

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.49 of 2011

Arising Out of PS.Case No. -116 Year- 2009 Thana -Rajnagar District- MADHEPURA

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1. Md. Nasim Raza Rahmani @ Munna S/O Late Md. M. Rahman (Motiurrahman),
R/O Village-Ramkhetari, P.O.-Simri, Via Rajnagar, P.S-Rajnagar, Distt.-
Madhubani

.... Appellant/s

Versus

1. The State Of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Ramakant Sharma, Sr. Advocate
Mr. Rajesh Kumar, Advocate

For the Respondent/s : Mr. Ashwani Kumar Sinha, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

and

HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI)

Date: 05-11-2018

Sole appellant Md. Nasim Raza Rahmani @ Munna
has been found guilty for an offence punishable under Section 302
IPC and sentenced to undergo RI for life vide judgment of conviction
dated 13.12.2010 and order of sentence dated 14.12.2010 passed by
Additional District Judge-II, Madhubani in Sessions Trial No.
29/2010.

2. Azima Khatoon wife of deceased Md. Motiur
Rahman of Village-Ramkhetari, PS-Rajnagar, Distt-Madhubani filed
a written report on 15.07.2009 disclosing therein that on the same day
at about 2:00 PM her husband was taking meal in his room, their son
Md. Nasim Raza Rahmani @ Munna aged about 30 years came from
Rajnagar and no sooner than he arrived, began to abuse his father. He



came inside the room, bolted it from inside and began to assault whereupon, her husband shouted for help. Hearing cry, her daughter, Roohi Khatoon rushed but seen the door locked came outside the house and raised alarm disclosing that her brother is assaulting her father after closing the room whereupon, the persons of the locality assembled. Anyhow, persuaded to open the door. After opening the door by Md. Nasim Raza Rahmani @ Munna, all of them have gone inside the room and found her husband Md. Motiur Rahman in an injured condition lying over a bed in a pool of blood. Her son was armed with Khanti. She had seen her husband having injury over his head. Blood was oozing out. His both hands were also injured. He was groaning. All the persons lifted him to Rajnagar hospital wherefrom, he was referred to DMCH where, her husband has been taken to. Anyhow, with the help of the neighbours, she succeeded in apprehending her son, Md. Nasim Raza Rahmani @ Munna. On arrival of the police, written report along with accused has been produced.

3. After registration of Rajnagar PS Case No. 116/2009, investigation commenced and during course thereof, on account of death of injured, Md. Motiur Rahman, Section 302 IPC was added whereunder, after concluding investigation, charge-sheet has been submitted, facilitating the trial, meeting with ultimate result,



subject matter of the instant appeal.

4. Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 CrPC is that of complete denial. It has also been pleaded that his sister, Roohi Khatoon has been affectionate towards a person which was opposed by him as well as his father and the said person taking advantageous position, on account of absence of the appellant, tried to develop physical relationship which was opposed at the end of his father and in the aforesaid background, his father was assaulted. Subsequently thereof, on the false pretext maneuvering the situation by his sister, got the appellant/accused involved in this case with false and frivolous allegation. In support thereof, also examined DWs.

5. In order to substantiate its case, prosecution had examined altogether 8 PWs out of whom PW-1, Roohi Khatoon , PW-2, Md. Afroj Alam @ Pappu, PW-3, Md. Nazim, PW-4, Ansarul Haque, PW-5, Md. Nayeem, PW-6, Azima Khatoon, PW-7, Satya Narayan Singh, and PW-8, Dr. Rama Nand Chaudhary as well as had also exhibited Ext-1 series, signature of respective witnesses over written report, Ext-2, written report, Ext-3, Formal FIR, Ext-4, endorsement over written report, Ext-5, Seizure list relating to seizure of blood stained Khanti, Ext-6, inquest report, Ext-7, Postmortem report.



6. Defence had also examined five DWs who are DW-1, Praveen Khatoon, DW-2, Hamida Khatoon, DW-3, Afroj Ansari, DW-4, Abdul Wahid and DW-5, Nuri Khatoon.

