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

Date of Decision: 12.03.2014

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CRL. A.64 of 2010

NAV RATTAN

..... Appellant

Through: Ms. Saahila Lamba, Adv.

versus

THE STATE (N.C.T. OF DELHI)

..... Respondent

Through: Mr. Feroz Khan Ghazi, APP with
Inspector Rajeshwar Aggarwal, P.S. Alipur.

CORAM:

HON'BLE MR. JUSTICE V.K. JAIN

JUDGEMENT

V.K. JAIN, J. (Oral)

On 24.8.2003, at about 5:40 a.m., Rakesh, a resident of Village Mukhmelpur informed on telephone that robbers had entered their house and had robbed them at the point of gun. The information was recorded vide DD No.36A of Police Station Alipur and a copy of the DD was given to ASI Jai Kumar of the aforesaid police station. When he reached the spot, the complainant Rakesh Kumar was present there. The complainant told the police officer that in the night he had kept the door of the house open, as he had some physical problem. At about 4:00 a.m. on 25.8.2003, he heard some noise in the house whereupon he got up. When he tried to raise alarm, two (2) boys armed

with country made pistols put their pistols against him and threatened to shoot him in case he raised alarm. The third person with them had a torch in his hand. His wife and children also woke up. Those persons threatened to shoot his wife and children in case they raised alarm and asked him to take out whatever he had. He further stated that he had Rs.1,500/- with him which the robbers snatched from him. They also forcibly removed ear rings which his wife was wearing besides taking out the silver paijeb and silver pendant kept in the almirah. Thereafter they went out and left after bolting the main gate.

2. This is also the case of the prosecution that on 27.8.2003, the appellant Nav Rattan who had been arrested in the case registered vide FIR No.310/2003, Chet Ram who had been arrested in the case registered vide FIR No.311/2003 and Chanderpal who had been arrested in the case registered vide FIR No.312/2003 confessed to their involvement in the aforesaid robbery whereupon they were arrested in this case. The case property alleged to have been got recovered by them was obtained and deposited in the *malkhana* of the police station. The appellant Nav Rattan refused to join TIP. The case property was got identified in a TIP and thereafter three (3) persons namely Chet Ram, Chanderpal and the appellant Nav Rattan were prosecuted.

3. All the three persons chargesheeted by the police were charged under Section 392/34 of IPC whereas Chanderpal and the appellant Nav Rattan were

additionally charged under Section 397 of the Penal Code for having used country made pistols during the commission of the robbery. Since the persons accused pleaded not guilty to the charges framed against them, the prosecution examined sixteen (16) witnesses. No witness was examined in defence.

4. The complainant came in the witness box as PW3 and *inter alia* stated that in the night of 24.8.2003, he had kept the main entrance of the house open though he had closed the gate. At about 4:00 a.m., he woke up on hearing some noise and saw that three (3) persons have entered the premises. Two of them were holding country made pistols, whereas one of them was carrying a torch. He identified all the three (3) accused persons as those who had entered the house. According to them the accused Chet Ram was carrying a torch whereas Nav Rattan and Chanderpal were carrying country made pistols. He further stated that both Nav Rattan and Chanderpal threatened them with country made pistols, threatening to kill him in case he raised alarm. They also threatened his wife and son who had woken up in the mean while. Thereafter they looted Rs.1,500/- from his possession and also took away the ear rings which his wife Babli was wearing. They also took away the silver paijeb and silver pendant which had been kept in the almirah and left the spot after locking the door from outside. The witness identified the pair of anklet Ex.P1, Silver chain with pendant Ex.P2 and pair of ear ring Ex.P3 as the articles which the

accused persons had stolen from his house.

5. PW6 Smt. Babli is the wife of the complainant. She corroborated his deposition and identified all the three (3) accused persons, claiming that Chetram had a torch with him whereas the other two accused were holding *kattas* in their hands. She also stated that the robbers had threatened to shoot her husband with a country made pistol, unless he took out money he had and thereafter they removed Rs.1,500/- from the pocket of the shirt of her husband which was lying on the bed besides forcibly removing her gold ear rings, which she was wearing. According to her they also took out her silver paijeb and silver pendant from the almirah. She identified the stolen articles Ex.P1 to Ex.P3.

