

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

% *Date of decision: August 19, 2014*

+ **CRL.A. 268/2014**

SURENDER KUMAR MATHUR Appellant

Represented by: Mr.K.Singhal, Advocate.

versus

STATE Respondent

Represented by: Mr.Varun Goswami, APP for
the State with Inspector Rajesh
Kumar, PS Begumpur.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. Speedy trial is the hallmark of a fair, just and reasonable procedure in conformity with the constitutional obligations enshrined in Article 21 however, when the speedy trial results in the denial of a fair trial to the accused the same would be violative of his constitutional rights. This is the grievance of Surender Kumar Mathur who by the impugned judgment dated January 18, 2014 stands convicted for the murder of Jai Kumar by gunshot injuries from his service pistol and destruction of evidence with the intention to screen himself from the legal punishment. Vide impugned order dated February 06, 2014 he has been directed to undergo Imprisonment for life and fine of ₹2 lakhs and default of payment of fine to undergo simple imprisonment for a period of one year and in case the fine is recovered the same be paid to father of the deceased as compensation under Section 357

Cr.P.C. for offence punishable under Section 302 IPC. He has also been awarded Rigorous Imprisonment for a period of three years and fine of ₹2,000/- and in default of payment of fine to undergo simple imprisonment for a period of 15 days for offence punishable under Section 201 IPC. For offence punishable under Section 27 Arms Act the appellant has been directed to undergo Rigorous Imprisonment for a period of five years and to pay a fine of ₹5,000/- and in default of payment of fine to undergo simple imprisonment for a period of one month.

2. The prosecution case unfolds from an information DD No.27A received on December 03, 2009 at 4.25 PM at PS Begumpur regarding an unidentified dead body lying at Flat No.50, Pocket 16A, Sector 22, Rohini, Delhi. SI Jai Prakash PW-30 and Constable Hari Ram PW-18 reached the spot where they found lying a body in a pool of blood in the kitchen of the flat having bullet injuries. Near the body three fired leads and two empty cartridges were lying. The identity of the dead body could not be established, the place where the dead body was recovered being uninhabited because the DDA flats situated near the place of incident were in damaged condition and there were no occupants.

3. On the basis of the endorsement on DD No.27A a rukka was prepared and FIR No.48/2009 was registered under Section 302 IPC. Since the identity of the deceased could not be established, the post-mortem was deferred and finally conducted on December 11, 2009. On December 21, 2009 Baddal PW-23 the father of the deceased came to the police station and inquired about the photographs being flashed in the cable TV etc. He was shown the photograph of the deceased and he identified the same to be of his

son Jai Kumar and raised his suspicion on Sonu @ Surender Kumar Mathur, a constable in the Delhi Police resident of Village Karala as he was having some money dispute with him. Surender Kumar Mathur was brought to the police station and interrogated however, he gave evasive replies and no sufficient material could be found against him. On January 02, 2010 the investigations stood transferred to Special Staff and was taken over by Inspector Puran Pant PW-29. On April 15, 2011 he collected pistol 9512 from PS Kanjhawala which was issued to Constable Surender Mathur and sent the same to FSL Rohini for comparison with the bullet and cartridge cases recovered. Five cartridges were also got issued so that they could be test fired from the pistol seized. On receipt of FSL report Surender Kumar Mathur was arrested on January 21, 2013.

4. The challenge of the learned counsel for the appellant is twofold. He contends that the only evidence against the appellant is the recovery of the two empty cartridges from the spot near the dead body which are allegedly connected to the pistol purportedly issued to him at around the time when the incident took place. He contends that neither the sanctity of the recovery of the two empty cartridges has been proved by the prosecution nor it has been proved that the appellant was issued the seized pistol on the particular date. We are noting these contentions to find out whether the appellant is justified in his grievance of denial of a fair trial and whether the dismissal of the application filed by the appellant for recalling PW-15, Constable Sandeep, PW-16 HC Rambir, PW-19 HC Nand Kishore inter alia regarding the entries in the Asla Register, PW-20 Constable Bhupender Singh regarding the knowledge of the present case, PW-27 SI Sandeep Tushir

regarding the recovery of Asla Register PW-29 Inspector Puran Pant regarding the knowledge of pistol 9512 and steps taken thereafter and PW-32 Inspector Rajesh Kumar inter alia regarding recovery of Asla Register amounted to denial of a fair trial to the appellant.

