

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

Date of decision: 11.01.2012

+ **CRL.A. 875/2011**

SUDHAKAR TIWARI ..... Appellant

Through : Ms. Anu Narula, Advocate

versus

STATE ..... Respondent

Through : Mr. Sanjay Lao, APP for the State.

**CORAM:**

**HON'BLE MR. JUSTICE S. RAVINDRA BHAT**

**HON'BLE MR. JUSTICE S.P.GARG**

**MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)**

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1. The present appeal is filed against the judgment and order dated 10.01.2010 whereby the appellant was convicted for the offence punishable under Section 302 IPC and sentenced to undergo life imprisonment. The prosecution case was that on 27.5.2007 at about 9.00 PM, the accused murdered his brother Inder Tiwari by strangulating him in flat bearing No. 150, Pocket 10, DDA Flats, Nasirpur, New Delhi. The prosecution during the course of trial had relied on the testimony of 19 witnesses. The principal witnesses who deposed and whose testimony persuaded the Trial Court to record conviction were PWs 2 and 5, the latter i.e. PW-5 was the most material of witnesses as she claimed to have seen the incident. According to her, the appellant used to

be a habitual drunkard and frequently consumed intoxicating substances. PW-5 deposed that on the day (of her husband's murder) the appellant had harassed her husband and he (her husband) had been trying to pacify him. The witness further deposed that incident occurred in the late evening at about 9.00 PM after the family had dinner when the deceased started to pacify the appellant who remained adamant. The deceased slapped the appellant, apparently both of them got "*entangled*" and despite PW-5's best efforts, she was unable to separate them. The appellant then allegedly strangled the deceased.

2. This Court does not propose to consider the merits of the appeal in detail. One of the main submissions made on behalf of the appellant was that he was denied the benefit of legal counsel, which resulted in miscarriage of justice. Learned counsel in this regard relied upon the order sheets in the trial court. She emphasised that after 24.04.2009, on which date appellant's counsel was present, there was no one to assist him on 29.05.2009. On that date the appellant was unrepresented despite that the trial court proceeded to record the testimony of several material witnesses. Similarly on the next date of hearing i.e. 22.08.2009, when the appellant was again unrepresented, further prosecution witnesses were examined. It was only on 12.10.2009 that the Court deemed it appropriate to appoint *amicus* to assist the appellant. The said *amicus* who argued the matter, did not discharge his duties properly. In this regard reliance was placed upon the testimonies of various witnesses including PW-10, PW-11, PW-12 (I.O.) and PW-13. Counsel submitted that none of these witnesses was even cross-examined. Apparently the application on behalf of the appellant to recall PW-5 for cross-examination was made. She could not be found; as was evident from the order of 26.06.2010, therefore there was no cross-examination.

3. It was argued that the denial of effective legal representation amounted to denial of a fair trial and therefore infringed Article 21 of the Constitution. Counsel submitted that apart from other facts which could not have been elicited from the witnesses, the appellant was also denied a proper counsel who could have pointed to the Court (even according to the testimony of the prosecution witnesses, notably PW-2) that he (the appellant) was a psychiatric patient and had suffered on account of some mental disorder. Had the appellant been given effective representation, this aspect could have been suitably highlighted.

4. The learned APP submitted that the order-sheet dated 29.05.2009 records that though the appellant's counsel was not present, he stated that there was no need for a lawyer. In these circumstances, the trial court could not be faulted for having proceeded to record the testimony of the witnesses having regard to the mandate under Section 309 Cr.P.C. The Counsel urged that so far as the plea of insanity or mental incapacity is concerned the same was not taken during the trial and cannot therefore be urged in the course of appeal.

5. This court has considered the records of the trial court. The appellant had been given legal aid, as he was unable to afford the services of a lawyer to defend himself. The last time the counsel so provided for him, appeared during the course of trial was on 24-04-2009. Subsequently on 29<sup>th</sup> May, 2009, though the Appellant was produced from judicial custody, his counsel was absent, and the court queried about whether he wanted a lawyer. He apparently refused. Thereafter, the court proceeded to record the testimony of prosecution witnesses. On the next dates of hearing, the Court proceeded to record prosecution evidence, and only on 12-10-2009 it appointed an *amicus*.

6. The conduct of the Appellant's defence has led us to conclude that this was one instance where legal aid for the poor resulted in poor legal aid. None of the material witnesses, including the IO was cross examined. It was much later that the *amicus* deemed it appropriate to move an application to recall PW-5; however, even that was not followed up. The result perhaps was predictable; the Appellant was convicted.

7. Section 304 of the Code of Criminal Procedure reads as follows:

*"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."*

8. The imperative of providing free legal aid was explained by the Supreme Court, in *Khatril (II) v. State of Bihar*, (1981) 1 SCC 627 in the following terms:

*"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 Sessions 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 of the free legal services provided by the State, he must be provided legal representation at the cost of the State. We*

*would also direct the State of Bihar and require 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 incommunicable 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.”*

In *Sukh Das v State of Arunachal Pradesh* 1986 (2) SCC 401, the court emphasized that the accused does not have to apply for legal aid and that failure of the court to provide this facility would vitiate the trial.

9. Having regard to the entire conspectus of the circumstances in this case, we have no doubt that the absence of effective representation on behalf of the Appellant, after 24-04-2009 has resulted in denial of fair trial, and infringed his right under Article 21 of the Constitution. The impugned judgment therefore, requires to be set aside.

10. In view of the above discussion, the impugned judgment is set aside, and the matter is remitted for conducting proceedings from the stage after 24-04-2009. The Trial Court shall continue the proceeding from the stage and permit the Appellant to cross examine all the witnesses who were examined after that date, unless the Appellant expressly gives up his right to do so, through an affidavit or appropriate application. In view of these circumstances, and having regard to the peculiar facts, the Appellant is directed to be released on bail, subject to his furnishing personal bond, and surety for the sum of ₹ 15,000/- to the satisfaction of the Trial Court. The Trial Court is requested to conclude the proceedings, and the trial, as expeditiously as possible, and in any event within four months from today. The parties are directed to be present before the Trial Court for directions in this regard, on 20<sup>th</sup> January, 2012. The Registry is

directed to ensure that the Trial Court records are transmitted to it immediately to ensure compliance with the present judgment.

11. The Appeal is allowed in the above terms.

**S. RAVINDRA BHAT**  
**(JUDGE)**

**S.P.GARG**  
**(JUDGE)**

**JANUARY 11, 2012**