



THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)
ITANAGAR PERMANENT BENCH
Criminal Appeal No. 21(AP)/2022

Bopa Wangnow,
Son of Late Khoapang Wangnow,
Resident of Pumao Village,
PO/PS Longding, District Longding,
Arunachal Pradesh.

.....Appellant.

-Versus-

1. The State of Arunachal Pradesh.
Represented by the Public Prosecutor.

2. Atar Singh Sharma
S/o Lt. Kanhayaram Sharma,
R/o Longding Bazaar,
PO/PS Longding,
Dist.- Longding,
Arunachal Pradesh.

.....Respondents.

BEFORE
HON'BLE MR. JUSTICE ROBIN PHUKAN
HON'BLE MR. JUSTICE KARDAK ETE

For the Appellant : Mr. P. Taffo. Advocate.

For the Respondents : Mr. J. Tsering,
P.P., Arunachal Pradesh.
.....Advocate.

Date of Hearing : 21.12.2023

Date of Judgment : **29th February, 2024**

JUDGMENT AND ORDER

Robin Phukan, J.

Heard Mr. P. Taffo, learned counsel for the appellant. Also heard Mr. J. Tsering, learned Public Prosecutor, Arunachal Pradesh, representing the State respondent.

2. In this appeal, under Section 374(2) of the Cr.P.C., the appellant, namely, Bopa Wangnow has challenged the correctness or otherwise of the judgment and order dated 09.06.2022, passed in Khonsa Sessions Case No.02/2021, arising out of Longding P.S. Case No.39/2017, under sections 364(A)/121/34 IPC read with sections 10/13 UA(P) Act and section 25(1A) Arms Act, by the learned Sessions Judge, Khonsa. It is to be noted here that vide the impugned judgment and order, the learned Court below has convicted the appellant, under Section 364(A)/34 of the IPC, and sentenced him to suffer imprisonment for life and also to pay a fine of Rs.20,000/-, with default stipulation.

3. The background facts, leading to filing of the present appeal, are briefly stated as under:-

“On 13.06.2017, at about 16.30 hrs an enquiry report was received from Inspector T. Wangsu of Longding P.S. to the effect that on

13.06.2017 at around 13.30 hrs a group of NSCN-K militant, identified as (i) SS. Lt. Nahbo Wangsu (ii) SS. L/CPL Tainai Wangnowham (iii) SS. L/CPL Palal Wangpan (iv) SS. Pvt. Honchun @ Ahon Wangsa (v) SS. L/CPL Wangthoak Wangsu had kidnapped Mr. Atar Singh Sharma, a businessman of Longding Market for not paying them the extortion money demanded by them. Upon the said report the Officer-in-Charge Longding Police Station registered a case, being Longding P.S. Case No. 39/2017, under sections 364(A)/121/34 IPC read with sections 10/13 UA(P) Act and read with section 25 (1A) of the Arms Act, and carried out the investigation which culminated in filing of charge sheet, being charge sheet No.02/2019 against four accused persons namely (i) SS. Lt. Nahbo Wangsu (ii) SS. L/CPL Tainai Wangnowham (iii) SS. L/CPL Palal Wangpan (iv) SS. L/CPL Wangthoak Wangsu and they were shown as absconder in the charge sheet. One of the accused, namely, SS. Pvt. Honchun @ Ahon Wangsa suffered demise in an encounter. Subsequently, on different dates accused (i) SS. Lt. Nahbo Wangsu (ii) SS. L/CPL Palal Wangpan (iii) SS. L/CPL Wangthoak Wangsu were arrested on the strength of warrant of arrest and committed to the court of learned Sessions Judge, Khonsa. Thereafter, the learned court below had framed charges against the said three accused under sections 364(A)/34 IPC read with sections 384/34 IPC and thereafter had examined five witnesses. Then on 15.03.2022, while witness Atar Singh was examined, he had implicated accused Bopa Wangnow, and then the learned court below had invoked the provision of section 319 Cr.P.C. and impleaded Bopa Wangnow as an accused. As accused