5. Before advertng to this issue it would be appropriate to note the course of trial before the Additional Sessions Judge. After arrest of appellant on January 21, 2013 charge sheet was filed and the case was committed to the learned Additional Sessions Judge on May 10, 2013. The matter was listed for consideration of charge on May 28, 2013 when fresh vakalatnama was filed on behalf of Shri Dinkar Kumar, Advocate. On the same date arguments on charge were heard and charge for offences punishable under Sections 302/201 IPC and Section 27 Arms Act was framed against the appellant. On that day the learned Trial Court also directed that formal witnesses at Serial No.3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 15, 21, 22, 23, 24, 25, 26 and 27 be examined by way of affidavit in terms of Section 296 Cr.P.C. which affidavit should be filed by the Investigating Officer by August 14, 2013 with advance copy to the learned counsel for the accused to which he had no objection. Apart from the above all witnesses were called through the Investigating Officer on the next date fixed i.e. September 26, 2013 when the matter was listed for the entire prosecution evidence. In the meantime, FSL reports were called. On September 26, 2013 supplementary charge sheet was received and the same was tagged along with the main file. There is no noting that the copy of the supplementary charge sheet was supplied to the appellant or not. On September 26, 2013 itself, the Court examined all the 32 witnesses mentioned in the charge sheet of which PW-1

to PW-19 tendered their examination-in-chief by way of affidavit on the same day. The counsel for the accused was asked to cross-examine them on September 26, 2013 itself. Even PW-22 to PW-32 were examined in Court and cross-examined on September 26, 2013 itself. The affidavits of PW-1 to PW-19 were sworn on September 26, 2013 and thus no advance copies of the affidavits as directed were furnished. On the same date i.e. September 26, 2013 an application was filed by the prosecution for the summoning of the witnesses HC Devender, Additional DCP, General Administration (PHQ) and In-charge, KOT (P&L) as due to inadvertence the names of these witnesses could not be mentioned in the list of the witnesses. This application was allowed and the three witnesses were summoned for the next date i.e. October 24, 2013. The matter was also listed for the statement of the accused under Section 313 Cr.P.C. for October 24, 2013. The order dated September 22, 2013 passed by the learned Additional Sessions Judge reads as under:-

“Supplementary charge sheet has been received. It be tagged along with main file.

PW1 HC Babu Lal, PW2 HC Parmod, PW3 HC Surender Singh, PW4 HC Surender Singh (914/OD), PW5 Ct.Sunil Kumar, PW6 Ct.Mandeep, PW7 Ct.Ajay, PW8 Ct.Hari Om, PW9 Ct.Kuldeep, PW10 W/Ct.Neel Kamal, PW11 W/Ct.Shakuntala, PW12 W/Ct. Renu, PW13 ASI Rakesh Kumar, PW14 Ct.Anil, PW15 Sandeep, PW16 HC Ranbir, PW17 Ct.Pawan, PW18 Ct. Hari Ram, PW19 HC Nand Kishore, PW20 Bhupender Singh, PW21 Vijender Singh, PW22 Indresh Kumar Mishra, PW23 Baddal, PW24 Inspector Mahesh Kumar, PW25 Puneet Puri, PW26 Kapoor Singh, PW27 SI Sandeep Tushir, PW28 Dr.Manoj Dhingra, PW29 Inspector Puran Pant, PW30 (Retd.) SI Jai Prakash, PW31

Inspector Sunil Kumar Sharma, PW32 Inspector Rajesh Kumar, are examined and discharged.

At this stage, application has been filed on behalf of the prosecution for summoning the witnesses namely HC Devender, Addl.DCP, General Admn. (PHQ) and Incharge, (Kot P & L). It is submitted that due to inadvertence the names of these witnesses could not be mentioned in the list of witnesses.