7. Learned counsel for the appellant during course of argument has submitted that due to poverty, appellant was not at all in a position to engage a counsel nor the learned lower court had cared to provide legal assistance in accordance with Section 304 of the CrPC and on account thereof, though the appellant cross-examined the witnesses compelled circumstances but, being ignorant of law, niceties of the trial imbecile over manner of cross-examination in order to strike upon the ingredients of the offence, failed to highlight the circumstances in a manner as legal expert could not have been able to expose the inherent defect in the prosecution case, side by side interestedness of the witnesses in order to save her paramour, by his sister and mother, that being so, irrespective of witnesses having been cross-examined at the end of appellant but fact remains, appellant remained undefended whereupon, trial vitiates.

8. It has also been submitted that improbability of the prosecution version is found unstitched during course of trial. In the written report there happens to be absence of discloser with regard to any kind of effort having been taken at the end of the appellant/accused in getting himself away from that room which has



been shown to be the place of occurrence as there happens to be discloser in the written report that when the door was opened, appellant/accused was standing having blood stained Khanti in his hand whom the informant apprehended with the assistance of persons assembled there and then he was produced before the police along with written report. During course of trial, from the evidence of the Investigating Officer, PW-7, it is evident that appellant was not arrested from a room allegedly, the place of occurrence nor he was produced there. In likewise manner, irrespective of the fact that none of the witnesses had stated that the accused/appellant had succeeded in throwing the blood stained Khanti, the same was seized away from the house what to talk about the room. This is a vital circumstance which questions over the reliability of the prosecution version. Keeping mum instead of explaining, the aforesaid event, speaks otherwise probalizing that the deceased might have been assaulted by somebody else who was given a slip by the family members and then, appellant has been made scapegoat.

9. Now coming to the status of the witnesses, it is evident that none of the witnesses has been named in the written report save and except, Roohi Khatoon. Md. Nayeem, Md. Afraje, Md. Najim, Md. Ansarul and Md. Amanat having their presence at the bottom of the written report identified their status to be that of FIR



attesting witnesses as, till then, some of the persons having their presence have taken the injured, Md. Motiur Rahman to Rajnagar Hospital. Then to DMCH. Those persons have not got lime light during course of trial. In its continuity, it has also been submitted that when the evidences of those witnesses are properly scrutinized coupled with the written report, Ext-2 along with evidence of the informant, PW-6, it is evident that none happens to be the witness of the occurrence.

10. It has also been submitted that after all, it happens to be obligation on the part of the prosecution to substantiate its case by cogent, reliable, creditworthy witnesses whereunder prosecution has failed. Then, it has been submitted that at an earlier occasion, during course of hearing this appeal, the court had found manner whereunder evidence of the Investigating Officer has been recorded to be in contravention of the Evidence Act and in the aforesaid background vide order dated 01.12.2016, invoking Section 391 of the CrPC directed re-examination of PW-7, the Investigating Officer which has accordingly been recorded. From perusal of the same, as has been submitted the deficiency persisting since before remained as which adversely affect upon genuineness of the prosecution version.

11. Furthermore, it has also been submitted that first of all prosecution has to support its case and then and then only, the



evidence of DWs could be seen. Learned lower court while appreciating the evidence just reversed the principle and with the aid of the evidence whatever been deposed at the end of DWs concluded by way of recording the judgment of conviction and sentence. Consequent thereupon, the same is liable to be set aside.

12. It has also been submitted that in worst case finding the prosecution case proved, even in that case, no offence under Section 302 IPC is made out, more particularly, in the background of the fact that the occurrence as alleged arose on the issue of partition. None of the witnesses had stated that they have seen the appellant/accused going inside the room armed with Khanti. So, whatsoever the consequences, that was on account of sudden provocation attracting the ingredients for an offence punishable under Section 304 Part II of the IPC and for that, appellant had sufficiently been punished being under custody from the date of alleged occurrence.

