also Article 22(1) along with Articles 22 and 39A of the Constitution of India. Paragraphs 11 to 20 (relevant) are reproduced below:

"11. Before dealing with the facts relating to the first point raised by learned amicus curiae, we think it appropriate to set out the legal provisions as well as the various judgments of Hon'ble the Supreme Court on this point. Article 21 of the Constitution of India runs as follows:-

"No person shall be deprived of his life or personal liberty except according to a procedure established by law."

12. Article 22 (1) of the Constitution of India is also relevant in this respect and hence the same is quoted hereinafter for ready reference:-

**"Article 22 in The Constitution Of India 1949**

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

13. Article 39-A of the Constitution of India is also relevant and thus, the same is also quoted hereinbelow for ready reference:-

"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."

14. Section 304 of the Code of Criminal Procedure deals with legal aid to an accused, who is not represented by any lawyer and have no means to

engage any lawyer. The aforesaid Section 304 of the Code of Criminal Procedure runs as follows:-

**"Section 304 in The Code Of Criminal Procedure, 1973**

304. Legal aid to accused at State expense in certain cases.

(1) Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State.

(2) The High Court may, with the previous approval of the State Government, make rules providing for-

(a) the mode of selecting pleaders for defence under sub- section (1);

(b) the facilities to be allowed to such pleaders by the Courts;

(c) the fees payable to such pleaders by the Government, and generally, for carrying out the purposes of sub- section (1).

(3) The State Government may, by notification, direct that, as from such date as may be specified in the notification, the provisions of sub- sections (1) and (2) shall apply in relation to any class of trials before other Courts in the State as they apply in relation to trials before Courts of Session."

15. In this regard, Rule 37 of General Rules (Criminal), 1977 framed by Allahabad High Court is also relevant, thus, the said rule is also quoted hereinbelow:-

**"37. When counsel should be engaged for accused.**

In any case which comes before a Court of Session, the court may engage counsel to defend the accused person if -

(a) the charge against him is such that a capital sentence is possible, and

(b) it appears that he has not engaged counsel and is not possessed of for sufficient means to do so.

To enable the Sessions Court to arrive at a decision as regards the second condition in the preceding paragraph, the committing magistrate, shall in such case make enquiries from the accused at the time of commitment and after making such other enquiries as may be necessary, report within a month of the commitment order to the court to which the commitment is made whether the accused is possessed of sufficient means to engage counsel. Each case must be decided on its merits and no hard and fast rule as to insufficiency of means should be applied. The Sessions Court in making its decision shall not be bound by the report of the committing magistrate.

Counsel appointed under this rule shall be furnished with the necessary papers free of cost and allowed sufficient time to prepare for the defence."

16. It is not out of place to mention that Rule 37 of the General Rule

(Criminal) 1957 framed by Hon'ble Allahabad High Court is pari materia the same of the present Rule 37 of General Rule (Criminal) 1977.

17. In *Bashira vs. State of U.P.* reported in AIR 1968 SC 1313, Hon'ble the Supreme Court has held that Rule 37 of the General Rule (Criminal) of the Allahabad High Court 1957 is mandatory and any violation of the same is violative of Article 21 of the Constitution of India, because the trial has not been conducted in accordance with the procedure established by law. Accordingly, Hon'ble the Supreme Court ordered that in such situation, the trial will be vitiated. Again the aforesaid point was considered by a three Judge Bench of Hon'ble the Supreme Court in the case of *Madhav Hayawadanrao Hoskot vs. State of Maharashtra* reported in 1978 SCC (Cri) 468, and held at paragraph no. 14 that:-

"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 judiciary, moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer-power or 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(1):

"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 ?"

