

THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09.02.2017

PRONOUNCED ON : 17.02.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

and

THE HONOURABLE MR.JUSTICE N.AUTHINATHAN

Criminal Appeal No.14 of 2017
and
Crl.M.P.No.298 of 2017

M.Kannan ... Appellant

- Vs -

State rep by The Inspector of Police,
All Women Police Station,
Bhavani, Erode District.
(Crime No.8 of 2015) ... Respondent

Prayer:- Appeal filed under Section 374 (2) of the Code of Criminal Procedure against the judgment passed by the learned Sessions Judge, (Mahilar Fast Track Court) Erode, in Spl.S.C.No.35 of 2015 dated 12.04.2016.

For Appellant : Mr.E.C.Ramesh
Mr.A.Raghunathan, Senior Advocate
for Mr.L.Sivaraman
Lower Court Counsel

For Respondent : Mr.P.Govindarajan
Additional Public Prosecutor

J U D G M E N T

S.Nagamuthu, J.

Every person has a right to a fair trial by a competent Court is the spirit of the right to life and personal liberty guaranteed under Article 21 of the Constitution of India "Denial of fair trial is as much injustice to the accused as it is to the to the victim and the society". The Hon'ble Supreme Court in Zahira Habibullah Sheikh & Anr vs State Of Gujarat & Ors reported in 2006 3 SCC 374 has explained the concept of fair

trail and said that it is central to the administration of justice and the cardinal principal of protection of human rights. In the instant case, the principal ground raised by the appellant is that there was denial of fair trail to him before the trial Court. Let us go into the circumstances under which such a plea is raised by the accused / appellant.

2. The appellant, hardly aged 23 years of age, is alleged to have kidnapped a young girl aged 16 years on 04.03.2015, had repeated sexual intercourse with her till 06.03.2015, which resulted in her pregnancy and at last administered drugs to the victim and caused miscarriage of the foetus on 03.07.2015. On these allegations, the respondent prosecuted him for offences under Section 366 I.P.C., Section 312 I.P.C. and Section 6 of the Protection of Child from Sexual Offences Act, 2012.

3. The trial Court, took cognizance of the offence on 19.11.2015 and posted the case for further proceedings on 03.12.2015. The accused appeared before the trial Court on 03.12.2015, upon whom, copies of the documents were served as required under Section 207 Cr.P.C. The accused sought for time to engage a counsel. On 08.12.2015 when the case came up for hearing, one "Mr.S" an Advocate of 17 years of standing in the Bar, filed memo of appearance for the accused. For hearing the parties on framing of charges, the case was adjourned to 15.12.2015. On that date, the learned Public Prosecutor opened up the case as required under Section 226 Cr.P.C. and the learned counsel Mr.S also made his submissions. The trial Court, thereafter, on 22.12.2015, framed charges against the accused under Section 366 I.P.C., Section 6 of the POCSO Act and Section 312 I.P.C. The accused pleaded not guilty. The trial Court ordered issuance of summons for the appearance of the prosecution witnesses on 25.01.2016.

4. On 25.01.2016, the accused appeared. As many as six witnesses were examined and six documents were marked by the prosecution. The records reveal that the learned counsel on record for the accused "Mr.S" did not make his appearance on that date. The trial Court recorded that there was no cross examination of any of the witnesses by the accused. The case was adjourned to 27.01.2016 for examination of further witnesses on the side of the prosecution.

5. On 27.01.2016, P.Ws.7 to 10 were examined and Exs.P7 to P11 were marked. The records do not reveal that the learned counsel for the accused made his appearance. But the learned counsel reported to us that he was present but he did not chose to cross examine any witness. Thus, the trial Court recorded that there was no cross examination of any prosecution witness. The case was adjourned to 18.02.2016.

6. On 18.02.2016, the accused made appearance and P.Ws.11 to 13 were examined and Exs.P12 to P18 were marked. Some material objects were also marked in evidence. The records do not indicate as to whether the learned counsel for the accused appeared or not. But the learned counsel has reported to us that he was present in Court but he choose not to cross examine any of the witnesses on that day also. The case was then adjourned to 02.03.2016.