6. PW12 ASI Jai Kumar is the police officer who went to the spot on receipt of information with respect to the robbery. He *inter alia* stated that on 26.8.2003, all the three accused were arrested in the case registered vide FIR Nos.311/2003, 312/2003 and 310/2003 under Section 25 of Arms Act and the copies of their respective disclosure statements were given to him. He arrested all the three accused persons and interrogated them. He further stated that on 9.9.2003, all the three persons pointed out the place where they had hidden the jewellery items and dug out a place near a room and took out a polythene packet which contained Rs.1,500/- besides one pair of silver paijeb, one silver

pendant in broken condition and one pair of gold ear rings. He identified the aforesaid articles as Ex.P1 to Ex.P3.

PW15 Constable Surender Kumar *inter alia* stated that on 9.9.2003, the accused persons were interrogated and they made the disclosure statement Ex.PW12/F. He further stated that they took them to Nangli Poona and from there they took them Wazirabad. They dug out earth near the wall of a room and took out a polythene packet which besides Rs.1,500/- contained one pair of silver paijeb, one broken pendant of silver and ain pair of gold ear rings.

PW2 S.I. Sudama Sharma proved the disclosure statement of the appellant Ex.PW2/A which he had made in the case registered vide FIR No.310/2003 on 26.8.2003. PW7 Constable Sant Ram *inter alia* stated that the accused Nav Rattan on being arrested in another case had made the disclosure statement Ex.PW7/A.

7. PW13 Shri Alok Aggarwal was posted as a Metropolitan Magistrate on 4.9.2003. According to him on the aforesaid date, the appellant Nav Rattan was produced before him in jail for the purpose of holding his TIP but he refused to join TIP despite having been warned that his non-participation would adversely affect him during trial.

PW14 Ms. Kaveri Baweja was posted as a Metropolitan Magistrate on 24.9.2003 and on the aforesaid date, the complainant Rakesh Kumar identified

the case property in a TIP held by her.

8. In his statement under Section 313 of Cr.P.C., the appellant Nav Rattan denied the allegations against him and claimed to be innocent. He *inter alia* stated that he refused to join TIP as he had been shown to the witnesses.

9. Vide impugned judgement dated 18.11.2009, the appellant was convicted under Sections 392/397 of IPC and vide impugned Order on Sentence dated 20.11.2009, he was sentenced to undergo RI for eight (8) years and to pay fine of Rs.5,000/- or to undergo SI for four (4) months in default. Being aggrieved from his conviction and sentence awarded to him, the appellant is before this Court by way of the present appeal.

10. Besides making several other submissions, the learned counsel for the appellant points out that neither PW12 ASI Jai Kumar nor PW15 Constable Surender Kumar, both of whom are material witnesses, the case of the prosecution being that the stolen property was recovered at the instance of the appellant and his co-accused, in their presence, were cross-examined on behalf of the accused persons. A perusal of the record would show that ASI Jai Kumar was examined on 18.9.2006, and on that day, no one was present for the accused persons. In fact, the order sheet of that date refers to presence of two accused though three accused persons were facing a joint trial in the case. In my view, instead of discharging such a material witness without any cross-

examination, the learned Trial Judge should either have deferred the cross-examination of the witness or should have requested the Delhi Legal Services Authority to provide a counsel to them at State expense. However, neither the cross-examination of the witness was deferred nor was an attempt made to make the services of a Legal Aid counsel available to the accused persons.

11. PW15 Constable Surender Kumar was examined on 22.11.2007. A perusal of the record would show that on the aforesaid date, the learned counsel for the accused persons was not present, he having gone to Tis Hazari Courts and, therefore, the witness Surender Kumar was discharged without any cross-examination. Since Constable Surender Kumar was a material witness, either his cross-examination should have been deferred on that date or the Delhi Legal Services Authority should have been requested to make the services of a Legal Aid counsel available to the appellant.

