

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.03.2017

CORAM :
THE HON'BLE MR.JUSTICE C.T.SELVAM
Crl.R.C.No.256 of 2017
and
Crl.M.P.No.2579 of 2017

1.Manikandan
S/o.Perumal

2.Thamaraikannan
S/o.Kathiravan

.. Petitioners

vs.

State represented by
The Inspector of Police
Mallur, Salem District.
Crime No.291 of 2015

.. Respondent

Criminal Revision filed under Section 397 and 401 Cr.P.C.
against the order of learned Chief Judicial Magistrate, Salem,
passed in C.M.P.No.543 of 2016 in S.C.No.115 of 2016 on
14.12.2016.

For Petitioners : Mr.T.Gowthaman

For Respondent : Mr.M.Mohammed Riyaz
Government Advocate [Crl.side]

O R D E R

Petitioners face trial for offences under Section 397 r/w
34 IPC, in case being tried in S.C.No.115 of 2016 on the file of
learned Chief Judicial Magistrate, Salem.

2. Petitioners/accused have filed a petition under Section
303 Cr.PC praying for the evidence recorded thus far to be
struck down in toto and prays for a denovo trial contending that
evidence has been recorded under farcical circumstances.
Petitioners undertake to complete the cross-examination within a
period of one week of the recommencement of trial. No prejudice
can be pleaded by the prosecution inasmuch as it is trite in law
that the right of the accused to face trial is paramount and it
out-weighs any subjective prejudice to the prosecution.

3. Before the trial Court, it was submitted on behalf of petitioners that the examination of witnesses in the above case commenced on 12.07.2016 without any counsel to defend them and the chief-examination of PW-1 was recorded and the case was adjourned to 14.07.2016, on which date PWs.2 to 7 were examined and documents were marked. On 20.07.2016, PWs.9 to 12 were examined and documents were marked. Recording of evidence was mechanically done with the statements being dictated by the Public Prosecutor and no part of the evidence was the spontaneous deposition of the witnesses. All exhibits have been marked as a matter of course and in spite of being present, petitioners did not have the competency or the legal acumen to understand what was going on. They could not object to anything on account of their lack of fundamental knowledge of criminal law and on account of the fact that they were not represented by counsel.

4. Court below has dismissed the petition informing that a *denovo* trial could be ordered only when the same was indispensable and towards averting a failure of justice. In the instant case, petitioners had informed of having engaged a counsel. The very order of Court below makes clear that such counsel was not present at Court on the hearing date, ostensibly owing to Court boycott by advocates and that evidence had been recorded despite petitioners not being represented by any counsel. Court below has sought to justify such procedure informing that none had raised objection to the examination of prosecution witnesses and that the accused had a right to seek recall of witnesses but without doing so had presently moved petition u/s.303 Cr.P.C.

5. Position informed by Court below hardly can justify progress in trial in the absence of accused being duly represented by counsel. Decisions on the right of accused to fair trial and representation by counsel legally equipped are legion. We would only refer to the decision of the Hon'ble Supreme Court in *Md.Sukur Ali vs State of Assam*, 2011 4 SCC 729:

"6. In our opinion, a criminal case should not be decided against the accused in the absence of a counsel. We are fortified in the view we are taking by a decision of the US Supreme Court in *Powell v. Alabama*, 287 US 45 (1932), in which it was observed :-

"What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. 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 defense, even though he have 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. If in any case, civil or criminal, a State or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense".

The above decision of the US Supreme Court was cited with approval by this Court in A.S Mohammed Rafi v. State of Tamil Nadu, AIR 2011 Supreme Court 308, vide para 24.

7. A similar view which we are taking here was also taken by this Court in Man Singh v. State of Madhya Pradesh (2008) 9 SCC 542, and in Bapu Limbaji Kamble v. State of Maharashtra, (2005) 11 SC 412.

8. In this connection we may also refer to Articles 21 and 22(1) of the Constitution. Articles 21 and 22(1) are as under :

"Article 21. Protection of life and personal liberty. - No person shall be deprived of his life or personal liberty except according to procedure established by law".

Article 22(1). Protection against arrest and detention in certain cases. - (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice."

9. In Maneka Gandhi v. Union of India AIR 1978 SC 597, 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 civilization, 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 recognizing what already existed and which civilized people have long enjoyed.

11. Apart from the above, we agree with the eminent jurist Seervai who has said in his "Constitutional Law of India", Third Edition, Vol. I, Pg. 857:-

"The right to be defended by counsel does not appear to have been stressed, and was clearly not considered in any detail in Ajaib Singh's case (1953) SCR 254. But the right of a person accused of an offence, or against whom any proceedings were taken under the Cr.P.C is a valuable right which was recognized by Section 340 Cr.P.C Article 22(1) on its language makes that right a constitutional right, and unless there are compelling reasons, Article 22(1) ought not to be cut down by judicial construction..... It is submitted that Article 22(1) makes the statutory right under Section 340 Cr.P.C a Constitutional right in respect of criminal or quasi-criminal proceedings."

12. We are fully in agreement with Mr. Seervai regarding his above observations. The Founding Fathers of our Constitution were

themselves freedom fighters who had seen civil liberties of our people trampled under foreign rule, and who had themselves been incarcerated for long period under the formula 'Na vakeel, na daleel, na appeal' (No lawyer, no hearing, no appeal). Many of them were lawyers by profession, and knew the importance of counsel, particularly in criminal cases. It was for this reason that they provided for assistance by counsel under Article 22(1), and that provision must be given the widest construction to effectuate the intention of the Founding Fathers."

The Criminal Revision Case stands allowed. The evidence recorded in S.C.No.115 of 2016 on the file of learned Chief Judicial Magistrate, Salem, shall stand struck off. The Court below shall enter upon denovo trial. This Court records the submission of learned counsel for petitioners that petitioners will fully co-operate towards early disposal of the case. Court below shall now dispose of the case as expeditiously as possible. Consequently, connected miscellaneous petition is closed.

-s/d-

Assistant Registrar(CSIV)

True Copy

Sub-Assistant Registrar

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To

1.The Chief Judicial Magistrate,
Salem.

2.The Inspector of Police
Mallur, Salem District.

3.The Public Prosecutor,
High Court, Madras.

+1 cc to Mr.T.Gowthaman Advocate sr 13888

Cr1.R.C.No.256 of 2017

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