Bopa Wangnow was present in the court on that day with his counsel, in connection with Longding P.S. Case No. 14/2017, under section 302 IPC, the learned court below had complied with provision of section 207, by providing him copies and exhibits. Thereafter, the learned court below, hearing the learned P.P. and learned counsel Mr. L. Wangpan for accused Bopa Wangnow, had framed charge against the accused Bopa Wangnow under section 364(A)/34 IPC read with sections 384/34 IPC and on being read and explained over the charges he pleaded not guilty. Thereafter, the learned court below had recalled the five witnesses examined earlier. Thereafter, the prosecution side had examined another two witnesses. After completion of examination of witnesses the learned court below had examined the accused persons under section 313 Cr.P.C. Thereafter, hearing arguments of both sides, the learned court below convicted the accused persons, including the present appellant under section 364(A)/34 IPC and sentenced him as aforesaid."

4. Being aggrieved, the appellant has preferred this appeal on the following grounds:-

- (i) The right to fair trial is violated here in this case as the learned court below, having examined witness Atar Singh Sharma, taken the appellant into custody, who was present in the court with his counsel in connection with another case, being Longding P.S. Case No.14/2017, had compelled the counsel for the appellant to cross-examine P.W.6,7 then and there after framing charge against him by providing him a

copy of the charge sheet, but he was not furnished the copy of statement of P.W.6 and the documents produced before the learned court below and there by prejudice was caused to him as he did not get time to go through the record and to consult his counsel;

- (ii) That, the wife of P.W.6, namely. Smti. Billu Devi, has not supported his version and there was material contradiction in their versions;
- (iii) That, the son of P.W.6 has supported the version of P.W.6;
- (iv) That, the learned trial court had mechanically convicted the appellant without there being any convincing evidence;
- (v) That, the learned court below has not given its reason for arriving at a conclusion that the charge under section 364(A) IPC has been proved against the appellant;

5. Mr. Taffo, learned counsel for the appellant, reiterated the points mentioned in the Memo of Appeal, also advanced three fold arguments:-

- 1) Firstly, Mr. Taffo submits that herein this case the right to fair trial has been violated as the appellant has not been given fair opportunity to defend himself. In support of his submission Mr. Taffo has referred the case of **Manu Sharma vs. State (NCT of Delhi)** reported in **(2010) 6 SCC 1**.
- 2) Secondly, Mr. Taffo submits that the wife and son of P.W.6, namely, Atar Singh have not supported the version of the appellant;

- 3) Thirdly, Mr. Tafoo submits that the mandate of *de-novo* trial has not been followed by the learned trial court;

Mr. Tafoo has also referred one case law, **Michael Machado and Another vs. Central Bureau of Investigation and another** reported in **(2003) 3 SCC 262**, to contend that the learned court below had ignored the basic requirement of section 319 Cr.P.C. while conducting the trial. Referring to another decision of Hon'ble Supreme Court in **Mohd. Hussain @ Julfikar Ali vs. State (Govt. of NCT of Delhi)** reported in **(2012) 2 SCC 584**, Mr. Tafoo submits that effective opportunity has to be provided to the accused to defend himself. And as the same have not been provided here in this case and as the right to fair trial is violated herein this case, Mr. Tafoo submits that the impugned judgment and order of conviction may be set aside and quashed.

6. On the other hand, Mr. J. Tsering, learned P.P., Arunachal Pradesh submits that the learned court below has not committed any illegality or impropriety by invoking the provision of section 319 Cr.P.C. against the present appellant and that there is ample corroboration in the evidence of P.W.3, 4 and 6 about the involvement of the present appellant with the charge and he was involved in kidnapping of P.W.6 and demanding ransom and detention of the P.W.6. Mr. Tsering, further submits that no right to fair trial of the appellant is violated herein this case. Mr. Tsering, further submits that the prosecution has succeeded in establishing all the ingredients of the charge under section 364A IPC herein this case and the learned court below has rightly convicted the appellant and therefore, contended to dismiss the appeal as it is devoid of merit. Mr.

