

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

Date of Hearing: 30.05.2011
Date of Decision: 30.05.2011

+ **CRL.A. No.399/2011**

DEEPAK @ SUDEEP GUPTA Appellant
Through: Mr. Vikas Yadav with Ms. Upma Yadav,
Advocates.
versus

STATE Respondent
Through: Mr. Lovkesh Sawhney, APP for the State
with Inspector Satvir Singh, PS Dabri.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE G.P.MITTAL

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| 1. Whether reporters of local papers may be allowed to see the Order? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the Order should be reported in the Digest? | Yes |

J U D G M E N T

S. RAVINDRA BHAT, J. (OPEN COURT)

Crl. A. No. 399/2011

1. Issue notice.
2. Mr. Lovkesh Sawhney, APP accepts notice on behalf of the State
3. This order will dispose of an Appeal against the judgment and order of the learned Addl. Sessions Judge dated 04.02.2011 in SC No.216/2009. The Appellant and his co-accused were sentenced to undergo imprisonment for life for having committed offences punishable under Section 302/ 307/ 324/ 34 IPC and also directed to pay fine. Facts of the case for the purpose of order need not be discussed elaborately in view of the grievance made out by the Appellant.
4. The prosecution alleged, having on 18.12.2009, received information of stab injuries

inflicted upon one Firoz. The prosecution apparently relied on statement of four persons and alleged that shortly after the incident Firoz died. The Appellant and the co-accused were charged with committing offences for which they were ultimately convicted and also for offence punishable under Section 27 Arms Act. On the basis of materials available and the evidence adduced before the Trial Court, the Appellant was found guilty and he, as well as co-accused were handed down the sentence against them.

5. The Appellants grievance is, even though he had engaged a counsel to conduct the defence on his behalf, the latter did not participate in the proceedings on certain dates during which the Trial Court proceeded to record the evidence viz-a-viz the examination-in-chief, as well as cross-examination of certain witnesses and thereafter foreclosed the rights of the Appellant to cross-examine them. It is urged that when the Appellant tried to rectify this position after engaging a new counsel and moved an application on 13.07.2010 under Section 311 Cr.P.C. to recall the witnesses (whose examination had been foreclosed by the Trial Court) that application was rejected.
6. Counsel relies upon *Suk Das and Anr. v. Union Territory of Arunachal Pradesh*, AIR 1986 SC 991, to submit that effective legal assistance and the duty of the Court to offer free legal aid to the accused, in serious offences, is an obligation and integral part of right to fair trial. Reliance was also placed on *Mohd. Shakur v. State of Assam*, 2011 Part II SLT 361 by submitting that the Court of competent criminal jurisdiction, should not take precipitate action and reject application for recall of witnesses made under Section 311 Cr.P.C. and should adopt a realistic approach in order to make the guarantee of the fair trial effective.
7. Learned APP submitted that the proceedings before the Trial Court would reveal that the four witnesses, whose cross-examination was foreclosed viz-a-viz Appellant's were cross-examined on behalf of the co-accused. It was also urged that even otherwise the conduct of the Appellant would reveal that on successive dates of hearing his counsel chose to remain absent and that after the application for recall of witnesses was rejected the trial proceeded and counsel went ahead with his arguments, and made submissions during the final stage of hearing. It is submitted that in these circumstances, the Appellants' grievance is unfounded.

8. We have carefully gone through the record of the Trial Court, which was summoned on the very first date of hearing. The order sheets would reveal that on 02.02.2010 PW-1 and PW-2 were cross-examined by learned counsel for co-accused. The Appellant's counsel requested for adjournment stating that he was not well; about 20 days prior to that date of hearing. The Trial Court declined the request. On 03.02.2010 the Appellant's counsel was not present and Trial Court closed the opportunity of the Appellant to cross-examine PW-3 and PW-4. Thereafter, the Trial Court proceeded to record the evidence of other witnesses on 25.03.2010, 27.03.2010 and 30.04.2010 and on all these dates there was no representation on behalf of Appellant. The record also does not reveal that Court made any other attempt to offer legal assistance to the Appellant. In this connection it would not be out of place to notice at this stage that Section 304 Cr.P.C. casts an obligation on the Court trying serious offences (in this case charge relating to a capital offence) to ensure that an unrepresented accused is given the facility of legal aid. The provision reads as under:

“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 the Courts of Session.”

9. To continue the narrative, the Appellant engaged a new counsel, who moved an application under Section 311 Cr.P.C. for recall of the witnesses whose cross-

examination was closed viz-a-viz PW-1 to PW-4, who could not be cross-examined. However, this application was rejected. The cross-examination of PW-7 too was similarly dealt with by the Trial Court, which closed the Appellant's right to do so. On 07.10.2010, learned Addl. Sessions Judge rejected the application under Section 311 Cr.P.C. Subsequently, the matter was argued finally and the impugned judgment was delivered on 04.02.2011.

10. The right to legal aid is integral part of fair procedure. Although, textually it would appear that right to such legal assistance ought to be extended in case of indigence, yet the Court cannot be oblivious of the circumstance that when the accused is helpless due to incarceration characterized as "incommunicado" in the Supreme Court decision in *Suk Das*, the Court has to be careful and guard itself against denial of fair procedure. Having regard to the facts and conspectus of circumstances, we are of the opinion that Trial Court's closing Appellant's right to cross-examine PW-1 to PW-4 and PW-7 prejudiced him resulting in violation of his right to a fair trial. That he approached this Court after the final judgment and not during the pendency of the case does not detract from the result as prejudice is writ large on the record. It is also settled that an interlocutory order can be challenged during the pendency of proceedings as well as along with main Appeal challenging the final order.
11. As a result of the above discussion the Appeal has to partly succeed. We set-aside the impugned judgment and remit the matter to the Trial Court in order to give opportunity to the Appellant to cross-examine PW-1 to PW-4 and PW-7 and thereafter proceed to record the statement under Section 313 Cr.P.C. The result of this order would also apply to the companion CrI. A. No.340/2011 and the same has to be allowed in the same terms. Since it is a common judgment, we make it clear that the remand is only for the limited purpose of enabling the cross-examination of said witnesses and recording of statement under Section 313 Cr.P.C. and also for hearing final arguments in the light of this development. The Trial Court is directed to ensure the presence of both the accused (who are in custody) during trial. Both have not been granted bail. We request the Trial Court to do this matter at the earliest preferable within four months from today. The parties are directed to be present before the Trial Court on 27.06.2011 for further directions.

12. In the light of these observations, the Appeal is allowed in the above terms. The

present order would relegate the parties to their position before passing the final judgment with a right to the Appellant herein to cross-examine PWs 1 to 4 and 7 as indicated earlier. In the light of the development mentioned above, Crl.A.No.340/2011 is also disposed of accordingly.

Crl. M. (Bail) No.538/2011 in Crl. A. No.399/2011

13. The bail applications in this Appeal and in the companion Crl. A. No.340/2011 are disposed of in the above terms.

(S. RAVINDRA BHAT)
JUDGE

(G.P. MITTAL)
JUDGE

MAY 30, 2011
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