7. On 02.03.2016, the accused made appearance, but the investigating officer was not present despite service of summons. Since the investigating officer had not appeared, the Court issued warrant for his arrest and production. On that day, P.Ws.14 and 15 were examined and Exs.P19 to P26 were marked. The records do not reveal that the learned counsel for the accused made appearance on that date. However, the learned counsel for the accused has reported to us that he made appearance but did not choose to cross examine any of the witnesses on that day also.

8. On 16.03.2016, the investigating officer appeared before the Court and he was examined as P.W.16, but he was not cross examined by the defence counsel. The accused filed a petition under Section 311 Cr.P.C. seeking to recall all the 16 witnesses examined already by the prosecution. The accused was directed by the Court as required under Section 437(A) of the Cr.P.C. to execute a personal bond with two sureties. The case was adjourned to 18.03.2016.

9. On 18.03.2016, the accused was not ready to execute bond with sureties as required earlier. However, he was examined under Section 313 Cr.P.C. in respect of the incriminating evidences against him. He denied the same. He told the court that he was going to examine the defence witness. The trial Court adjourned the case to 24.03.2016 for reply of the learned public prosecutor in CrI.M.P.No.72 of 2016 filed under Section 311 Cr.P.C. and for the examination of the defence witnesses.

10. On 24.03.2016, the accused made appearance but bond was not executed as directed earlier. The CrI.M.P.No.72 of 2016 was pending and the matter was adjourned to 28.03.2016. No defence witness was examined on that day.

11. On 28.03.2016, the accused executed bond with sureties under Section 437(A) Cr.P.C. thereby undertaking to appear before the Court for further hearings. On that date, the trial Court dismissed CrI.M.P.No.72 of 2016 thereby declining to recall P.Ws.1 to 16. The trial Court adjourned the case to 04.04.2016 for examination of the defence witnesses.

12. On 04.04.2016, the accused made appearance. The defence counsel also made appearance but no defence witness was examined. Therefore, the trial Court closed the evidence on the side of the defence and adjourned the case to 05.04.2016 for arguments.

13. In the meanwhile, on 05.04.2016, seeking a copy of the order made in CrI.M.P.No.72 of 2016 so as to approach the High Court challenging the said order was filed through the same counsel.

14. The trial Court, on 06.04.2016, issued order to the office to grant copy on furnishing of stamp papers by the accused. Since stamp papers were not furnished the copy application was struck off on 10.04.2016.

15. On 05.04.2016, when the case was taken up for arguments, the learned counsel "Mr.S" filed a petition seeking adjournment on the ground that the order declining to recall the witnesses was going to be challenged. The trial Court dismissed that petition on the same day. After hearing the learned public prosecutor alone, the trial court posted the case for judgment on 12.04.2016. The learned counsel for the accused did not submit his arguments.

16. On 12.04.2016, the trial Court delivered judgment convicting the appellant under Section 366 I.P.C., Section 312 I.P.C. and Section 6 of the POCSO Act. The trial Court sentenced the accused to undergo rigorous imprisonment for ten years and pay a fine of Rs.10,000/- in default to undergo simple imprisonment for two years for offence under Section 366 I.P.C.; to undergo imprisonment for life and pay a fine of Rs.10,000/- in default to undergo simple imprisonment for two years for offence under Section 6 of the POCSO Act and to undergo rigorous imprisonment for three years for offence under Section 312 I.P.C. Challenging the said conviction and sentence, the appellant is before this Court with this appeal.

17. This appeal was filed on 16.12.2016, before this Court. There was a delay of 187 days and the same was condoned by this Court on 23.12.2016 in CrI.M.P.No.13762 of 2016 in CrI.A.No.SR53011 of 2016.

18. Thereafter, this appeal came up for admission on 19.01.2017 and it was accordingly admitted. Along with the appeal, the appellant had filed CrI.M.P.No.298 of 2017 seeking suspension of sentence. During arguments, the learned counsel highlighted that there was no cross examination of any witness by the defence counsel and that there was denial of fair trial.

This Court therefore, directed the Registry to call for the original records from the trial Court forthwith and to list the case on 09.02.2017 for hearing. Accordingly, when this appeal came up for hearing on 09.02.2017, "Mr.S", the learned counsel who conducted the trial before the lower Court on behalf of the accused also appeared before this Court.