13. Learned counsel for the appellant relied upon AIR 1981 SC 928[Khatri v. State of Bihar], AIR 1975 SC 1026 [Ram Kumar Pandey v. State of M.P], 1982 CrLJ 2314[Jagmohan v. State of Rajasthan], AIR 1978 SC 59[Bir Singh v. The State of U.P.], AIR 1979 SC 1369[Hussainara Khatoon v. Home Secretary, State of Bihar, Patna] AIR 1983 SC 624[Ranjan Dwivedi v. Union of India], 1985



CrLJ 324 [Union of India v. Abdulkadar Abdulgani Masmani & ors., AIR 1965 SC 1887[Rajeshwar Prasad Mishra v. The State of W.B], AIR 2016 SC 4745[Dhal Singh Dewangan v. State of Chhattisgarh, (2017) 13 SCC 491[Machindra v. Sajjan Galfa Rankhamb], (1977) 4 SCC 420[Bir Singh v. State of U.P.].

14. On the other hand, learned APP urged that mere non presence of counsel representing an accused will not cast any kind of aspersion over the findings, more particularly, in the background of non raising the grievances at the end of the accused as well as actively participating during conduction of the trial by way of cross-examining the witnesses. The accused had taken own risk and so, now after conviction, he could not be allowed to raise the theme of prejudice. Accordingly, the submission having been made at the end of the appellant that on account of non compliance of Section 304 of the CrPC the trial vitiates, has got no legal recognition.

15. Coming to the merit of the case, it has been submitted that written report was filed within few hours of the occurrence. At that very time, mental condition of the informant is also to be perceived as, her husband has been assaulted by her own son. At one side, the victim, husband is there, while at the other side, the assailant happens to be her son, own blood. Such situation is to be visualized by the court in its right perspective. Furthermore, It has also been



submitted that that FIR could not be considered to be an encyclopedia giving minute to minute details, having descriptive narration of presence of witness at particular point, having proper access. Virtually, the importance of FIR is with regard to informing the police over commission of an occurrence, be it a cognizable or non cognizable. If the occurrence happens to be cognizable, then in that circumstance, police will proceed with an investigation and if the offence is non cognizable then, investigation has to commence after permission of the Magistrate.

16. With regard to the status of the witnesses, it is evident that none could be said to be an interested, inimical in the background of *inter se* relationship. Furthermore, the occurrence having been committed inside the house, on account thereof, only the family members, that means to say, PW-1, sister and PW-6, mother would be the natural witnesses. If their evidences are properly scrutinized, they have supported the case of the prosecution and the same has got additional support from the DWs. It has also been submitted that some sort of inconsistency or exaggeration is bound to occur during course of evidence of the witnesses on account of their mental equilibrium, perception, intellectuality, lapse of memory, when they came in witness box after years together. Brushing aside the same, which are not at all the touching core of the prosecution case rather appears to be



superficial one, did not cast any kind of perversity over the prosecution version whereupon this appeal is fit to be dismissed.

17. Two Sections are relevant to be taken note of at the present juncture in the background of the fact that there happens to be an argument at the end of appellant that by virtue of non providing of legal assistance during course of trial, instant trial vitiates counter meeting with at the end of learned APP that the accused himself indulged in defending his right, on account thereof, he could not be allowed to assail the judgment on that very score. For better appreciation those two Sections are quoted below:-

“303. Right of person against whom proceedings are instituted to be defended. Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code, may of right be defended by a pleader of his choice.”

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

(1) Where, in a trial before the Court of Session, 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 rules providing for-

(a) the mode of selecting pleaders for defence under sub- section (1);

(b) the facilities to be allowed to such pleaders by the Courts;

(c) the fees payable to such pleaders by the Government, and generally, for carrying out the purposes 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 Courts of Session.