18. In the case of *Hussainara Khatun and Ors. vs. Home Secretary, State of Bihar* reported in AIR 1979 SC 1369, Hon'ble Supreme Court has held that free legal services to indigent and poor accused is implicit in Article 21 of the Constitution of India. The following observation of Hon'ble Supreme Court at para- 6 of the aforesaid judgment is quoted hereinbelow:-

"6. ....It is now well settled, as a result of the decision of this Court in *Maneka Gandhi v. Union of India* (1) that when Article 21 provides that no person shall be deprived of his life or liberty except in accordance with the procedure established by law, it is not enough that there should be some semblance of procedure provided by law, but the procedure under which a person may be deprived of his life or liberty should be 'reasonable, fair and just'. Now, a procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as 'reasonable fair and just. It is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the court's process that he should have legal services available to him. This Court pointed out in *M.H. Hoskot v. State of Maharashtra* (2).:"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 poor and the needy is an essential element of any 'reasonable, fair and just' procedure. It is not necessary to quote authoritative pronouncements by judges and jurists in support of the view that without the service of a lawyer an accused person would be denied 'reasonable, fair and just' procedure."

19. In the case of Khatri and Ors. v. State of Bihar reported in AIR 1981 SC 928, Hon'ble the Supreme Court has held that an accused is entitled to free legal services when he was first produced before the Magistrate and it is the duty of the Magistrate and Sessions Judge to inform every accused, who appears before them about their aforesaid legal right. Paras 4 & 5 of the aforesaid judgment is quoted hereinbelow:-

"4. That takes us to one other important issue which arises in this case. It is clear from the particulars supplied by the State from the records of the various judicial magistrates dealing with the blinded prisoners from time to time that, neither at the time when the blinded prisoners were produced for the first time before the judicial magistrate nor at the time when the remand orders were passed, was any legal representation available to most of the blinded prisoners. The records of the judicial magistrates show that no legal representation was provided to the blinded prisoners, because none of them asked for it nor did the judicial magistrates enquire from the blinded prisoners produced before them either initially or at the time of remand whether they wanted any legal representation at State cost. The only excuse for not providing legal representation to the blinded prisoners at the cost of the State was that none of the blinded prisoners asked for it. The result was that barring two or three blinded prisoners who managed to get a lawyer to represent them at the later stages of remand, most of the blinded prisoners were not represented by any lawyers and save a few who were released on bail, and that too after being in jail for quite some time, the rest of them continued to languish in jail. It is difficult to understand how this state of affairs could be permitted to continue despite the decision of this Court in Hussainara Khatonn's case. This Court has pointed out in Hussainara Khatoon's case (supra) which was decided as far back as 9th March, 1979 that the right to free legal services is clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21 and the State is under a constitutional mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer. It is unfortunate that though this Court declared the right to legal aid as a Fundamental Right of an accused person by a process of judicial construction of Article 21, most of the States in the country have not taken note of this decision and provided free legal services to a person accused of an offence. We regret this disregard of the decision of the highest court in the land by many of the States despite the

constitutional declaration in Article 141 that the law declared by this Court shall be binding through-out the territory of India. Mr. K. G. Bhagat on behalf of the State agreed that in view of the decision of this Court the State was bound to provide free legal services to an indigent accused but he suggested that the State might find it difficulty to do so owing to financial constraints. We may point out to the State of Bihar that it cannot avoid its constitutional obligation to provide free legal services to a poor accused by pleading financial or administrative inability. The State is under a constitutional mandate to provide free legal aid to an accused person who is unable to secure legal services on account of indigenious and whatever is necessary for his purpose has to be done by the State. The State may have its financial constraints and its priorities in expenditure but, as pointed out by the court in *Rhem v. Malcolm*. "The law does not permit any Government to deprive its citizens of constitutional rights on a plea of poverty" and to quote the words of Justice Blackmun in *Jackson vs. Bishop*, 404 F. Supp. 2d, 571: "humane considerations and constitutional requirements are not in this day to be measured by dollar considerations." Moreover, this constitutional obligation to provide free legal services to an indigent accused does not arise only when the trial commences but also attaches when the accused is for the first time produced before the magistrate. It is elementary that the jeopardy to his personal liberty arises as soon as a person is arrested and produced before a magistrate, for it is at that stage that he gets the first opportunity to apply for bail and obtain his release as also to resist remand to police or jail custody. That is the stage at which an accused person needs competent legal advice and representation and no procedure can be said to be reasonable, fair and just which denies legal advice and representation to him at this stage. We must, therefore, hold that the State is under a constitutional obligation to provide free legal services to an indigent accused not only at the stage of trial but also at the stage when he is first produced before the magistrate as also when he is remanded from time to time.

