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

+ **CRL.A. 830/2013 and Crl. M. B. No. 1350/2013 (suspension)**

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Decided on: 12th March, 2014

BHARAT SINGH RAWAT

..... Appellant

Through: Mr. Kirti Uppal, Sr. Advocate with
Mr. Sunil Sethi, Advocate.

versus

STATE NCT OF DELHI

..... Respondent

Through: Neeraj K. Singh, APP for the State
with SI Premvir Singh, PS Sultanpuri,
Delhi.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J (ORAL)

1. By this appeal the Appellant challenges the impugned judgment dated 12th April, 2013 convicting the Appellant for offence under Section 306 IPC read with Section 354 IPC and the order on sentence dated 20th April, 2013 awarding sentence of Rigorous Imprisonment for a period of ten years and a fine of Rs. 10,000/- and in default of payment of fine to undergo Simple Imprisonment for a period of one month.

2. Learned counsel for the Appellant has challenged the impugned judgment and the order inter alia on the ground that there was a complete

denial of the right to defence to the Appellant, though no charge under Section 354 IPC was framed, however, the Appellant was still convicted of the said offence and in any case even if the evidence is taken as a whole no case for conviction under Section 306 IPC is made out.

3. A brief sequence of the events which transpired before the learned Trial Court at the fag end of the trial is required to be noted to ascertain whether there was a denial of right to defence to the Appellant. On 18th March, 2013, the learned APP closed the prosecution evidence and the matter was listed for the statement of the Appellant on 22nd March, 2013. Vide order dated 22nd March, 2013, the learned Additional Sessions Judge noted that the statement of the accused under Section 313 Cr.P.C. has been recorded, the accused has been granted opportunity to file the written statement in terms of Section 313 (5) Cr.P.C. if he so desires within two days and granted one opportunity to the Appellant to examine witnesses in defence if he so wishes and listed the matter for entire defence evidence on 2nd April, 2013. On 2nd April, 2013 the Appellant submitted that he did not wish to examine any witness in defence and thus the defence evidence was closed and the matter was listed for final arguments and filing of memorandum of arguments on 12th April, 2013.

4. When the matter came up on 12th April, 2013 learned counsel for the Appellant filed memorandum of arguments. However, the Reader of the Court pointed out that an application had been filed by the Appellant under Section 315 Cr.P.C. seeking permission to lead defence evidence. The learned Additional Sessions Judge took up the application and inquired from the learned counsel for the Appellant, who pleaded ignorance about filing of the said application. A perusal of the application showed that the same was signed only by the Appellant and not by any counsel as no fresh vakalatnama was attached. Thus a copy of the application was supplied to the learned counsel for the Appellant who stated that the application seems to have been personally filed by the Appellant and thus the Appellant be personally asked about the same. On the Appellant being asked he stated that the said application was filed by an advocate who was not his regular counsel and he had himself put the same in the petition box of the Court after signing the same but he was not aware about the contents of the application. On further query by the Court as to whether he wants to examine the witnesses, the Appellant stated that he wants to get call details of mobile phone of the deceased for the year 2008 retrieved. On this learned counsel for the Appellant submitted that earlier the Appellant had made a similar request to

him but being fully aware of the fact that it was not possible to get the call detail records for the year 2008 retrieved on accounts of Rules and Guidelines of the Government of India, he had advised the Appellant against making such request to the Court and perhaps for this reason the Appellant had chosen to file an application on his own.

5. The learned Additional Sessions Judge dismissed the application of the Appellant as no such request seeking directions to the service providers for preserving the call details of the phone of the deceased was made by the Appellant at the investigation or initial stage of the trial and at such a belated stage the request could not be allowed in view of the settled Rules and Guidelines of the Government of India regarding preservation of call details. As regards the prayer for examining the other witnesses mentioned in the application, since the Appellant did not make any mention before the Court and he was not aware of the contents of the application hence the Court rejected the said prayer also and dismissed the application. On the same date the learned Additional Sessions Judge heard the arguments and passed the judgement convicting the Appellant as noted above.