18. Article 21 of the Constitution looks prudent to be quoted at the present, which reads as follows:-

“ 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 ”

19. At an earlier occasion, these Sections have got no primacy but, after *Hussainara Khatoon*'s case, the aforesaid two provisions have properly been interpreted and highlighted. The Hon'ble Apex Court in *Hussainara Khatoon v. Home Secretary, State of Bihar, Patna* as reported in *AIR 1979 SC 1369*, has held that an accused is to be allowed to be properly defended by a legal practitioner failing which, it ultimately cost upon the validity of the trial. It has also been held that in terms of Article 39A of the Constitution, it happens to be an obligation on the part of the State to provide free legal aid to the accused, contrary to it, it will be in contravention of Article 21 of the Constitution.

6. Then there are several under-trial 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 under-trial 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 under-trial prisoners are unable to furnish and which, therefore, effectively shuts out for them any possibility of release from pretrial 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](#)((1978)1 SCC 248) 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 unnder 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 indregredient of reasonable, fair and just procedure to a prisonel 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 v. State of Maharashtra](#) ((1978) 3 SCC 544).:"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 supporteve 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*((1963) 372 US 335):

"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 every where 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 idea 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 following passage from the judgment of Douglas, J. in *Jon Richard Argersinger v. Raymond Hamlin*((1972) 407 US 25) "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.

The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries but it 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 realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. Both Powell and Gideon involved felonies. But their rationale has relevance to any criminal trial, where an accused is deprived of his liberty.

x x x x x x 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)"

7. We may also refer to [Article 39A](#) the fundamental constitutional directive which reads as follows:

"39A. Equal justice and free legal aid:-The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. (emphasis added)"



This Article also emphasises that free legal service is an inalienable element of 'reasonable, fair and just' procedure for without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. The right to free legal services is, therefore, clearly an essential ingredient of 'reasonable, fair and just, procedure for a person accused of an offence and it must be held implicit in the guarantee of [Article 21](#). This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so required, provided of course the accused person does not object to the provision of such lawyer. We would, therefore, direct that on the next remand dates, when the under-trial prisoners, charged with bailable offences, are produced before the Magistrates, the State Government should provide them a lawyer at its own cost for the purpose of making an application for bail, provided that no objection is raised to such lawyer on behalf of such under-trial prisoners and if any application for bail is made, the Magistrates should dispose of the same in accordance with the broad outlines set out by us in our judgment dated 12th February, 1979. The State Government will report to the High Court of Patna its compliance with this direction within a period of six weeks from today.

8. *****

9. We may also take this opportunity of impressing upon the Government of India as also the State Governments, the urgent necessity of introducing a dynamic and comprehensive legal service programme with a view to reaching justice to the common man. Today, unfortunately, in our country the poor are priced out of the judicial system with the result that they are losing faith in the capacity of our legal system to bring about changes in their life conditions and to deliver justice to them. The poor in their contact with the legal system have always been on the wrong side of the law. They have always come across "law for the poor" rather than "law of the poor". The law is regarded by them as something mysterious and forbidding-always taking something away from them and not as a positive and



constructive social device for changing the socio economic order and improving their life conditions by conferring rights and benefits on them. The result is that the legal system has lost its credibility for the weaker sections of the community. It is, therefore, necessary that we should inject equal justice into legality and that can be done only by dynamic and activist scheme of legal services. We may remind the Government of the famous words of Mr. Justice Brennan "Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with. But injustice makes us want to pull things down. When only the rich can enjoy the law, as a doubtful luxury, and the poor, who need it most, cannot have it because its expense puts it beyond their reach, the threat to the continued existence of free democracy is not imaginary but very real, because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in an benefit by its impartiality and fairness."

And also recall what was said by Leeman Abbot years ago in relation to affluent America.

"If ever a time shall come when in this city only the rich can enjoy law as a doubtful luxury, when the poor who need it most cannot have it, when only a golden key will unlock the door to the courtroom, the seeds of revolution will be sown, the fire-brand of revolution will be lighted and put into the hands of men and they will almost be justified in the revolution which will follow."

We would strongly recommend to the Government of India and the State Governments that it is high time that a comprehensive legal service programme is introduced in the country. That is not only a mandate of equal justice implicit in [Article 14](#) and right to life and liberty conferred by [Article 21](#), but also the compulsion of the constitutional directive embodied in [Article 39A](#).