12. In Mohd. Hussain @ Julfikar Ali Vs. The State (Govt. of NCT) Delhi 2012 (1) SCALE 145, the evidence of 56 witnesses out of 65 witnesses examined by the prosecution including the eye-witnesses and the Investigating Officer were recorded by the trial court without providing a counsel to the appellant. None of the 56 witnesses had been cross-examined by the accused/appellant. Thereafter, the trial court appointed a counsel to defend the appellant and the evidence of remaining witnesses was recorded in his

presence, though he thought it fit not to cross-examine any of them. Later, the counsel sought permission to examine one prosecution witness and when the permission was granted, she only performed the formality of cross-examining the said witness. In his appeal against conviction, the appellant contended before this Court that the matter needed to be remanded back to the trial court for a fresh trial, since the accused did not have a fair trial inasmuch as on most of the hearings, when material witnesses were examined, he was unrepresented and the trial court did not bother to provide him legal aid at the State expense, thereby failing to discharge its duty of ensuring that the accused was defended properly and effectively, at all stages of the trial, either by his private counsel or in the absence of a private counsel by an experienced and responsible amicus curiae. The contention, however, was rejected by this Court holding that the case before it was not a case where the accused did not have a fair trial. In taking this view, this Court endorsed the view taken by the learned trial Judge who had *inter alia* noted that the accused was initially represented by a counsel who did not appear on some dates and thereafter an amicus curiae was appointed for the accused though the said amicus curiae chose not to cross-examine some witnesses and the accused himself was not interested in cross-examining the witnesses. Disagreeing with this Court Hon'ble Mr. Justice H.L. Dattu who along with Hon'ble Mr. Justice C.K. Prasad constituted the Bench

inter alia observed as under:

“17. The Code of Criminal Procedure provides that in all criminal prosecutions, the accused has a right to have the assistance of a counsel and the Cr.P.C. also requires the court in all criminal cases, where the accused is unable to engage counsel, to appoint a counsel for him at the expenses of the State. Howsoever guilty the appellant upon the inquiry might have been, he is until convicted, presumed to be innocent. It was the duty of the Court, having these cases in charge, to see that he is denied no necessary incident of a fair trial. In the present case, not only the accused was denied the assistance of a counsel during the trial and such designation of counsel, as was attempted at a late stage, was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard. The Court ought to have seen to it that in the proceedings before the court, the accused was dealt with justly and fairly by keeping in view the cardinal principles that the accused of a crime is entitled to a counsel which may be necessary for his defence, as well as to facts as to law..... The necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of a counsel was a denial of due process of law. It is equally true that the absence of fair and proper trial would be violation of fundamental principles of judicial procedure on account of breach of mandatory provisions of Section 304 of Code of Criminal Procedure.

18. After carefully going through the entire records of the trial court, I am convinced that the appellant/accused was not provided the assistance of a counsel in a substantial and meaningful sense. To hold and decide otherwise, would simply to ignore actualities and also would be to ignore the fundamental postulates, already adverted to.

19. The Cr. P.C. ensures that an accused gets a fair trial. It is essential that the accused is given a reasonable opportunity to defend himself in the trial. He is also permitted to confront the witnesses and other evidence that the prosecution is relying upon. He is also allowed the assistance of a lawyer of his choice, and if he is unable to afford one, he is given a lawyer for his defence. The right to be defended by a learned counsel is a principal part of the right to fair

trial. If these minimum safeguards are not provided to an accused; that itself is to an accused.....”