Tsering also referred to a decision of Hon'ble Supreme Court in **Vinod vs. State of Haryana** reported in **(2008) 2 SCC 246**, to bolster his submission.

7. Having heard the submission of learned Advocates of both sides, we have carefully gone through the petition and documents placed on record and also perused the record of the learned Court below.

8. It appears from the record of the learned court below that present appellant has neither been named in the FIR nor named in the charge sheet. It appears that in the FIR, Exhibit-1, five persons were named and they are, namely, (i) SS. Lt. Nahbo Wangsu (ii) SS. L/CPL Tainai Wangnowham (iii) SS. L/CPL Palal Wangpan (iv) SS. Pvt. Honchun @ Ahon Wangsa (v) SS. L/CPL Wangthoak Wangsu. It also appears that having carried out the investigation, the investigating officer had laid charge sheet against four accused persons namely (i) SS. Lt. Nahbo Wangsu (ii) SS. L/CPL Tainai Wangnowham (iii) SS. L/CPL Palal Wangpan (iv) SS. L/CPL Wangthoak Wangsu and they were shown as absconder in the charge sheet. The other accused namely, SS. Pvt. Honchun @ Ahon Wangsa, whose name find mention in the FIR, suffered demise in an encounter.

9. That, the record of the learned court below also reveals that three accused, namely, (i) SS. Lt. Nahbo Wangsu (ii) SS. L/CPL Palal Wangpan (iii) SS. L/CPL Wangthoak Wangsu were arrested on the strength of warrant of arrest and committed to the court of learned Sessions Judge, Khonsa. Further, the record reveals that the learned court below had framed charges against the said three accused under sections 364(A)/34 IPC read with sections 384/34 IPC and thereafter, had examined five

witnesses, out of 7 witnesses, cited in the charge sheet till 15.03.2022. And on that day i.e. 15.03.2022, while witness Atar Singh Sharma was examined, he had deposed that accused Bopa Wangnow is also involved in the offence and as per his direction the other accused have kidnapped him and demanded money and received a sum of Rs.10,00,000/- and thereafter, he had issued a receipt, which he had produced and exhibited before the court. Further, it appears that on the basis of evidence of this witness and the document exhibited by him, the learned court below had invoked the provision of section 319 Cr.P.C. and arraigned Bopa Wangnow as an accused.

10. And it is the procedure, so adopted by the learned court below, thereafter, according to Mr. Tafoo, the learned counsel for appellant, was contrary to the fair trial and as such the right to fair trial of the appellant stands impaired. The learned court below, according to Mr. Tafoo, ought to have passed summon order to newly arraigned accused i.e. the present appellant, and thereafter furnishing copies to him along with the evidence of witness Atar Singh Sharma, ought to have fix one date for hearing on the point of charge and thereafter ought to have conducted a de-novo trial. Instead, Mr. Tafoo submits, the learned court below had framed charge against the appellant, who was present in the court on that day in connection with another case, on the same day, and thereafter, compelled to cross-examine the witnesses present on that day, without furnishing him the evidence of witness Atar Singh Sharma, based upon whose evidence, the learned court below has arraigned him as an accused invoking section 319 Cr.P.C. And this procedure, according to Mr. Tafoo, had impaired the right to fair trial of the appellant. But, this

submission of Mr. Taffo is being controverted by Mr. J. Tsering, the learned P.P.

