

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

Crl. Appeal No. 2395-SB of 2003

Date of Decision : 19.11.2015

Ajit Singh

..... Appellant

Versus

State of Punjab

..... Respondent

***CORAM:* HON'BLE MR. JUSTICE DARSHAN SINGH**

Present : Mr.Ashwani Bharadwaj, Advocate
for the appellant.

Mr. Manjit Singh Naryal, Addl.AG, Punjab.

1. **Whether Reporters of Local papers may be allowed to see the judgment? Yes**
2. **To be referred to the Reporters or not? Yes**
3. **Whether the judgment should be reported in the Digest? Yes**

DARSHAN SINGH, J.

1. The present appeal has been preferred against the judgment of conviction dated 02.12.2003, vide which appellant Ajit Singh was held guilty and convicted for the offence punishable under Section 9 of the Prevention of Corruption Act, 1988 (for short 'Act') and the order on the quantum of sentence of the even dated, vide which appellant has been sentenced to undergo rigorous imprisonment for a period of six months and to pay a fine of ₹ 5000/- in default thereof to further undergo rigorous imprisonment for a period of one and half months.

2. The brief facts giving rise to this prosecution are that complainant Mota singh moved an application Ex.PA to DSP Majitha.

Ditto application Ex.PB was moved to the Deputy Commissioner, Amritsar alleging therein that in the year 1991 accused-appellant Ajit Singh has taken ₹ 9000/- from him for getting his son Satnam Singh recruited in Military. He has not got his son recruited so far nor he has returned his amount of ₹ 9000/-. The accused has also confessed in Panchayat and assured that he will return the money. He is a clever and forcible person and is threatening him that he has defamed in the Panchayt and he will not return his money. On this application moved by complainant Mota Singh, the present case was registered and investigation initiated.

3. Initially the accused-appellant could not be arrested and was declared as proclaimed offender by the Court of learned Judicial Magistrate, Amritsar vide order dated 01.02.1999. On completion of the formalities of the investigation, the report under Section 173 of Code of Criminal Procedure (for short Cr.P.C) was presented in *absentia*. However, the accused-appellant was arrested on 09.04.1999 and joined the proceedings.

4. The accused-appellant was charge sheeted for the offence punishable under Section 9 of the Act by the learned Special Judge, Amritsar vide order dated 20.08.1999, to which the accused-appellant pleaded not guilty and claimed trial.

5. In order to substantiate its case, prosecution examined as many as three witnesses.

6. As borne out from the record of the trial Court and the impugned judgment, after the closure of the evidence accused-appellant

was examined under Section 313 Cr.P.C. But, the said statement is not available on record. As per the reports received from the learned District & Sessions Judge, Amritsar, the said statements have lost and even the reconstruction thereof is not possible.

7. On appreciating the material on record and the contentions raised by learned counsel for the parties, the accused-appellant was held guilty and convicted for the offence punishable under Section 9 of the Act and was awarded the sentence as mentioned in the upper part of the judgment.

8. Aggrieved with the aforesaid judgment of conviction and order of sentence, the present appeal has been preferred.

9. I have heard Mr. Ashwani Bharadwaj, Advocate, learned Legal Aid Counsel for the appellant, Mr. Manjit Singh Naryal, learned Additional Advocate General, for the State of Punjab and has meticulously examined the record of the case.

10. Initiating the arguments, learned counsel for the appellant contended that it is a case of denial of fair trial to the appellant. The appellant was not represented by any counsel on the date when all the three witnesses of the prosecution were examined. Learned Special Judge has not informed the appellant of his right to have the legal aid counsel nor he complied with the mandatory provisions of Section 304 Cr.P.C and Article 21 of the Constitution of India. He contended that appellant was charged with the serious offence. It is not believable that he will not choose to test their testimonies by way of cross-examination. Learned trial Judge has mentioned 'Nil opportunity given' as a matter of routine.

The entire judgment of the learned trial Court is based on the fact that the testimonies of these witnesses has gone unchallenged.

11. He further contended that it is alleged that the money was paid in the year 1991. But, the FIR has been registered in the year 1998 i.e. after more than 7 years and there is no explanation as to why the complainant kept mum for such a long period.

12. He further contended that there is a material contradiction in the case of the prosecution. As per the affidavit Ex.PC, the accused has demanded ₹ 12000/- and the said amount of ₹ 12000/- was paid to him. Whereas, in the applications Ex.PA, Ex.PB and the statements of the witnesses, it is alleged that the sum of ₹ 9000/- was paid.