6. The Appellant immediately filed a petition before this Court being Crl. M.C. No. 1501/2013 against the order of the learned Additional Sessions

Judge rejecting the application for leading defence evidence and when the matter came up on 17th April, 2013 this Court listed the matter for 6th May, 2013 directing requisitioning of the record of the Trial Court through Special Messenger. However, since there was no stay of proceedings before the learned Trial Court, the learned Additional Sessions Judge went ahead by hearing the arguments on the quantum of sentence and passed the impugned order on sentence. On 18th April, 2013 the Appellant's counsel was not present and the Appellant sought for legal assistance from the State. While this discussion was going on, one of the colleagues of the learned counsel for the Appellant appeared before the Court and the request of the Appellant was informed to the learned counsel by the Court. The court observed that it had specifically asked the Appellant that if he had discharged the counsel from the case which he denied and submitted that he was under the impression that nobody was appearing for him on account of which he had made the request for legal assistant at State expense. On 18th April, 2013 itself file was taken up at 1.00 p.m. when the Ahlmad of the Court placed the fax copy of the order dated 17th April, 2013 passed by this Court in CrI. M.C. No. 1505/2013 and stated that the file of this Court had been urgently called to the High Court today itself. After hearing the arguments on sentence the

matter was listed for orders on 20th April, 2013. Since there was no stay of the proceedings the learned Additional Sessions Judge passed the impugned order on 20th April, 2013 awarding sentence as noted above.

7. In the application filed by the Appellant under Section 315 Cr.P.C. for leading evidence the Appellant had stated that on 2nd April, 2013 the Appellant was not in a fit state of mind and thus he refused to lead evidence.

He stated that he wanted to lead evidence on the following:

- “i) That the deceased Smt. Rashmi Rawat was under depression due to torture and blackmailing by some boy, who used to make continuous calls on her phone no. 9911885527 of Idea Co. And SMS exchanged between them with contents of messages and the said calls records can be taken out from the Idea Mobile Company and for this purpose the official of Idea Mobile Company are required to be examined.
- ii) Further the deceased during first pregnancy of deceased, she suffered with miscarriage due to acute pain in stomach and till then she was under depression and under treatment with the Doctors of Mool Chand Hospital and Private Doctors, therefore, the said Doctors are required to be examined in defence evidence.
- iii) Further the suicidal note of the deceased Smt. Rashmi was not in her handwriting and for this purpose the husband of deceased and the hand writing expert is required to be examined.

- iv) Further the family members of applicant/accused for leading their defence evidence.

8. The application of the Appellant seeking permission to lead defence evidence was dismissed primarily on the count that the Appellant had not made any request either during the investigation or during the trial for preserving the records from the service providers of the telephone and hence at this belated stage the same would not be available in view of the Government of India Rules and Guidelines. However, the learned Additional Sessions Judge totally lost sight of the fact that call records of the phone no. 9911885527-Idea Company of the deceased were already on record duly filed by the Investigating Agency along with the charge sheet. The same also find mentioned in the list of documents with charge sheet. However, the prosecution did not examine the concerned officer who could have proved the call detail records which however, did not foreclose the right of the Appellant to examine the said witness in his defence. The call records being there on record already, the dismissal of the application on the basis that at the said belated stage it would not be possible to retrieve the call details from the service providers, was wholly incorrect. Further the learned Additional Sessions Judge failed to notice that in the said application the

Appellant had sought to examine the doctors from the Mool Chand Hospital and the Private Hospitals who had treated the deceased for depression, also sought to prove that the alleged suicide note was not in the hand writing of the deceased and to examine his family members in defence. The said request has been lightly brushed aside by the learned Additional Sessions Judge stating that the prayer for examining no other witness has been made by the Appellant in the Court.

9. A perusal of the order dated 12th April, 2013 and 18th April, 2013 show that there was total non-cooperation by the learned counsel for the Appellant and in this situation the learned Trial Court ought to have acted as per law to guard the right of defence of the Appellant. A perusal of the cross-examination of the prosecution witnesses shows that the Appellant had suggested to the family members of the deceased that the mother-in-law of the deceased saw some SMS in the mobile of the deceased after she heard the deceased talking on her mobile to some boy and informed the same to the father-in-law who asked the deceased not to indulge in such activities resulting in annoyance to her. The witnesses have also been suggested that the husband of the deceased had objections to her relations with one Rinku who used to reside in front of their house and when the factum of SMS to the

boy came to the knowledge of the husband and his parents who also informed the parents of the deceased, the deceased committed suicide. Thus it cannot be said that the defence witnesses, which the Appellant wanted to examine were an afterthought because this was the line of defence of the Appellant throughout the trial starting from PW1.