11. To appreciate the submissions of learned Advocates of both sides, we deemed it appropriate to discuss a decision of Hon'ble Supreme Court presently holding this field. A Constitutional Bench of Hon'ble Supreme Court, in the case of **Sukhpal Singh Khaira v. State of Punjab, (2023) 1 SCC 289**, in para 41, had laid down detailed guidelines that the competent court must follow while exercising power under Section 319 Cr.P.C. as under:-

- 41.1. If the competent court finds evidence or if application under Section 319 CrPC is filed regarding involvement of any other person in committing the offence based on evidence recorded at any stage in the trial before passing of the order on acquittal or sentence, it shall pause the trial at that stage.**
- 41.2. The court shall thereupon first decide the need or otherwise to summon the additional accused and pass orders thereon.**
- 41.3. If the decision of the court is to exercise the power under Section 319 CrPC and summon the accused, such summoning order shall be passed before proceeding further with the trial in the main case.**
- 41.4. If the summoning order of additional accused is passed, depending on the stage at which it is passed, the court shall also apply its mind to the fact as to whether such summoned accused is to be tried along with the other accused or separately.**
- 41.5. If the decision is for joint trial, the fresh trial shall be commenced only after securing the presence of the summoned accused.**
- 41.6. If the decision is that the summoned accused can be tried separately, on such order being made, there will be no impediment for the court to continue and conclude the trial against the accused who were being proceeded with.**
- 41.7. If the proceeding paused as in para 41.1 above, is in a case where the accused who were tried are to be acquitted, and the**

decision is that the summoned accused can be tried afresh separately, there will be no impediment to pass the judgment of acquittal in the main case.

41.8. If the power is not invoked or exercised in the main trial till its conclusion and if there is a split-up (bifurcated) case, the power under Section 319 CrPC can be invoked or exercised only if there is evidence to that effect, pointing to the involvement of the additional accused to be summoned in the split-up (bifurcated) trial.

41.9. If, after arguments are heard and the case is reserved for judgment the occasion arises for the Court to invoke and exercise the power under Section 319CrPC, the appropriate course for the court is to set it down for re-hearing.

41.10. On setting it down for re-hearing, the above laid down procedure to decide about summoning; holding of joint trial or otherwise shall be decided and proceeded with accordingly.

41.11. Even in such a case, at that stage, if the decision is to summon additional accused and hold a joint trial the trial shall be conducted afresh and *de novo* proceedings be held.

41.12. If, in that circumstance, the decision is to hold a separate trial in case of the summoned accused as indicated earlier:

(a) The main case may be decided by pronouncing the conviction and sentence and then proceed afresh against summoned accused.

(b) In the case of acquittal the order shall be passed to that effect in the main case and then proceed afresh against summoned accused.

12. At this stage, to appreciate the controversy with greater precision, we deemed it appropriate to reproduce the order, so passed by the learned court below while invoking section 319 Cr.P.C.

15-03-2022

Today the present case is fixed for production of accused persons and examination of PW's. Accused persons namely Nahbo Wangsu, Palai Wangpan and Wangthuak Wangsu are produced from Judicial Custody, Longding. The State is represented by Learned PP Mr. N. Matey. Learned Legal Aid Counsel Miss S. Lowang for the accused persons is present.

During the time of examination of PW-06, namely, Atar Singh Sharma, he has deposed before this Court that after his kidnap by the accused persons, his family members had paid an amount of Rs.15 Lacs in two installments as ransom for his release. An amount of Rs.5 Lacs was paid by Arun Kumar Sharma, S/o Atar Singh Sharma, to Nahbo Wangsu and another amount of Rs.10 Lacs is paid by the wife of victim to Bopa Wangnow. PW-06- Mr. Atar Sharma has exhibited the letter pad dated 15-06-2017, whereby, acknowledgment of Rs.15 Lacs with threatening to Atar Sharma was signed by Lieutenant Cornel of NSCN-K, Bopa Wangnow and Commander Scc Let Nahbo Wangsu. I have carefully perused exhibit-01 and seen that this is a letter pad in the name of Government of People's Republic, Nagaland, Officer of Commander, Mobile-II, NSCN/GPRN. Said letter is addressed to Atar Singh, Longding Bazaar. It is acknowledged that public complaint came to their office of Wancho Commander Mobile-II that he is an intelligent within public and Nagas, not cooperating with bazaar and if he wish to stay at Longding, then he should not repeat the same. A fine of Rs.15 Lacs was received in cash to solve it and Atar Sharma is directed not to repeat the same again. In view of above evidence on record, it is found that Bopa Wangnow is one of the persons who is involved in abduction of Atar Singh Sharma and he received ransom amount for release him. In view of above materials, it is found that Bopa Wangnow Lieutenant Cornel of NSCN/GPRN is one of the persons involved in kidnapping of Atar Sharma and receiving ransom with other accused persons. As such, this Court, as provided U/S 319 CrPC, finds it appropriate that Bopa Wangnow is one of the persons who should be tried together with the other accused persons. It is decided that this Court will proceed for trial of accused Bopa Wangnow with other accused persons.