5. But even this right to free legal services would be illusory for an indigent accused unless the magistrate or the Sessions Judge before whom he is produced informs him of such right. It is common knowledge that about 70 per cent of the people in the rural areas are illiterate and even more than that percentage of people are not aware of the rights conferred upon them by law. There is so much lack of legal awareness that it has always been recognised as one of the principal items of the programme of the legal aid movement in this country to promote legal literacy. It would make a mockery of legal aid if it were to be left to a poor ignorant and illiterate accused to ask for free legal services. Legal aid would become merely a paper promise and it would fail of its purpose. 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. Unfortunately, the judicial magistrates failed to discharge this obligation in the case of the blinded prisoners and they

merely stated that no legal representation was asked for by the blinded prisoners and hence none was provided. We would, therefore, direct the magistrates and Session Judges in the country to inform every accused who appears before them and who is not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal services at the cost of the State. Unless he is not willing to take advantage every other State in the country to make provision for grant of free legal services to an accused who is unable to engage a lawyer on account of reasons such as poverty, indigence or incommunicado situation. The only qualification would be that the offence charged against the accused is such that, on conviction, it would result in a sentence of imprisonment and is of such a nature that the circumstances of the case and the needs of social justice require that he should be given free legal representation. There may be cases involving offences such as economic offences or offences against law prohibiting prostitution or child abuse and the like, where social justice may require that free legal services need not be provided by the State."

20. In the cases of *Suk Das and Another v. Union Territory of Arunachal Pradesh* [AIR 1986 SC 991], *Tyron Nazareth v. State of Goa* [1994 Supp. (3) SCC 321] and *Mohd. Hussain alias Zulfikar Ali v. State (Government of NCT of Delhi)* [(2012) 2 SCC 584], Hon'ble the Supreme Court had reiterated the aforesaid principle and held that if the adequate legal aid has not been provided to the accused during the trial, the same is violative of Article 21 of the Constitution of India. Thus, the conviction and sentence of such accused cannot be sustained."

12. Hon'ble Supreme Court in the case of **Anokhilal Vs. State of Madhya Pradesh, 2019 SCC OnLine SC 1637**, has held that legal aid provided by the State must be extended real and meaningful assistance. Hon'ble Apex Court has also laid down that in all cases where there is a possibility of life sentence or death sentence, Advocates, who have put in minimum 10 years of practice at the Bar, alone be considered to be appointed as *Amicus Curiae*. Relevant paragraphs 33 of the aforesaid judgment is being reproduced as under:-

"33. Before we part, we must lay down certain norms so that the infirmities that we have noticed in the present matter are not repeated:—

i) In all cases where there is a possibility of life sentence or death sentence, learned Advocates who have put in minimum of 10 years practice at the Bar alone be considered to be appointed as *Amicus Curiae* or through legal services to represent an accused.

ii) In all matters dealt with by the High Court concerning confirmation of death sentence, Senior Advocates of the Court must first be considered to be appointed as *Amicus Curiae*.

iii) Whenever any learned counsel is appointed as *Amicus Curiae*, some reasonable time may be provided to enable the counsel to prepare the matter. There cannot be any hard and fast rule in that behalf.



However, a minimum of seven days' time may normally be considered to be appropriate and adequate.

iv) Any learned counsel, who is appointed as *Amicus Curiae* on behalf of the accused must normally be granted to have meetings and discussion with the concerned accused. Such interactions may prove to be helpful as was noticed in *Imtiyaz Ramzan Khan*."

13. Admittedly, in the present case, the legal aid provided by the Amicus Curiae was not real and effective, as he denied to cross-examine the prosecution witnesses, therefore, the impugned order has been passed on the wrong premise and is liable to be set aside.

14. Trial court is directed to recall all the prosecution witnesses, whose examination-in-chief was conducted and provide opportunity to the revisionist to cross-examine them.

15. The revision is, accordingly, allowed. Impugned order dated 21.09.2019 passed by Additional Sessions Judge/Special Judge (POCSO Act), Faizabad in Special Session Trial No. 78 of 2018 is hereby quashed.

**January 14, 2020**  
**VKS**