10. In *Zahira Habibullah Sheikh (5) and another vs. State of Gujarat and others*, 2006 (3) SCC 374 the Hon'ble Supreme Court explained the concept to fair trial to an accused and held that same was centric to the administration of justice and essential for protection of human rights. It was held:

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 the 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 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.

37. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not about over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny.

38. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty stage-managed, tailored and partisan trial.

39. The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice.

40. "Witnesses" as Bentham said: are the eyes and ears of justice. Hence, the importance and primary of the quality of trial process. If the witness himself is incapacitated from acting

as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors, like the witness being not in a position for reasons beyond control to speak the truth in the Court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by Courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface rendering truth and justice, to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the Court and justice triumphs and that the trial is not reduced to a mockery. Doubts are raised about the roles of investigating agencies. Consequences of defective investigation have been elaborated in *Dhanraj Singh @ Shera and Ors. v. State of Punjab* 2004 CriLJ 1807. It was observed as follows:

5. In the case of a defective investigation the Court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly

defective. (See Karnel Singh v. State of M.P. 1995 CriLJ 4173).

6. In Paras Yadav and Ors. v. State of Bihar 1999 CriLJ 1122 it was held that if the lapse or omission is committed by the investigating agency or because of negligence the prosecution evidence is required to be examined de hors such omissions to find out whether the said evidence is reliable or not. The contaminated conduct of officials should not stand on the way of evaluating the evidence by the courts; otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party.

7. As was observed in Ram Bihari Yadav v. State of Bihar and Ors. 1998 CriLJ 2515 if primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the Law enforcing agency but also in the administration of justice. The view was again re-iterated in Amar Singh v. Balwinder Singh and Ors. 2003 CriLJ 1282.

11. In *Zahira Habibullah Sheikh*(5) (supra) while explaining the object of Section 311 Cr.P.C., it was held:

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 for 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 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.

28. As indicated above, the Section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: it is, that the Court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court. Sections 60, 64 and 91 of the Indian Evidence Act, 1872 (in short, 'Evidence Act') are based on this rule. The Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the Court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The Court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the Court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the Court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.

29. The object of the Section 311 is to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society. If a witness called by Court gives evidence against the

complainant he should be allowed an opportunity to cross-examine. The right to cross-examine a witness who is called by a Court arises not under the provision of Section 311, but under the Evidence Act which gives a party the right to cross-examine a witness who is not his own witness. Since a witness summoned by the Court could not be termed a witness of any particular party, the Court should give the right of cross-examination to the complainant. These aspects were highlighted in *Jagat Rai v. State of Maharashtra*.

30. Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying existence of Courts of justice. The operative principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involves a delicate judicial balancing of competing interests in a criminal trial, the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences.

12. In *Mohd. Hussain alias Julfikar Ali vs. State (Govt. Of NCT), Delhi*, AIR 2012 SC 750 while dealing with the Article 14 of the International Covenant of Civil and Political Rights Guaranteed to the Citizens it was noted:

“30. Having said so, it needs consideration as to whether assistance of the Counsel would be necessary for fair trial. It needs no emphasis that conviction and sentence can be inflicted only on culmination of the trial which is fair and just. I have no manner of doubt that in our adversary system of criminal justice, any person facing trial can be assured a fair trial only when the Counsel is provided to him. Its roots are many and find places in manifold ways. It is internationally

recognized by covenants and Universal Declaration of Human Rights, constitutionally guaranteed and statutorily protected.

31. Article 14 of the International Covenant on Civil and Political Rights guarantees to the citizens of nations signatory to that covenant various rights in the determination of any criminal charge and confers on them the minimum guarantees. Article 14 (2) and (3) of the said covenant read as under:

“Article 14.

xxx xxx xxx

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with Counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;....