I have considered the request made. The witnesses HC Devender, Addl. DCP, General Admn. (PHQ) and Incharge, Kot P & L are relevant and necessary for the just and fair adjudication of the present case. In the interest of the applications is hereby allowed and these witnesses are permitted to be summoned on next date.

At this stage, on request of Addl. PP, the witnesses HC Devender and Incharge, Kot P & L are permitted to be examined by way of affidavits in terms of Section 296 Cr.PC being formal in nature which affidavits should be filed by the IO in advance with advance copy to the Ld. Defence Counsel.

Case be listed for examination of newly summoned witnesses namely HC Devender, Addl. DCP, General Admn. (PHQ) and Incharge, Kot P & L and for statement of accused under Section 313 Cr.PC thereafter on 23.10.2013. At this stage, on request of Ld. Counsel who submits that date of any Thursday may be given, the date is changed to 24.10.2013 and date of 23.10.2013 is cancelled.

The bail application of accused be kept pending as not pressed at this stage to be taken up later on mentioning of Ld.Counsel.”

6. On October 24, 2013 ACP Kishore Kumar PW-33 and SI Nathu Ram PW-34 and HC Devender Kumar PW-35 were examined and discharged.

The prosecution closed its evidence. On the same day statement of the appellant was recorded under Section 313 Cr.P.C. and the matter was listed for defence evidence on November 26, 2013. On November 20, 2013 the appellant moved an application for recalling of the prosecution witnesses as noted above which was listed on November 22, 2013 on which date the learned Trial Court dismissed the application by the following order:

“Heard arguments on the application by way of which the accused seeks recall of PW15 Ct.Sandeep, PW16 HC Ranbir, PW19 HC Nand Kishore, PW20 Bhupender Singh, PW27 SI Sandeep Tushir, PW29 Inspector Puran Pant and PW32 Inspector Rajesh Kumar. The ground on which the recall of these witnesses is sought, has not been mentioned in the application and the only ground raised is that they have not been questioned on the following aspect of compliance of law i.e. Section 35 of Indian Evidence Act and Punjab Police Rules.

I have considered the submissions made and I may observe that firstly, under no circumstances can the applicant be permitted to fill the lacuna of his case, secondly, in so far as the question of law is concerned, the witnesses need not be recalled for putting the aspect of law and for being questioned on the same and thirdly in so far as the question with regard to the secret information is concerned, no question can be permitted to be put in this regard to the witnesses.

The application under Section 311 Cr.PC filed on behalf of the accused is hereby dismissed. However, it is clarified that it shall be open to the applicant/accused to call witnesses in order to disprove and controvert the evidence led by the prosecution. The question of law can be raised at any stage by the accused for which witnesses need not be called. Case be listed for the date fixed i.e. 26.11.2013.”

7. The legal position with regard to the fair trial as enunciated by the Hon'ble Supreme Court in (1980) 1 SCC 81 Hussainara Khatoon (I) vs. State of Bihar is:

“5.... Speedy trial is of the essence of criminal justice and there can be no doubt that delay in trial by itself constitutes denial of justice. It is interesting to note that in the United States, speedy trial is one of the constitutionally guaranteed rights. The Sixth Amendment to the Constitution provides that:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”

So also Article 3 of the European Convention on Human Rights provides that:

“Every one arrested or detained . . . shall be entitled to trial within a reasonable time or to release pending trial.”

We think that even under our Constitution, though speedy trial is not specifically enumerated as a fundamental right, it is implicit in the broad sweep and content of Article 21 as interpreted by this Court in Maneka Gandhi v. Union of India [(1978) 1 SCC 248 : (1978) 2 SCR 621]. We have held in that case that Article 21 confers a fundamental right on every person not to be deprived of his life or liberty except in accordance with the procedure prescribed by law and it is not enough to constitute compliance with the requirement of that article that some semblance of a procedure should be prescribed by law, but that the procedure should be “reasonable, fair and just”. If a person is deprived of his liberty under a procedure which is not “reasonable, fair or just”, such deprivation would be violative of his fundamental right under Article 21 and he would be entitled to enforce such fundamental right and secure his release. Now obviously procedure prescribed by law for depriving a person of liberty cannot be “reasonable, fair or just” unless that procedure ensures a speedy trial for determination of the guilt of such person. No procedure which does not ensure a reasonably

quick trial can be regarded as “reasonable, fair or just” and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21.”