Though Hon’ble Mr. Justice C.K. Prasad did not agree with Hon’ble Mr. Justice H.L. Dattu in remanding the matter back to the trial court for fresh disposal and directed acquittal of the accused, there was no disagreement in the Bench that the appellant having not been provided a counsel on the dates material witnesses were examined, had been denied a fair trial. The following view taken by Hon’ble Mr. Justice C.K. Prasad is pertinent in this regard:

“29. While holding the appellant guilty the trial court has not only relied upon the evidence of the witnesses who have been cross-examined but also relied upon the evidence of witnesses who were not cross-examined. The fate of the criminal trial depends upon the truthfulness or otherwise of the witnesses and, therefore, it is of paramount importance. To arrive at the truth, its veracity should be judged and for that purpose cross- examination is an acid test. It tests the truthfulness of the statement made by a witness on oath in examination-in-chief. Its purpose is to elicit facts and materials to establish that the evidence of witness is fit to be rejected. The appellant in the present case was denied this right only because he himself was not trained in law and not given the assistance of a lawyer to defend him. Poverty also came in his way to engage a counsel of his choice.”

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“35. In my opinion, the right of a person charged with crime to have the services of a lawyer is fundamental and essential to fair trial. The right to be defended by a legal practitioner, flowing from Article 22 (1) of the Constitution has further been fortified by the introduction of the Directive Principles of State Policy embodied in Article 39 A of the Constitution by the 42nd Amendment Act of 1976

and enactment of sub-section 1 of Section 304 of the Code of Criminal Procedure. Legal assistance to a poor person facing trial whose life and personal liberty is in jeopardy is mandated not only by the Constitution and the Code of Criminal Procedure but also by International Covenants and Human Rights Declarations. If an accused too poor to afford a lawyer is to go through the trial without legal assistance, such a trial cannot be regarded as reasonable, fair and just. The right to be heard in criminal trial would be inconsequential and of no avail if within itself it does not include right to be heard through counsel. One cannot lose sight of the fact that even intelligent and educated men, not trained in law, have more than often no skill in the science of law if charged with crime. Such an accused not only lacks both the skill and knowledge adequately to prepare his defence but many a time loses his equilibrium in face of the charge. A guiding hand of counsel at every step in the proceeding is needed for fair trial. If it is true of men of intelligence, how much true is it of the ignorant and the illiterate or those of lower intellect! An accused without the lawyer faces the danger of conviction because he does not know how to establish his innocence.”

13. Since two material witnesses ASI Jai Kumar and Constable Surender Kumar were not at all cross-examined on behalf of the appellant and other accused persons, that resulted in denial of a fair opportunity of cross-examination of the aforesaid witnesses to the appellant.

14. The learned counsel for the appellant submits that in these circumstances the impugned judgement may be set aside qua the appellant and the matter may be remanded back to the trial court for giving an opportunity to the appellant to cross-examine the aforesaid two material witnesses, namely ASI Jai Kumar and Constable Surender Kumar, after a counsel is provided to them by the Delhi Legal Services Authority. The submission made by the learned counsel, in my

view, is justified in the facts & circumstances of the case.

15. Accordingly the impugned judgement dated 18.11.2009 and impugned Order on Sentence dated 20.11.2009 to the extent they pertain to the appellant Nav Rattan are hereby set aside and the matter is remanded back to the trial court for requesting Delhi Legal Services Authority to make the services of a Panel counsel available to the appellant and then recall PW12 ASI Jai Kumar and PW15 Constable Surender Kumar for the purpose of their cross-examination by the counsel who would be provided to the appellant by Delhi Legal Services Authority. After cross-examination of the aforesaid two witnesses, the learned trial Judge shall pass a fresh order on merits qua the appellant, taking into consideration the cross-examination of the aforesaid witnesses.

The LCR be sent back along with a copy of this order.

One copy of this order be sent to the Jail Superintendent who shall produce the appellant before the District & Sessions Judge, Rohini at 10:00 a.m. on 24.3.2014. The learned District & Sessions Judge, Rohini will assign the case to the concerned court and direct production of the appellant before the said court on the same date. The learned trial Judge will ensure that the aforesaid two witnesses are recalled and cross-examined and a fresh order is passed within three (3) months of the appellant being produced before him for

the first time, pursuant to this order.

The appeal stands disposed of accordingly.

MARCH 12, 2014
b'nesh

V.K. JAIN, J.