19. We heard the learned counsel on record for the appellant Mr.E.C.Ramesh as well as the learned counsel Mr.S and the learned Additional Public Prosecutor for the State and we have also perused the records carefully. We afforded opportunity to the learned counsel "Mr.S." to explain his stand in respect of the alleged dereliction of professional duty.

20. The learned counsel for the appellant would submit that in the application filed under Section 311 Cr.P.C. seeking to recall the prosecution witnesses [P.Ws.1, 2, 4, 12, 13 and 14], it was stated that the learned counsel for the accused "Mr.S" was engaged in the Mahila Court in S.C.No.94 of 2015 and therefore, the witnesses could not be cross examined on 25.01.2016, 27.01.2016 and 18.02.2016. But the said petition was dismissed by the trial Court, which by itself, according to the learned counsel, would amount to denial of fair trial. The learned counsel further submitted that the conviction of the accused without sufficient opportunity to the accused to cross examining the witnesses is a denial of fair trial and so the same is liable to be set aside. But, the learned Public Prosecutor submitted that there was no denial of opportunity to the accused. According to him, the accused willfully failed to utilize the opportunity.

21. We are unable to appreciate the conduct of the learned counsel "Mr.S" who conducted the trial before the trial Court. If it was true that he was unable to be present before the trial Court on 25.01.2016, on which date, few witnesses were examined, he could have made alternative arrangements to ensure that there was legal assistance to the accused. But he had simply abandoned the case on that day. When few more witnesses were examined on 27.01.2016, Mr.S was present. He submitted to us that though he was present, he could not cross examine the witnesses on 27.01.2016 because that would not have served any purpose without cross examining P.Ws.1 to 6. On 27.01.2016, the learned counsel did not even care to file a petition seeking to recall P.Ws.1 to 6 for the purpose of cross examination. Neither he filed a petition to defer the cross examination of the witnesses examined on 27.01.2016.

22. Again on 18.02.2016, when few more witnesses were examined, according to "Mr.S", he was present, but he did not choose to cross examine the said witnesses. Neither he filed any

petition seeking to defer the cross examination of these witnesses. On 02.03.2016 and 16.03.2016, when the other witnesses were examined, though "Mr.S" was present, he did not cross examine these witnesses and he did not also choose to file any petition to defer the cross examination.

23. For the first time, seeking to recall some of the witnesses, a petition was filed only on 16.03.2016. It is not explained to Court as to why he did not choose to file petition on time during the previous hearings to recall those witnesses. The said petition was dismissed on 28.03.2016. On 04.04.2016 "Mr.S" appeared. The evidence on the side of the defence was closed and the matter was adjourned to 05.04.2016. The learned counsel did not choose to file any application seeking a copy of the order dismissing the petition filed to recall the witnesses to approach this Court either on 28.03.2016 or 04.04.2016. On the last day i.e. on 05.04.2016 when the case was taken up for arguments, the learned counsel filed a petition seeking a copy of the order. The petition filed by the counsel seeking adjournment was also dismissed. However, the trial Court posted the case to 12.04.2016 for judgment.

24. The trial Court ordered granting of the copy of the order dated 28.03.2016 on 06.04.2016 itself. But the learned counsel "Mr.S" did not file judicial stamp papers and therefore the copy application was struck off on 10.04.2016 and thus the judgment was delivered on 12.04.2016.

25. From the above narration of facts, it is crystal clear that there was gross dereliction of professional duty by the counsel, "Mr.S". He has not shown any interest in providing legal assistance to the accused which is his legal obligation under law, though, admittedly, he was paid his legal fees. Undoubtedly, the accused, though had engaged a counsel, was deprived of proper legal assistance because of the failure of the counsel engaged by him to appear before the Court to conduct the case. In these circumstances, now the question is whether on that score, can we hold that there was denial of fair trial to the accused.