8. However, the speedy trial does not mean that a fair trial is not ensured to the accused. As noted above all 32 witnesses of the prosecution mentioned in the charge sheet were examined on September 26, 2013. Come what may even for the best legal brains it is humanly impossible to prepare a reasonable and fair cross-examination of 32 witnesses in one go on a single day. Moreover out of 32 witnesses 19 tendered their evidence by way of affidavit on the same day and without a reasonable time for the counsel to have gone through the said affidavits, it was not possible for him to cross-examine the witnesses fairly.

9. Non assurance of a fair trial by Courts which included unusual haste has been frowned upon by the Supreme Court in (2006) 3 SCC 374 Zahira Habibullah Sheikh Vs. State of Gujarat wherein it was observed:

“35.....The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interest of society is not to be treated completely with disdain and as persona non grata. The courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice—often referred to as the duty to vindicate and uphold the “majesty of the law”. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in

dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. The courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.

36. *The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning a Nelson's eye to the needs of society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial."*

10. The denial of a fair trial of the appellant was further compounded by the learned Trial Court by rejecting the application of the appellant under Section 311 Cr.P.C. One of the reasons for the dismissal of the application for the recall of PW-15 Constable Sandeep, PW-16, HC Ranbir, PW-19 HC Nand Kishore, PW-20 Bhupender Singh, PW-27 SI Sandeep Tushir, PW-29 Inspector Puran Pant and PW-32 Inspector Rajesh Kumar was that the witnesses need not be recalled for the questions of law as the same can be raised at any stage by the accused. The appellant was not seeking to raise question of law but wanted to cross-examine the witnesses on the aspect whether they had complied with the law laid down under the Evidence Act and Punjab Police Rules by drawing their attention to it. The Punjab Police Rules provides for issuance, return and stock of arms and ammunitions issued to the police personnels and by drawing the attention of the witnesses to the relevant provisions the appellant wanted to elicit facts from them in cross-examination. This could be neither termed as filling up of lacunae nor raising questions of law.

11. Dealing with legal position for recall of witnesses under Section 311 Cr.PC in (2012) 7 SCC 56 P. Sanjeeva Rao Vs. State of Andhra Pradesh it was held-

“18. Denial of an opportunity to recall the witnesses for cross-examination would amount to condemning the appellant without giving him the opportunity to challenge the correctness of the version and the credibility of the witnesses. It is trite that the credibility of witnesses whether in a civil or criminal case can be tested only when the testimony is put through the fire of cross-examination. Denial of an

opportunity to do so will result in a serious miscarriage of justice in the present case keeping in view the serious consequences that will follow any such denial.

19. The nature and extent of the power vested in the courts under Section 311 CrPC to recall witnesses was examined by this Court in Hanuman Ram v. State of Rajasthan [(2008) 15 SCC 652: (2009) 3 SCC (Cri) 1149]. This Court held that the object underlying Section 311 was to prevent failure of justice on account of a mistake of either party to bring on record valuable evidence or leaving an ambiguity in the statements of the witnesses. This Court observed: (SCC p. 654, para 7)

“7. ... ‘26. ... This is a supplementary provision enabling, and in certain circumstances imposing on the court the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

27. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the

*accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is “at any stage of inquiry or trial or other proceeding under this Code”. It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.’ [As observed in *Zahira Habibullah Sheikh (5) v. State of Gujarat*, (2006) 3 SCC 374, p. 392, paras 26-27: (2006) 2 SCC (Cri) 8.]”*

(emphasis supplied)

20. Grant of fairest opportunity to the accused to prove his innocence is the object of every fair trial, observed this Court in *Hoffman Andreas v. Inspector of Customs*[(2000) 10 SCC 430: 2001 SCC (Cri) 1488] . The following passage is in this regard apposite: (SCC p. 432, para 6)

“6. ... In such circumstances, if the new counsel thought to have the material witnesses further examined the court could adopt latitude and a liberal view in the interest of justice, particularly when the court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible.”