13. He further contended that essential ingredients of the offence punishable under Section 9 of the Act are not made out at all. The prosecution witnesses have not stated that accused-appellant has received the money as a motive or reward for inducing any public servant by using the personal influence. They have simply stated that appellant has received ₹ 9000/- for getting the son of the complainant recruited in Army. They have not deposed that this money was taken by the appellant in order to influence any public servant. Thus, he contended that the conviction of appellant has been wrongly recorded.

14. On the other hand, learned State counsel contended that all the three witnesses of the prosecution were examined in the presence of appellant. He had opted not to cross-examine them. So, their testimonies have gone unchallenged. Now, he cannot allege that he has been denied the fair trial. Learned State counsel further contended that from the

statements of the prosecution witnesses which have gone unchallenged, it is proved that accused-appellant has received a sum of ₹ 9000/- as a motive or reward for getting Satnam Singh, the son of the complainant Mota Singh recruited in Army. Obviously, this money was to influence the public servant. Thus, he contended that there is no infirmity in the conviction of appellant as recorded by the learned trial Court.

15. I have duly considered the aforesaid contentions.

16. Accused-appellant in this case was charge sheeted for the offence punishable under Section 9 of the Act, which is a serious offence. It is not disputed that the fair trial is a fundamental right of a person charged with a criminal offence. The accused charged with a serious offence must not be deprived of his valuable right of fair and impartial trial. To do that, would be negation of concept of due process of law. The Cr.P.C provides that in all criminal prosecutions, the accused has a right to have the assistance of a counsel. The Cr.P.C also requires that the Court in all criminal case where accused is unable to engage a counsel, the Court shall appoint a counsel for him at the expenses of the State. The right of fair trial is internationally recognized and have also been incorporated in the Constitution of India and the Cr.P.C. The Hon'ble Apex Court in case **Mohd. Hussain @ Julfikar Ali Vs. The State (Govt. of NCT) Delhi 2012(1) R.C.R (Criminal) 614** has laid down as under:-

“30. 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; 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) entitled 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 to be defended and right to have legal assistance without payment.

31. 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.”

32. 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 39 A 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.

33. Besides the International Covenants and Declarations and the constitutional guarantees referred to above, Section 303 of the Code of Criminal Procedure gives right to any person accused of an offence before a criminal court to be defended by a pleader of his choice. Section 304 of the Code of Criminal Procedure contemplates legal aid to accused facing charge in a case triable by Court of Sessions at State expense and the same reads as follows:

“304. Legal aid to accused at State expense in certain cases.

- (1) Where, in a trial before the Court of Sessions, the accused is not represented by a pleader, and where it appears to the court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State.
- (2) The High Court may, with the previous approval of the State Government make rule providing for -
 - (a) The mode of selecting pleaders for defence under sub-section (2);
 - (b) The facilities to be allowed to such pleaders by the Courts;
 - (c) The fee payable to such pleaders by the Government, and generally, for carrying out the purpose of sub-section (1).
- (3) The State Government may, by notification, direct that, as from such date as may be specified in the notification, the provisions of sub-sections (1) and (2) shall apply in relation to any class of trials before other courts in the State as they apply in relation to trials before the Courts of Session.”

From a plain reading of the aforesaid provision it is evident that in a trial before the Court of Sessions if the accused is not represented by a pleader and has not sufficient means, the Court shall assign a pleader for his defence at the expense of the State. The entitlement to free legal aid is not dependent on the accused making an application to that effect, in fact, the court is obliged to inform the accused of his right to obtain free legal aid and provide him with the same.

34. In my opinion, the right of a person charged with crime to have the services of a lawyer is fundamental and essential to fair trial. The right to be defended by a legal practitioner, flowing from Article 22 (1) of the Constitution has further been fortified by the introduction of the Directive Principles of State Policy embodied in Article 39 A of the Constitution by the 42nd Amendment Act of 1976 and enactment of sub-section 1 of Section 304 of the Code of Criminal Procedure. Legal assistance to a poor person facing trial whose life and personal liberty is in jeopardy is mandated not only by the Constitution and the Code of Criminal Procedure but also by International Covenants and Human Rights Declarations. If an accused too poor to afford a lawyer is to go through the trial without legal assistance, such a trial cannot be regarded as reasonable, fair and just. The right to be heard in criminal trial would be inconsequential and of no avail if within itself it does not include right to be heard through counsel. One cannot lose sight of the fact that even intelligent and educated

men, not trained in law, have more than often no skill in the science of law if charged with crime. Such an accused not only lacks both the skills and knowledge adequately to prepare his defence but many a time loses his equilibrium in face of the charge. A guiding hand of counsel at every step in the proceeding is needed for fair trial. If it is true of men of intelligence, how much true is it of the ignorant and the illiterate or those of lower intellect! An accused without the lawyer faces the danger of conviction because he does not know how to establish his innocence.”