26. In this regard, we may refer to some of the judgments of the Hon'ble Supreme Court on this subject. In Kartar Singh vs State Of Punjab reported in 1994 3 SCC 569, the Constitution Bench of the Hon'ble Supreme Court succinctly explained the purpose of cross examination in paragraph 278 in the following words:

"278. Section 137 of the Evidence Act defines what cross-examination means and Sections 139 and 145 speak of the mode of cross-examination with reference to the

documents as well as oral evidence. It is the jurisprudence of law that cross-examination is an acid-test of the truthfulness of the statement made by a witness on oath in examination-in-chief, the objects of which are:

(1) to destroy or weaken the evidentiary value of the witness of his adversary;

(2) to elicit facts in favour of the cross-examining lawyer's client from the mouth of the witness of the adversary party;

(3) to show that the witness is unworthy of belief by impeaching the credit of the said witness;

and the questions to be addressed in the course of cross-examination are to test his veracity; to discover who he is and what is his position in life; and to shake his credit by injuring his character."

27. The same view was reiterated by the Hon'ble Supreme Court in Jayendra Vishnu Thakur vs State Of Maharashtra reported in 2009 7 SCC 104, wherein the Hon'ble Supreme Court has held as follows:

"A right to cross-examine a witness, apart from being a natural right is a statutory right. Section 137 of the Evidence Act provides for examination-in-chief, cross-examination and re-examination. Section 138 of the Evidence Act confers a right on the adverse party to cross-examine a witness who had been examined in chief, subject of course to expression of his desire to the said effect. But indisputably such an opportunity is to be granted. An accused has not only a valuable right to represent himself, he has also the right to be informed thereabout. If an exception is to be carved out, the statute must say so expressly or the same must be capable of being inferred by necessary implication. There are statutes like the Extradition Act, 1962 which excludes taking of evidence viz-a-viz opinion..."

28. Referring to the above judgments, in Mohd. Hussain @ Julfikar Ali vs The State (Govt. of NCT) Delhi reported in (2012) 2 SCC 584, the Hon'ble Supreme Court has held as follows:

"11. In my view, every person, therefore, has a right to a fair trial by a competent court in the spirit of the right to life and personal liberty. The object and purpose of providing competent legal aid to undefended and unrepresented accused persons are to see that the accused gets free and fair, just and reasonable trial of charge in a criminal case....."

The Hon'ble Supreme Court then went on to refer to paragraphs 35, 36 and 37 of the judgment in Zahira Habibullah Sheikh Vs. State of Gujarat reported in (2006) 3 SCC 374, wherein, the Hon'ble Supreme Court has explained fair trial in the following words:

"35. This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crime being public wrong in breach and violation of public rights and duties, which affects the whole community as a community and is harmful to society in general. 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.

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 in 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 a bout 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."

29. The Hon'ble Supreme Court has further referred to a , earlier judgment in M.H. Hoskot Vs. State of Maharashtra reported in 1978 (3) SCC 544, wherein, in paragraph 14 has held as follows:

"14. The other ingredient of fair procedure to a prisoner, who has to seek his liberation through the court process is lawyer's services. Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise; and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side. Our judicature, moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer-power for steering the wheels of equal justice under the law. Free legal services to the needy is part of the English criminal justice system. And the American jurist, Prof. Vance of Yale, sounded sense for India too when he said :

"What does it profit a poor and ignorant man that he is equal to his strong antagonist before the law if there is no one to inform him what the law is? Or that the courts are open to him on the same terms as to all other persons when

he has not the wherewithal to pay the admission fee?" "

30. Again the Hon'ble Supreme Court has referred to Mohd. Sukur Ali v. State of Assam reported in (2011) 4 SCC 729, wherein, in paragraphs 9 and 10 the Hon'ble Supreme Court has held as follows:

"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 or 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, Scaevola, Crassus, etc. who defended the accused. In fact the higher the human race has progressed in civilisation, the clearer and stronger has that 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 simply recognising what already existed and which civilised people have long enjoyed. "

31. In Hussainara Khatoon and Others v. Home Secy., State of Bihar reported in (1980) 1 SCC 98, in paragraph 6 the Hon'ble Supreme Court has held as follows:

"6. Then there are several undertrial prisoners who are charged with offences which are bailable but who are still in jail presumably because no application for bail

has been made on their behalf or being too poor they are unable to furnish bail. It is not uncommon to find that undertrial prisoners who are produced before the Magistrates are unaware of their right to obtain release on bail and on account of their poverty, they are unable to engage a lawyer who would apprise them of their right to apply for bail and help them to secure release on bail by making a proper application to the Magistrate in that behalf. Sometimes the Magistrates also refuse to release the undertrial prisoners produced before them on their personal bond but insist on monetary bail with sureties, which by reason of their poverty the undertrial prisoners are unable to furnish and which, therefore, effectively shuts out for them any possibility of release from pre-trial detention. This unfortunate situation cries aloud for introduction of an adequate and comprehensive legal service programme, but so far, these cries do not seem to have evoked any response. We do not think it is possible to reach the benefits of the legal process to the poor, to protect them against injustice and to secure to them their constitutional and statutory rights unless there is a nation-wide legal service programme to provide free legal services to them. It is now well settled, as a result of the decision of this Court in *Maneka Gandhi v. Union of India* that when Article 21 provides that no person shall be deprived of his life or liberty except in accordance with the procedure established by law, it is not enough that there should be some semblance of procedure provided by law, but the procedure under which a person may be deprived of his life or liberty should be "reasonable, fair and just". Now, a procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as "reasonable, fair and just". It is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the court's process that he should

have legal services available to him. This Court pointed out in M.H.Hoskot Vs. State of Maharashtra:

"Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise; and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side. Our judicature, moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer-power for steering the wheels of equal justice under the law".

Free legal services to the poor and the needy is an essential element of any "reasonable, fair and just" procedure. It is not necessary to quote authoritative pronouncements by Judges and Jurists in support of the view that without the service of a lawyer an accused person would be denied "reasonable, fair and just" procedure. Black, J., observed in Gideon v. Wainwright :

"Not only those precedents but also reason and reflection require us to recognise that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both State and Federal quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime who fail to hire the best lawyers they can get to prepare and present their defences. That Government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are

the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but is in ours. From the very beginning, our State and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realised if the poor man charged with crime has to face his accusers without a lawyer to assist him."

The philosophy of free legal service as an essential element of fair procedure is also to be found in the passage from the judgment of Douglas, J. in *Jon Richard Argersinger v. Raymond Hamlin* :

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he

faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate or those of feeble intellect.

Both Powell and Gideon involved felonies. But their rationale has relevance to any criminal trial, where an accused is deprived of his liberty.

The court should consider the probable sentence that will follow if a conviction is obtained. The more serious the likely consequences, the greater is the probability that a lawyer should be appointed The court should consider the individual factors peculiar to each case. These, of course would be the most difficult to anticipate. One relevant factor would be the competency of the individual defendant to present his own case." (emphasis added)"

32. After making extensive reference to the above judgments, the Hon'ble Supreme Court in Mohd. Hussain @ Julfikar Ali vs The State (Govt. of NCT) Delhi cited supra, in paragraph 16 of the judgment, has held as follows:

"16. In Ram Awadh v. State of U.P. reported in 1999 Cr.L.J. 4083, the Allahabad High Court held :

"14. The requirement of providing counsel to an accused at the State expense is not an empty formality which may be not by merely appointing a counsel whatever his calibre may be. When the law enjoins appointing a counsel to defend an accused, it means an effective counsel, a counsel in real sense who can safeguard the interest of the accused in best possible manner which is permissible under law. An accused facing charge of murder may be sentenced to death or imprisonment for

life and consequently his case should be handled by a competent person and not by a novice or one who has no professional expertise. A duty is cast upon the Judges before whom such indigent accused are facing trial for serious offence and who are not able to engage a counsel, to appoint competent persons for their defence. It is needless to emphasize that a Judge is not a prosecutor and his duty is to discern the truth so that he is able to arrive at a correct conclusion. A defence lawyer plays an important role in bringing out the truth before the Court by cross-examining the witnesses and placing relevant materials or evidence. The absence of proper cross-examination may at times result in miscarriage of justice and the Court has to guard against such an eventuality." "