20. In the case of *Ranjan Dwivedi v. Union of India* as reported in *AIR 1983 SC 624*, wherein the petitioner was himself an



Advocate on record of the Supreme Court, side by side was also one of the accused relating to popularly known case i.e. ***Samastipur Bomb blast*** and for better appreciation relevant paragraphs are quoted below:-

4. During the pendency of the writ petition, the Court by its interim order dated June 4, 1981 having regard to the fact that the petitioner is a practising lawyer and is involved in a long drawn sessions trial, directed that the State should undertake to help him in the matter of his defence so far as the payment of fees to his counsel to defend him in the trial was concerned. It directed that the petitioner will inform the Court of Sessions the name of the counsel who would be appearing for him with a direction that the State would make necessary arrangement to pay the amount required to be expended on his fees subject to final accounting to be made depending on the result of the writ petition. By the subsequent order dated August 18, 1981 the Court in modification of the earlier order quantified that a sum of Rs. 500 per day will be paid by the State to the senior counsel and Rs. 250 per day to the junior for representing the petitioner.

5. At the hearing it was urged by learned counsel for the petitioner that suitable directions be made in conformity with the interim orders passed by the Court for payment of a reasonable amount as fees to the amicus curiae who appears for the petitioner at the trial. The learned Additional Solicitor-General on the other hand takes serious exception to the directions made by the Court and contends that the petitioner has no legal right to be supplied with a lawyer by the State nor is there any corresponding obligation cast on the State to give financial assistance to him to engage a counsel of his choice. According to him, the remedy of the petitioner is to make an application before the learned Additional Sessions Judge under sub-s. (1) [s. 304](#) of the Code of Criminal Procedure, 1973 to provide him with free legal aid and it is for the learned Additional Sessions Judge to be satisfied on material placed before him that the petitioner is not possessed of



sufficient means to engage a counsel. The submission is that it is upon the fulfillment of this condition that a direction can be made to provide a counsel for his defence at the expense of the State. He accordingly contends that no petition under [Art. 32](#) of the Constitution is maintainable.

6. The petition is virtually for the enforcement of the Directive Principle of State Policy enshrined in [Art. 39A](#) of the Constitution which reads:

"39A. The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."

7. There can be no doubt that the petitioner is not entitled to the grant of a writ of Mandamus for the enforcement of the Directive Principle enshrined in [Art. 39A](#) by ordaining the Union of India to give financial assistance to him to engage a counsel of his choice on a scale equivalent to, or commensurate with, the fees that are being paid to the counsel appearing for the State. As is clear from the terms of [Art. 39A](#), the social objective of equal justice and free legal aid has to be implemented by suitable legislation or by formulating schemes for free legal aid. The remedy of the petitioner, if any, lies by way of making an application before the learned Additional Sessions Judge under sub-s. (1) of s. 304 [of the Code](#) of Criminal Procedure, 1973, and not by a petition under [Art. 32](#) of the Constitution.

8. The traditional view expressed by this Court on the interpretation of [Art. 22\(1\)](#) of the Constitution in [Janardan Reddy & Ors. v. The State of Hyderabad & Ors.](#) (1951 AIR 217) that 'the right to be defended by a legal practitioner of his choice' could only mean a right of the accused to have the opportunity to engage a lawyer and does not guarantee an absolute right to be supplied with a lawyer by the State, has now undergone a change by the introduction of the Directive Principle of State Policy embodied in [Art. 39A](#) by the Constitution (Forty-Second) Amendment Act, 1976, and the enactment of sub-s. (1) of [s. 304](#) of the Code of