Article 14(3)(d) entitles the person facing the criminal charge either to defend himself in person or through the assistance of a Counsel of his choice and if he does not have legal assistance, to be informed of his right and provide him the legal assistance without payment in case he does not have sufficient means to pay for it. It is accepted in the civilized world without exception that the poor and ignorant man is equal to a strong and mighty opponent before the law. But it is of no value for a poor and ignorant man if there is none to inform him what the law is. In the absence of such information that courts are open to him on the same terms as to all other persons the guarantee of equality is illusory. The aforesaid International Covenant on Civil and Political Rights guarantees to the indigent citizens of the member countries the right to be defended and right to have legal assistance without payment.

32. Not only this, the Universal Declaration on Human Rights ensures due process and Article 10 thereof provides that everyone is entitled in full equality to a fair hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charges against him. Article 11 of Universal Declaration of Human Rights guarantees everyone charged with a penal offence all the guarantees necessary for the defence, the same reads as under:

“(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

33. These salutary features forming part of the International Covenants and Universal Declaration on Human Rights are deep rooted in our constitutional scheme. Article 21 of the Constitution of India commands in emphatic terms that no person shall be deprived of his life or personal liberty except according to the procedure established by law and Article 22(1) thereof confers on the person charged to be defended by a legal practitioner of his choice. Article 39A of the Constitution of India casts duty on the State to ensure that justice is not denied by reason of economic or other disabilities in the legal system and to provide free legal aid to every citizen with economic or other disabilities.

13. In *Chaluvegowda and others vs. State by Circle Inspector of Police*, 2012 (4) Scale 382 it was held:

24. This Court in *Mohd. Sukur Ali v. State of Assam*, (2011) 4 SCC 729, has held:

“5. 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.

.....

9. In *Maneka Gandhi v. Union of India*, it has been held by a Constitution Bench of this Court that the procedure for depriving a person of his life and liberty should be fair, reasonable and just. We are of the opinion that it is not fair or just that a criminal case should be decided against an accused in the absence of a counsel. It is only a lawyer who is conversant with law who can properly defend an accused in a criminal case. Hence, in our opinion, if a criminal case (whether a trial or appeal/revision) is decided against an accused in the absence of a counsel, there will be violation of Article 21 of the Constitution.

10. The right to appear through counsel has existed in England for over three centuries. In ancient Rome there were great lawyers e.g. Cicero, Scaevolo, Crassus, etc. who defended the accused. In fact the higher the human race has progressed in civilisation, the clearer and stronger has the right appeared, and the more firmly has it been held and asserted. Even in the Nuremberg trials the Nazi war criminals, responsible for killing millions of persons, were yet provided counsel. Therefore when we say that the accused should be provided counsel we are not bringing into existence a new principle but simple recognising what already existed and which civilised people have long enjoyed.”

14. Section 311 Cr.P.C. is a salutary provision to be followed by the trial Court to ensure a fair trial. It is bounden duty of the Court to see that no relevant and admissible evidence whether of the prosecution or the defence is left out. In the present case despite material evidence having been collected by the prosecution, the prosecution failed to examine the said witness for exhibiting the call detail records of the deceased and the Appellant was within his legal right to have called the witnesses to prove the

same. A criminal court is not a referee of a match to see which side wins. A criminal trial is a quest for truth and every effort is required to be made by the learned Trial Court to ensure that truth is unravelled. In the present case denial to the Appellant to lead defence evidence has resulted in failure of a fair trial.

15. Without going into the other aspects of the matter as to whether without any charge being framed under Section 354 IPC the Appellant could have been convicted for the said offence and whether even if the entire prosecution evidence is taken as it is, the Appellant is not liable to be convicted under Section 306 IPC, I am of the considered opinion that the impugned judgment of conviction and order on sentence are liable to be set aside on the sole ground that a valuable right, that is, right to lead defence evidence has been denied to the Appellant. Consequently the impugned judgment of conviction and order on sentence are set aside.

16. The Appellant is granted liberty to lead defence evidence before the learned Trial Court and where after a reasoned judgment will be passed. The parties will appear before the learned trial court on 14th April, 2014. The Appellant was on bail during the trial and in view of the fact that the impugned judgment and conviction and order on sentence are set aside, the

Appellant is directed to be released on bail on his furnishing a personal bond in the sum of Rs. 25,000/- with one surety of the like amount, subject to the satisfaction of the learned Trial Court.

Appeal and the application are disposed of. Order dasti.

(MUKTA GUPTA)
JUDGE

MARCH 12, 2014
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