33. In *Mohd. Hussain @ Julfikar Ali vs The State (Govt. of NCT) Delhi* cited supra, on facts, similar to the case on hand, the Hon'ble Supreme Court found one Mr. Riyaj Ahmed, an Advocate, who was engaged by the accused appeared on behalf of the accused represented him and cross examined some of the witnesses and omitted to cross examine the others. Later on Mr. Riyaj Ahmed did not appear in the Court on some days. At that time, the Court appointed one Mrs. Sadhna Bhatia as Amicus Curiae to defend the accused at State expenses. Ultimately the accused was convicted. The Court thus found that there was no proper legal assistance to the accused. The Hon'ble Supreme Court held that for the failure of the Advocate to appear and extend legal assistance by cross examining the witness, the accused cannot be blamed. The Supreme Court held that though right to speedy trial is a fundamental right and that rigid time limit is not countenanced, but in the facts of the case, since there was denial of fair trial, violating Article 21 of the Constitution of India, the conviction and sentence should be set aside.

34. In the instant case, the facts are almost similar. For failure and gross dereliction of duty of the learned counsel engaged by the accused, the accused cannot be penalized. In our considered view, the trial without legal assistance cannot be regarded as reasonable, fair and just. As held by the Hon'ble

Supreme Court, it is an essential ingredient of reasonable, fair and just procedure to an accused who is to seek his liberation through the Court process that he should have effective legal assistance. Therefore, we hold that in the instant case, there is denial of fair trial to the appellant and hence, the conviction and sentence cannot be allowed to sustain and the matter needs to be remanded back to the trial Court so as to afford sufficient opportunity to the accused to cross examine the witness and to examine witnesses in defence.

35. While doing so, we cannot lose sight of the provisions of the POCSO Act which, among other things aims at the protection of the privacy of the child. Section 35 of the Act states as follows:

"Section 35: Period for recording of evidence of child and disposal of case : (1) The evidence of the child shall be recorded within a period of thirty days of the Special Court taking cognizance of the offence and reasons for delay, if any, shall be recorded by the Special Court. (2) The Special Court shall complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offence..."

Similarly, Section 36 of the Act mandates that a child should not see the accused at the time of testifying and Section 37 of the Act states that the trial shall be conducted in-camera. These are the statutory safeguards to the victim so as to ensure her privacy and fair trial to her. Speedy trial which is guaranteed under Article 21 of the Constitution of India is not only the right guaranteed to the accused but to the victim as well. Sections 35 to 37 of the POCSO Act, reassures fair trial to the victim as guaranteed under Article 21 of the Constitution of India. Summoning the victim of penetrative sexual assault to Court and examining her repeatedly would further aggravate the trauma and stress caused by the perpetrator of the crime to the victim. Instead of assisting the victim to come out of the trauma and it may amount to invasion into her privacy and the same would thus violate fair trial to her. Therefore, recalling the victim of rape to the Court for the purpose of examination shall not be allowed as a routine.

36. The court shall carefully strike a balance between the fair trial to the accused as well as the victim. In other words, the right of the accused to cross examine the victim and the right of the victim to privacy should be measured meticulously and without causing any harm to any of these

rights, the court should draw the line. When we do the said exercise, we are convinced that the right of the accused for fair trial which, in the instant case, has been denied on account of the gross dereliction of professional duty by the learned counsel needs to be provided once again, however with sufficient safeguard to the victim's privacy. Thus, we are inclined to remand the case back to the trial Court to allow the accused to cross examine the witnesses on the same day and to examine witnesses in defence and with a further direction to the trial Court to dispose of the case within three months. While the victim / child is under examination, the trial Court shall scrupulously follow the provisions of the POCSO Act.

37. While doing so, we cannot simply ignore the apparent dereliction of professional duty on the part of the learned counsel "Mr.S". Now there are few options before us. The first one is to debar him from appearing before the Courts as held by the Hon'ble Supreme Court in R.K.Anand vs Registrar, Delhi High Court reported in (2009) 8 SCC 106 and refer the matter to the Bar Council for necessary disciplinary action and the second option is to straight away refer the matter to the Bar Council for necessary action. Yet another option is to even leave it open for the accused to approach the Bar Council for necessary action against the learned counsel. But, "Mr.S" the learned counsel who appeared before us assisted by a learned Senior Counsel tendered unconditional apology for the above dereliction. He submitted to us that he has got 17 years of experience in the profession and never in the past, this kind of mistake occurred on his part amounting to professional misconduct. He has further filed an affidavit, wherein in paragraphs 2 to 4 he has stated as follows:

"2. I submit that I have been practising on the criminal side for the past 17 years. I attend Courts in around Erode District. It has never happened during my practice that I have unnecessarily been responsible for postponement of trials. I have been diligent in my work all these days. I reiterate that what has happened in this case was mistake and I apologise for the same unreservedly. I assure this Hon'ble Court that in future to I will not seek adjournment in any case for the purpose of cross examination of witness.