Criminal Procedure. It was in this case that the Court observed that the American rule enunciated in the case of *Powell v. Alabama* (287 U.S. 45 (1932)) founded on the doctrine of 'due process' was not applicable to India and that under [Art. 22\(1\)](#) there was no absolute right to an accused to be supplied with a lawyer by the State. There has been a definite shift in the stance adopted by the Court by its decisions in [Maneka Gandhi v. Union of India](#) ((1978)1 SCC 248), *E. P. Royappa v. State of Tamil Nadu* (1974 AIR 555) [R.D. Shetty v. The International Airport Authority of India & Ors.](#) (1979 AIR 1628) In *Maneka Gandhi's* case, supra, the Court observed that the requirement of compliance with natural justice was implicit in [Art. 21](#) and that if any penal law did not lay down the requirement of hearing before effecting him, that requirement would be implied by the Court so that the procedure prescribed by law would be reasonable and not arbitrary procedure. The procedure which was 'arbitrary' oppressive or fanciful, was no 'procedure' at all. A procedure which was unreasonable could not be said to be in conformity with [Art. 14](#) because the concept of reasonableness permeated that Article and arbitrariness is the antithesis of equality guaranteed under [Art. 14](#). It is difficult to hold in view of these decisions that the substance of the American doctrine of 'due process' has not still been infused into the conservative text of Art 21.

9. Although in the earlier decisions the Court paid scant regard to the Directives on the ground that the Courts had little to do with them since they were not justiciable or enforceable, like the Fundamental Rights, the duty of the Court in relation to the Directives came to be emphasized in the later decisions which reached its culmination in *Keshavanand Bharti v. Union of India* (4) laying down certain broad propositions. One of these is that there is no disharmony between the Directives and the Fundamental Rights because they supplement each other in aiming at the same goal of bringing about a social revolution and the establishment of a welfare State, which is envisaged in the Preamble. The Courts therefore have a responsibility in so interpreting the Constitution as to ensure implementation of the Directives and to harmonize the social objective underlying the Directives with the individual rights. Primarily, the mandate in [Art. 39A](#) is



addressed to the Legislature and the Executive but insofar as the Courts of Justice can indulge in some judicial law-making within the interstices of the Constitution or any statute before them for construction, the Courts too are bound by this mandate.

10. Read with [Art. 21](#), the Directive Principle in [Art. 39A](#) has been taken cognizance of by the Court in [M. H. Hoskot v. The State of Maharashtra](#)((1978) 3 SCC 544), [State of Haryana v. Darshana Devi & Ors.](#)(1979 AIR 855) and [Hussainara Khatoon & Ors. v. Home Secretary, State of Bihar, Patna](#)(AIR 1979 SC 1369) to lead to certain guidelines in the administration of justice. One of these is that when the accused is unable to engage a counsel owing to poverty or similar circumstances, the trial would be vitiated unless the State offers free legal aid for his defence to engage a lawyer whose engagement the accused does not object. This more or less echoes the moving words of Sutherland, J. in Powell's case, (supra). 'The right to the aid of counsel', wrote Sutherland, J., 'is of a fundamental character'. In this country (i e. United States of America) 'historically and in practice', a hearing has always included 'the right to the aid of counsel when desired and provided by the party asserting the right'. Sutherland, J. went on to indicate why this should be so:

"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 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."

But he did not stop there. If the accused were unable to get counsel, even though opportunity were offered, then the 'due process' clause in the Fourteenth



Amendment required the trial court 'to make effective appointment of counsel'. This was new law, and so it was natural that the Court would set careful limits for the new principle;

"Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine. All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defence because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the Court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case,"

11. It must be stated that Powell's case involved a capital punishment where the accused was unable to employ counsel due to his indigence and therefore was incapable adequately of making his own defence, and according to the Supreme Court, the failure of the trial court to give reasonable time and opportunity to secure counsel was a clear denial of due process.