Copy as provided U/S 207 Cr.P.C. including the exhibits are served upon accused Bopa Wangnow who is present before the Court today for attending Longding PS Case No.14/17, where, allegation is against four of the accused persons of killing one Tailai Wangpan. I have heard Learned Counsel Mr. L. Wangpan appearing for the accused Bopa Wangnow. After consideration of entire materials on record and evidences, charge U/S 364(a)/384 R/W Sec.34-IPC are framed against accused Bopa Wangnow who has pleaded not guilty and claimed to be tried.

Two prosecution witnesses namely Shri Atar Sharma and Shri Topha Wangsu are present. They are examined as PW-06 & 07 and discharged after due cross examination by Learned Legal Aid Counsel Miss S. Lowang appearing for accused persons namely Nahbo, Palai and Wangthoak and Learned Counsel Mr. L. Wangpan appearing for accused Bopa Wangnow.

As Learned Counsel for accused Bopa Wangnow did not get an opportunity for cross examination, prosecution witnesses namely Shri Abo Manham, Shri Manpang Wangsu, Smti Billu Devi Sharma, Shri Arun Kumar Sharma and Shri Amit Chaudhary, they be re-called for re-examination as provided U/S 319 CrPC. Issue WT message in addition to summons.

Accused Bopa Wangnow is taken into custody of the Court as provided U/S 319(3) CrPC. Accused Bopa Wangnow be remanded in Judicial Custody, Longding, for 13 days. Let the accused person be medically examined before remanding in Judicial Custody.

Remand accused persons namely Nahbo Wangsu, Palai Wangpan and Wangthuak Wangsu in Judicial Custody, Longding, for 13 days.

Fix on- 28-03-22, for production of accused persons and re-examination of PW's.

13. A cursory perusal of the aforementioned order indicates that during examination of Atar Singh Sharma as P.W.6, the learned court below had arrived at a conclusion that Bopa Wangnow, Lieutenant Colonel of NSCN/GPRN, is one of the persons involved in kidnapping of Atar Singh Sharma and he had received ransom with other accused persons and as such, the learned court below had deemed it appropriate that Bopa Wangnow should be tried together with the other accused persons, and accordingly, decided to proceed for trial of accused Bopa Wangnow with other accused persons.

14. It also appears that the learned court below, having decided to proceed against Bopa Wangnow, did not pass any order for issuing summon to him. Instead, the learned court below had furnished copy, including the exhibits, to him U/S 207 Cr.P.C., as he was present in the court in connection with Longding PS Case No.14/17. Thereafter, the learned court below, after hearing learned counsel, Mr. L. Wangpan, appearing for the accused Bopa Wangnow and after considering the

entire materials on record and evidences, had framed charge U/S 364A/384 R/W Sec.34-IPC against accused Bopa Wangnow, who had pleaded not guilty and claimed to be tried. Thereafter, the learned court below, on the same day, had examined two prosecution witnesses, namely Shri Atar Singh Sharma and Shri Topha Wangsu and discharged them after cross examination. Then the learned court below had recalled the other prosecution witnesses, namely, Shri Abo Manham, Shri Manpang Wangsu, Smti Billu Devi Sharma, Shri Arun Kumar Sharma and Shri Amit Chaudhary, as learned counsel for accused Bopa Wangnow did not have an opportunity to cross examine them.