17. As per the aforesaid ratio of law, the guiding hand of a counsel at every step in the proceeding is needed for the fair trial. The right of a person charged with crime to have the services of a lawyer is fundamental and essential to the fair trial flowing from Article 21, 22 (1), 39 A of the Constitution of India and Section 304 of Cr.P.C.

18. It is a clear case wherein the fair trial has been denied to the appellant. The proceedings of the trial Court shows that the appellant was initially represented by his counsel. But, counsel for the appellant has not appeared from 04.07.2000 to 14.10.2003. Reproduction of all the interim orders i.e. orders dated 04.07.2000, 04.10.2000, 09.01.2001, 03.05.2001, 28.11.2001, 01.04.2002, 09.09.2002, 18.11.2002, 21.02.2003, 28.04.2003, 16.07.2003 and 14.10.2003 will burden the judgment. It is suffice to mention that in all these interim orders only the presence of accused has been marked without his counsel. However, the relevant order dated 04.10.2000 when all the three witnesses were examined is reproduced as under:-

“Present: Shri Sita Ram, Addl.PP for State
Accused on bail.

Received on transfer. Be registered.

Three Pws examined. One PW S.I Jasbir Singh has been given up. No other PW is present and examined. Be summoned again for 09.01.2001.

Special Judge
4.10.2K”

The aforesaid orders shows that on that date the accused-appellant was not represented by any counsel. All the three witnesses of the prosecution, namely PW-1 complainant-Mota Singh, PW-2 Pritam Singh in whose presence it is alleged that the money was paid by the complainant to the appellant and PW-3 Kulwant Singh, who had participated in the Panchayat conveyed to ask the appellant to return the money, have been examined on that date and for all the three witnesses in the cross-examination it is mentioned 'Nil opportunity given'. All the aforesaid three witnesses were the material witnesses of the prosecution. They have not been cross-examined at all. Accused-appellant was not represented by any counsel on that date. There is no material on record to show that the learned Special Judge has complied with Section 304 sub-section 1 Cr.P.C and offered to assign him a lawyer for his defence. For the fair trial of the appellant, it was the incumbent duty of the learned Special Judge either to adjourn the case for the cross-examination of the aforesaid witnesses or to have appoint some counsel as amicus curiae under Section 304 Cr.P.C to cross-examine the aforesaid material witnesses. This lapse has resulted in great prejudice to the appellant and has virtually resulted into failure of justice. In fact, 'Nil opportunity given' appears to have been mentioned in a routine manner in the cross-examination of these witnesses without visualizing the fact that accused-appellant was facing the serious charge under Section 9 of the Act.

19. The impugned judgment shows that the conviction of appellant has been simply recorded by the learned trial Court on the ground that the statements of the aforesaid witnesses had gone

unchallenged and it necessarily implies that the other side does not dispute their version.

20. It cannot possibly be denied that cross-examination of a witness is very vital, important, valuable right of an accused, integral part and essential ingredient of a fair trial which is an acid test to determine the credibility of a witness, which is totally missing in this case. The Hon'ble Supreme Court in **Mohd. Hussain @ Julfikar Ali's case (Supra)** has laid down as under:

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

21. In view of the aforesaid ratio of law laid down by the Hon'ble Apex Court, the fact that accused-appellant was neither represented by any counsel/lawyer on the crucial date when all the three material witnesses were examined nor the learned trial Court had made any effort to appoint any amicus curiae to defend the appellant and as already mentioned these are the only three witnesses examined by the prosecution in this case, who have not faced any cross-examination and the conviction of the appellant has been based on the statements of these

witnesses alone simply on the ground that their statements have gone unchallenged. Thus, it is a clear case where the fair trial to the appellant has been denied and has resulted in the failure of justice. Consequently, this Court has no hesitation to exercise the power under Section 386 (b) (i) Cr.P.C to set aside the conviction and to remit the case to the learned trial Court for fresh decision after affording the appellant the full and fair opportunity to cross-examine the witnesses already examined by the prosecution. Since, the case is being remanded for fresh decision after recording the cross-examination of the witnesses, so I refrain from expressing any opinion on the merits of the case.

22. Thus, keeping in view of my aforesaid discussion, the present appeal is hereby allowed, the conviction of the appellant as recorded by the learned trial Court and the sentence awarded to him are hereby set aside. The case is remanded/remitted to the learned trial Court to afford the appellant the full and fair opportunity to cross-examine the prosecution witnesses already recorded and then to decide the case afresh in-accordance with law.

November 19, 2015

s.khan

(DARSHAN SINGH)
JUDGE