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% 12.08.2011

Present: Petitioner in custody alongwith Mr.Pradeep Kumar Arya,
Advocate with Mr. Narinder Chaudhry, Advocate, Mr. Rana
Kunal, Advocate, Ms. Esha Singh, Mr. Anuj Tomar, Advocate &
Mr. Shobhit Mittal, Advocate.
Ms. Jasbir Kaur, APP for the respondent/State.

+Crl.Rev. P.No.296/2011

The petitioner was charged in case FIR No.603/1998 P.S. Janak Puri
for the offence punishable under Section 279/338/304A IPC and convicted
on all the counts vide judgment of learned ACMM dated 07.12.2010.
Consequent upon conviction, vide order dated 13.12.2010 he was
sentenced to undergo RI for the period of three months for the offence
under Section 279 IPC, RI for the period of one year for the offence under
Section 338 IPC and RI for the period of one year for the offence under
Section 304A IPC. In addition thereof, the convict was directed to pay
compensation of ₹ 25,000/- to the legal representative of the deceased
Atma Ram and ₹ 10,000/- to the injured Rakesh Rana.

Feeling aggrieved by the impugned judgment of conviction and
order on sentence, the petitioner preferred an appeal. The appeal was
dismissed by learned Additional Sessions Judge vide judgment dated
08.02.2011.

Instant revision petition is directed against the impugned judgment
of conviction of learned ACMM as also the order of the appellate court.

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physical file have been compared and
the digital data is as per the physical
file and no page is missing.

It is contended on behalf of the revisionist that the conviction of the revisionist is the result of an unfair trial wherein the petitioner was not provided with a reasonable opportunity to cross-examine the witnesses. Learned counsel submits that perusal of the impugned judgment would show that conviction of the petitioner is based upon the sole testimony of Rakesh Rana (PW2), who was not cross-examined on behalf of the petitioner. Learned counsel has drawn my attention to the endorsement of the court on the copy of the statement of PW2 wherein it is recorded, "cross-examination by accused himself as counsel awaited till 11:27 am not arrived, Nil. Opportunity given." Learned counsel for the petitioner submits that from this, it is apparent that the learned trial Magistrate has failed to give proper opportunity to the accused to cross-examine the witness in defence and this has resulted in gross injustice, because the petitioner could not bring out the true facts on record. In support of this contention, learned counsel for the petitioner has relied upon the judgment of the Supreme Court in the matter of **Mohd. Sukur Ali Vs. State of Assam**, 2011 Crl.LJ. 1690.

Learned APP, on the other hand, has argued in support of the judgment of conviction as well as judgment of appellate court. It is submitted that throughout the trial, the accused was being represented by defence counsel. Therefore, if the counsel for the revisionist has preferred not to appear at the time of cross-examination of the witness, no fault can be found in the procedure adopted by learned ACMM. Learned APP has thus urged for dismissal of the revision petition.

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It is not disputed that neither of the witnesses examined by the prosecution, except (PW8) Inspector Anil Sharma IO, was cross-examined. It is also not disputed that the case of the prosecution rests solely on the testimony of PW2 Rakesh Rana, the injured eye witness. From the copy of statement of PW2 on record, it is evident that Rakesh Rana was examined on 15.05.2007 in early hours of the day and at 11:27 am, the learned ACMM, instead of waiting for the counsel for the petitioner to come and cross-examine the witness, asked the accused/petitioner to cross-examine the witness on his own and when the petitioner showed his inability to do so, he closed the examination of the star witness Rakesh Rana and discharged him by recording, "Nil. Opportunity given."

The Supreme Court, in the matter of **Mohd. Sukur Ali**(supra), while dealing with the issue of the right of a person to be represented by a defence counsel, inter alia, observed thus:

"7. We are of the opinion that even assuming that the counsel for the accused does not appear because of the counsel's negligence or deliberately, even then the Court should not decide a criminal case against the accused in the absence of his counsel since an accused in a criminal case should not suffer for the fault of his counsel and in such a situation the Court should appoint another counsel as amicus curiae to defend the accused. This is because liberty of a person is the most important feature of our Constitution. Article 21 which guarantees protection of life and personal liberty is the most important fundamental right of the fundamental rights guaranteed by the Constitution. Article 21 can be said to be the 'heart and soul' of the fundamental rights.

8. In our opinion, a criminal case should not be decided against the accused in the absence of a counsel. We are fortified in the view we are taking by a decision of the US Supreme Court in Powell v. Alabama, 287 US 45 (1932), in which it was observed:

What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the

right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he is not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a State or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."

From the above, it is apparent that in a criminal trial, when the liberty is at stake, the accused has a right to be effectively represented by a defence counsel. An accused, who is not fully conversant with the nuances and technicalities of law and who is generally incapable of properly cross-examining the witnesses, is not expected to defend himself properly without the assistance of a lawyer. Therefore, it is bounden duty of the court to ensure that the accused in a criminal trial is effectively represented by a defence counsel. In case the counsel is not available to defend an accused, it is the obligation of the trial court to inform the accused that he has a right to be represented by a lawyer and whether he would like to prefer being defended by a legal aid counsel. This procedure obviously has not been followed by the learned ACMM. Therefore, in my considered view, the trial cannot be termed as a fair trial.

There is one other aspect to this case. The petitioner, in his statement under Section 313 CrPC has explained that his vehicle did not cause the accident and actually, the accident was caused by a motorcyclist. From the record, it transpires that the motorcyclist is the same person who has appeared as PW2 to prove the case of prosecution. Therefore, denial of right to cross examine PW2 has resulted in grave injustice to the petitioner. This is not to say that by exercising the right of cross examination, the petitioner definitely would have been able to establish his defence, but the fact remains that the right to cross examine would have afforded him an opportunity to bring the true facts on record.

In view of the above, I am of the view that the learned ACMM, by foreclosing the right of the petitioner to cross examine the star witness of the prosecution PW2 Rakesh Rana because of non-availability of his counsel, has committed a grave illegality resulting in prejudice to the defence of the accused/petitioner. Accordingly, I accept the revision. The judgment of conviction passed by learned ACMM as well as the impugned order of the Appellate Court is set aside and the matter is remanded back to the concerned court for trial in accordance with law.

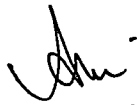
The petitioner is in judicial custody. He be released forthwith, if not required in any other case.

Petition stands disposed of.

Copy of the order be sent to the Jail Superintendent concerned for necessary action. The petitioner shall appear before the concerned Magistrate on 23.08.2011.

Trial court record be sent back.

Order Dasti.


(AJIT BHARIHOKE)
JUDGE

 **AUGUST 12, 2011**
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