15. That, as held by Hon'ble Supreme Court in the case of Sukhpal Singh Khaira (supra) whenever the competent court finds evidence regarding involvement of any other person in committing the offence based on evidence recorded at any stage in the trial before passing of the order on acquittal or sentence, ***it shall pause the trial*** at that stage. Thereafter, the court shall first decide the need or otherwise to summon the additional accused and pass orders thereon. And if the decision of the court is to exercise the power under Section 319 Cr.P.C. and summon the accused, such summoning order shall be passed ***before proceeding further with the trial in the main case.*** Thereafter, the court has to take a decision as to whether such summoned accused has to be tried along with the other accused or separately. And if the decision is for joint trial, ***the fresh trial shall be commenced only after securing the presence of the summoned accused.***

16. Thus, it transpires that the course of action, the learned court below ought to have adopted, is that having find evidence about involvement of the appellant in the offence, the learned court below ought to have paused the trial. And immediately after deciding to proceed against present appellant, the learned court below ought to have passed summon order to secure the attendance of the accused so arraigned, and thereafter, to decide whether the appellant is to be tried along with the other accused or separately. And when decision is taken for joint trial, fresh trial ought to have been started after securing his attendance. And having secured the attendance of the accused/appellant, learned court below ought to have furnish the copies of documents as contemplated under section 207 Cr.P.C. and also the copy of the evidence of P.W.6, who had implicated him with the offences, and the document exhibited by P.W.6 and also the evidence of other witnesses examined already and thereafter, ought to have fix a date for hearing on the point of charge in view of section 230 Cr.P.C.

17. It is also to be noted here that section 230 Cr.P.C. provides for fixing a date for prosecution evidence, after framing of charge, when the accused pleaded not guilty. The section reads as under:-

"If the accused refuses to plead, or does not plead, or claims to be tried or is not convicted under Section 229, the Judge shall fix a date for the examination of witnesses, and may, on the application of the prosecution, issue any process for compelling the attendance of any witness or the production of any document or other thing."

The word 'shall' used in the section contemplates that it is mandatory for the courts to fix a date for examination of the witnesses.

And only after framing of charge against accused/appellant, the prosecution witnesses ought to have been summoned.

18. In the case in hand, as discussed herein above, the learned court below, having found it appropriate that Bopa Wangnow is one of the persons who should be tried together with the other accused persons, and deciding to proceed against him with other accused persons, neither paused the trial nor passed summon order. Instead of pausing the trial and passing summoned order and conducting the trial afresh, what the learned court did was - it furnishes copy, as provided U/S 207 Cr.P.C. including the exhibits upon accused Bopa Wangnow, who was present before the Court on that day in connection with Longding PS Case No.14/17. Thereafter, having heard Learned Counsel, Mr. L. Wangpan for the accused Bopa Wangnow and after consideration of entire materials on record and evidences, the learned court below had framed charges against him U/S 364(A)/384 R/W Sec.34-IPC and on account of not pleading guilty, the learned court below had examined two prosecution witnesses, namely, Shri Atar Singh Sharma and Shri Topha Wangsu as PW-06 & 07 and discharged them after due cross examination. It is to be noted here that P.W.6 - Atar Singh Sharma is the person who had implicated accused/appellant Bopa Wangnow.

19. Thus, in the given facts and circumstances on record and as discussed herein above, the submission of Mr. Tafoo, the learned counsel for the accused/appellant assumes significance. As submitted by him, the right to fair trial of the appellant appears to be violated herein this case as the learned court below had not conducted *de novo* trial, as contemplated under the provision of section 319 Cr.P.C., and summon

order was not and reasonable opportunity was not afforded to him for arguing on the point of charge and also the copy of evidence of the P.W, 6 was not furnished to him and he was compelled to cross-examine the P.W.6 and 7 who were present in the court on that day in connection with another case. Mr. Tafoo, the learned counsel for the appellant has rightly pointed this out during hearing. And we find substance in the submission of Mr. Tafoo and the ratio laid down in the case of **Michael Machado and Another** (supra), so referred by him, also strengthened his submission. It is to be mentioned here that in the said case it has been held as under:-