3. I pray that this Hon'ble Court may kindly be pleased to take into account the above mentioned circumstances and deal with me leniently. I would like to state that on 06.04.2016, I handed over the case papers to

Murugan father of accused in the presence of the accused.

4. I am anxious no disciplinary action be taken against me. In order to avoid such disciplinary action, I am willing to pay Rs.30,000/- (Rupees thirty thousand only) as compensation. The said sum of Rs.30,000/- may be apportioned between the victim girl and any charitable institution, as this Hon'ble Court may deem fit."

38. He also told us that he received a sum of Rs.10,000/- as the legal fees from the accused. Considering his past history and considering the offer made by him to pay a sum of Rs.30,000/- as compensation, we avoid suggesting for any disciplinary action against him under the Advocates Act. We are inclined to accept the unconditional apology tendered by him and his offer to pay Rs.30,000/- as compensation. Accordingly, we direct him to deposit a sum of Rs.30,000/- (Rupees thirty thousand only) to the credit of the trial Court, within a period of four weeks from the date of this judgment and the trial Court shall in turn pay a sum of Rs.15,000/- (Rupees fifteen thousand) to the accused and the balance sum of Rs.15,000/- to P.W.2 (victim) as compensation.

39. The learned counsel for the appellant would submit that the trial Court is still presided over by the same Judge. In our considered view, going by the various events in the case before the trial Court, it would not be conducive to allow the same Judge who is presiding over the trial Court to conduct the trial. Therefore, we hold that in the interest of justice, the trial of the case should be transferred to the Special Court dealing with POCSO Act Cases in a near by Salem District.

40. In the result, the criminal appeal is allowed in the following terms:

(i) The conviction and sentence imposed on the appellant is set aside and the case in Spl.S.C.No.35 of 2015 is remanded back to the trial Court. The fine amount, if any, paid by him shall be refunded.

(ii) The case shall forthwith stand transferred from the trial Court to the

Special Court dealing with POCSO Act cases in Salem District.

(iii) The trial Court shall forthwith transmit all the records to the Special Court dealing with POCSO Act cases in Salem District namely, Sessions Judge, Mahila Court, Salem Salem District.

(iv) If the accused is unable to engage a counsel, the transferee Court shall provide legal aid to him.

(v) The prosecution will be at liberty to recall any witness already examined for the purpose of further examination in chief and to examine any additional witness and the accused shall be entitled to cross examine the said witnesses.

(vi) The accused will be at liberty to recall any witness, who has already been examined, if not recalled by the prosecution and the accused shall be entitled to cross examine the said witnesses and also to examine any witness / witnesses in defence and to prove defence documents.

(vii) The prosecution will be at liberty to prove any documents or material objects in accordance with law.

(viii) The transferee Court shall dispose of this case and deliver fresh judgment in accordance with law, within a period of three months from the date of receipt of the records.

(x) Consequently, the connected Miscellaneous petition in Clr.M.P.No.298 of 2017 is closed.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

To

1. The Sessions Judge,
(Mahilar Fast Track Court),
Erode.
2. The Sessions Judge,
(Mahilar Fast Track Court),
Salem.
3. The Inspector of Police,
All Women Police Station,
Bhavani, Erode District.
4. The District Collector,
Erode District.
5. The Superintendent of Police,
Erode District.
6. The Superintendent,
Central Prison, Coimbatore.
7. The Director General of Police,
Mylapore, Chennai-4.
8. The Public Prosecutor,
Madras High Court.

Copy to

The Section Officer,
Criminal Section,
High Court, Madras.

+2cc to M/S.E.C.Ramesh, Advocate Sr.8779

Cr1.A.No.14 of 2017 and
Cr1.M.P.No.298 of 2017

gm1[co]
srg 24/2/2017

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