(emphasis supplied)

21. The extent and the scope of the power of the Court to recall witnesses was examined by this Court in *Mohanlal Shamji Soni v. Union of India* [1991 Supp (1) SCC 271 : 1991

SCC (Cri) 595] wherein this Court observed: (SCC p. 283, para 27)

“27. The principle of law that emerges from the views expressed by this Court in the above decisions is that the criminal court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command and examination of any person which would depend on the facts and circumstances of each case.”

(emphasis supplied)

22. Discovery of the truth is the essential purpose of any trial or enquiry, observed a three-Judge Bench of this Court in Maria Margarida Sequeira Fernandes v. Erasmo Jack de Sequeira [(2012) 5 SCC 370 : (2012) 3 SCC (Civ) 126] . A timely reminder of that solemn duty was given in the following words: (SCC p. 384, para 35)

“35. What people expect is that the court should discharge its obligation to find out where in fact the truth lies. Right from inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice.”

23. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined-in-chief about an incident that is nearly seven years old. Delay takes a heavy toll on the human memory apart from breeding cynicism about the efficacy of the judicial system to decide cases within a reasonably foreseeable time period. To that extent the apprehension expressed by Mr Raval, that the prosecution may suffer prejudice on account of a belated recall, may not be wholly without any basis. Having said that, we are of the opinion that on a parity of reasoning and looking to the

consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to the prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself.”

12. Learned Trial Court permitted PW-1 to 19 to be examined on affidavit being formal witnesses under Section 296 Cr.PC. While dealing with formal witnesses their Lordships in *P. Sanjeeva Rao (supra)* held that there is no gainsaying that every prosecution witness need not be cross-examined by the defence. It all depends upon the nature of the deposition and whether the defence disputes the fact sought to be established thereby. Formal witnesses are at times not cross-examined if the defence does not dispute what is sought to be established by reference to their deposition. However, in a prosecution case based on recoveries witnessed by the police officers with no independent persons available, the witnesses of recovery and others like in the present case the witnesses of issuance of arms/ammunitions cannot be said to be formal witnesses. They were required to be cross-examined effectively by the defence.

13. Hence we are of the considered opinion that the undue haste shown by the learned Additional Sessions Judge amounts to denial of a fair trial to the accused, who was seriously prejudiced in effectively cross-examining the witnesses.

14. We, therefore, set aside the impugned judgement of conviction and order on sentence and remand the matter back to the learned Trial Court for

recalling PW-2 HC Pramod, PW-3 HC Surender Singh, PW-4 HC Surender Singh, PW-5 Ct. Sunil Kumar, PW-6 Ct. Mandeep, PW-7 Ct. Ajay, PW-8 Ct. Hari Om, PW-9 Ct. Kuldeep, PW-14 Ct. Anil, PW-15 Ct. Sandeep, PW-16 HC Ranbir, PW-17 Ct. Pawan, PW-18 Hari Ram, PW-19 HC Nand Kishor, PW-20 Bhupender Singh, PW-24 Inspector Mahesh Kumar, PW-25 Puneet Puri, PW-26 Kapoor Singh, PW-27 SI Sandeep Tushir, PW-28 Dr. Manoj Dhingra, PW-29 Inspector Puran Pant, PW-30 SI Jai Prakash, PW-31 Inspector Sunil Kumar Sharma and PW-32 Inspector Rajesh Kumar and permit the accused to cross-examine them. The court would then follow the procedure prescribed by recording additional statement of accused under Section 313 Cr.P.C. if need be and permit the accused to lead defence evidence if any. The appellant would also be at liberty to file an application for bail before the learned Trial Court which would be disposed of in accordance with law.

15. Appeal is disposed of.

16. TCR be sent back.

(MUKTA GUPTA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

AUGUST 19, 2014
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