"14. The court while deciding whether to invoke the power under Section 319 of the Code, must address itself about the other constraints imposed by the first limb of sub-section (4), that proceedings in respect of newly-added persons shall be commenced afresh and the witnesses re-examined. The whole proceedings must be recommenced from the beginning of the trial, summon the witnesses once again and examine them and cross-examine them in order to reach the stage where it had reached earlier."

20. It is now well settled in catena of decisions of Hon'ble Supreme Court that right to fair trial is a fundamental right as enshrined in the Article 21 of the constitution of India. It (fair trial) is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened at any stage of trial in any manner. Fair trial encompasses the interests of all the stakeholders of the system i.e. the accused, the victim and of the society. And therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is also a human right. Thus, under no circumstances can a person's right to fair trial be

jeopardized. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same. Reference in this context can be made to the following decision of Hon'ble Supreme Court- **(i) Zahira Habibulla H. Sheikh & Anr. v. State of Gujarat & Ors. AIR 2004 SC 3114; (ii) Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors., AIR 2006 SC 1367; (iii) Vijay Kumar v. State of U.P. & Anr., (2011) 8 SCC 136; and (iv) Sudevanand v. State through C.B.I. (2012) 3 SCC 387.**

21. Again in the case of **Manu Sharma v. State (NCT of Delhi)**, reported in **(2010) 6 SCC 1** while dealing with the issue of right to fair trial of the accused, Hon'ble Supreme Court has held as under:-

"197. In the Indian criminal jurisprudence, the accused is placed in a somewhat advantageous position than under different jurisprudence of some of the countries in the world. The criminal justice administration system in India places human rights and dignity for human life at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play balanced role in the trial of a crime. The investigation should be judicious, fair, transparent and expeditious to ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 20 and 21 of the Constitution of India.

198. A person is entitled to be tried according to the law in force at the time of commission of offence. A person could not be punished for the same offence twice and most significantly cannot be compelled to be a witness against himself and he cannot be deprived of his personal liberty except according to the procedure established by law. The law in relation to investigation

of offences and rights of an accused, in our country, has developed with the passage of time. On the one hand, power is vested in the investigating officer to conduct the investigation freely and transparently. Even the courts do not normally have the right to interfere with the investigation. It exclusively falls in the domain of the investigating agency. In exceptional cases the High Courts have monitored the investigation but again within a very limited scope. There, on the other a duty is cast upon the Prosecutor to ensure that rights of an accused are not infringed and he gets a fair chance to put forward his defence so as to ensure that a guilty does not go scot-free while an innocent is not punished. Even in the might of the State the rights of an accused cannot be undermined, he must be tried in consonance with the provisions of the constitutional mandate. The cumulative effect of this constitutional philosophy is that both the courts and the investigating agency should operate in their own independent fields while ensuring adherence to basic rule of law.

199. It is not only the responsibility of the investigating agency but as well as that of the courts to ensure that investigation is fair and does not in any way hamper the freedom of an individual except in accordance with law. Equally enforceable canon of the criminal law is that the high responsibility lies upon the investigating agency not to conduct an investigation in tainted and unfair manner. The investigation should not prima facie be indicative of a biased mind and every effort should be made to bring the guilty to law as nobody stands above law de hors his position and influence in the society.”

22. In the case of **Mohd. Hussain @ Julfikar Ali** (supra), so referred by Mr. Tafoo also Hon’ble Supreme Court has emphasized that – It is essential that the accused is given a reasonable opportunity to defend himself in the trial and that the Criminal Procedure Code ensures that an accused gets a fair trial.

23. Thus, having analyzed the submissions of Mr. Tafoo, the learned counsel for the appellant, in the light of illuminating discourse, as above, we find the same well merited and we record our concurrence to the same. The right to fair trial, which is now fundamental right of every citizen of this country, is violated herein this case in as much as summon

was not issued to him and reasonable opportunity was not afforded to him before framing charge and the evidence of P.W.6 - Shri Atar Sharma was not furnished to him before framing the charge and that the de-novo trial was not conducted by the learned trial court as mandated by section 319 Cr.P.C. and by Hon'ble Supreme Court in Sukhpal Singh Khaira (supra) and also in Michael Machado and Another (supra).

24. Under the facts and circumstances discussed herein above, we are of the view that the impugned judgment and order of conviction, so far it relates to the present accused/appellant, failed to withstand the legal scrutiny as it came to be passed in contravention of the procedure prescribed in the Cr.P.C and in contravention of the law laid by Hon'ble Supreme Court in the cases discussed herein above, and thereby caused prejudice to the accused/appellant, and as such, it violates his right to fair trial, as enshrined in Article 21 of the Constitution of India and there occasioned miscarriage of justice. And on such count, the impugned judgment and order of conviction and sentence of the accused/appellant is liable to be interfered with. Now, exploring the next course of action, to be adopted here in this case and having regards to the given facts and circumstances on the record, we are of the considered opinion that in view of violation of right to fair trial of the accused/appellant, end of justice would be meted out if the case is remanded back to the learned trial court to proceed with the same afresh from the stage of furnishing copies under section 207 Cr.P.C., having set aside the conviction and sentence.

25. In arriving at such a decision we derived authority from a decision of Hon'ble Supreme Court in **Nashib Singh vs. State of Punjab,**

(2022) 2 SCC 89, wherein, dealing with the issue of retrial and discussing its earlier decisions on the same, held as under:-

33. The principles that emerge from the decisions of this Court on retrial can be formulated as under:

33.1. The appellate court may direct a retrial only in “exceptional” circumstances to avert a miscarriage of justice.

33.2. Mere lapses in the investigation are not sufficient to warrant a direction for retrial. Only if the lapses are so grave so as to prejudice the rights of the parties, can a retrial be directed.

33.3. A determination of whether a “shoddy” investigation/trial has prejudiced the party, must be based on the facts of each case pursuant to a thorough reading of the evidence.

33.5. If a matter is directed for retrial, the evidence and record of the previous trial is completely wiped out.

33.4. It is not sufficient if the accused/prosecution makes a facial argument that there has been a miscarriage of justice warranting a retrial. It is incumbent on the appellate court directing a retrial to provide a reasoned order on the nature of the miscarriage of justice caused with reference to the evidence and investigatory process.

33.6. The following are some instances, not intended to be exhaustive, of when the Court could order a retrial on the ground of miscarriage of justice:

(a) The trial court has proceeded with the trial in the absence of jurisdiction;

(b) The trial has been vitiated by an illegality or irregularity based on a misconception of the nature of the proceedings; and

(c) The prosecutor has been disabled or prevented from adducing evidence as regards the nature of the charge, resulting in the trial being rendered a farce, sham or charade.

26. In the result, we find sufficient merit in this appeal and accordingly, the same stands allowed. The impugned judgment and order of conviction and sentence, dated 09.06.2022, concerning the

present accused/appellant, stands set aside and quashed. The case is remanded back to the learned trial court to proceed with the same afresh, from the stage of furnishing copies under section 207 Cr.P.C. We hope and trust that the learned court below would make an endeavour to complete the trial at an earliest date.

27. Since we are remanding the case back to the learned trial court below to proceed with the same afresh, from the stage of furnishing the copies, under Section 207 of the Cr.P.C., we deem it appropriate not to embark on detail discussion of evidence on record and to make any comment on the merit of the same, so that no prejudice is caused to either parties.

28. Send down the record of the learned court below immediately with a copy of this judgment and order. The parties have to bear their own costs.

Sd/- Kardak Ete
JUDGE

Sd/- Robin Phukan
JUDGE

Comparing Assistant