12. There was a clear departure by the Supreme Court of the United States in *Betts v. Brady* (316 U.S. 455 (1942)) where the Court made an abrupt break and held that the 'due process' clause of the Fourteenth Amendment did not impose upon the States, as the Sixth Amendment imposed upon the Federal Government, an absolute requirement to appoint counsel for all indigent accused in criminal cases. It required the State to provide a counsel only where the particular circumstance of a case indicated that the absence of counsel would result in a trial lacking 'fundamental fairness'. Ever since the decision in *Bett's* case, the problem of the constitutional right of an accused in a State Court became a continuing source of controversy until it was set at rest in the celebrated case of *Guideon v. Wainwright*. ((1963) 372 US 335) Under the rule laid down in *Bett's* case, the Court had to consider the 'special circumstances' in each case to determine whether the denial of counsel had amounted to a constitutional defect in the trial and in an era of constantly expanding federal restrictions on State criminal processes, it was



hardly startling that the Court in Gideon's case explicitly rejected the rule laid down in Bett's case and held that 'Sixth Amendment's (unqualified) guarantee of counsel for all indigent accused' was a "fundamental right made obligatory upon the State by the Fourteenth Amendment". We are however not in the United States of America and therefore not strictly governed by the 'due process' clause in the Fourteenth Amendment. We therefore need not dilate on the subject any further.

21. In *Khatiri v. State of Bihar* as reported in *AIR 1981 SC*

928 wherein, it has been held as follows:-

4. That takes us to one other important issue which arises in this case. It is clear from the particulars supplied by the State from the records of the various judicial magistrates dealing with the blinded prisoners from time to time that, neither at the time when the blinded prisoners were produced for the first time before the judicial magistrate nor at the time when the remand orders were passed, was any legal representation available to most of the blinded prisoners. The records of the judicial magistrates show that no legal representation was provided to the blinded prisoners, because none of them asked for it nor did the judicial magistrates enquire from the blinded prisoners produced before them either initially or at the time of remand whether they wanted any legal representation at State cost. The only excuse for not providing legal representation to the blinded prisoners at the cost of the State was that none of the blinded prisoners asked for it. The result was that barring two or three blinded prisoners who managed to get a lawyer to represent them at the later stages of remand, most of the blinded prisoners were not represented by any lawyers and save a few who were released on bail, and that too after being in jail for quite some time, the rest of them continued to languish in jail. It is difficult to understand how this state of affairs could be permitted to continue despite the decision of this Court in Hussainara Khatoon's case. This Court has pointed out in Hussainara Khatoon's case (supra) which was decided as far back as 9th March, 1979 that the right to free legal services is clearly an



essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of [Article 21](#) and the State is under a constitutional mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer. It is unfortunate that though this Court declared the right to legal aid as a Fundamental Right of an accused person by a process of judicial construction of [Article 21](#), most of the States in the country have not taken note of this decision and provided free legal services to a person accused of an offence. We regret this disregard of the decision of the highest court in the land by many of the States despite the constitutional declaration in [Article 141](#) that the law declared by this Court shall be binding through-out the territory of India. Mr. K. G. Bhagat on behalf of the State agreed that in view of the decision of this Court the State was bound to provide free legal services to an indigent accused but he suggested that the State might find it difficulty to do so owing to financial constraints. We may point out to the State of Bihar that it cannot avoid its constitutional obligation to provide free legal services to a poor accused by pleading financial or administrative inability. The State is under a constitutional mandate to provide free legal aid to an accused person who is unable to secure legal services on account of indigence and whatever is necessary for his purpose has to be done by the State. The State may have its financial constraints and its priorities in expenditure but, as pointed out by the court in *Rhem v. Malcolm*. "The law does not permit any Government to deprive its citizens of constitutional rights on a plea of poverty" and to quote the words of Justice Blackmun in *Jackson vs. Bishop*, 404 F. Supp. 2d, 571: "humane considerations and constitutional requirements are not in this day to be measured by dollar considerations." Moreover, this constitutional obligation to provide free legal services to an indigent accused does not arise only when the trial commences but also attaches when the accused is for the first time produced before the magistrate. It is elementary that the jeopardy to his personal liberty arises as soon as a person is arrested and produced before a magistrate, for it is at that stage that he gets the first opportunity to apply for bail and obtain his



release as also to resist remand to police or jail custody. That is the stage at which an accused person needs competent legal advice and representation and no procedure can be said to be reasonable, fair and just which denies legal advice and representation to him at this stage. We must, therefore, hold that the State is under a constitutional obligation to provide free legal services to an indigent accused not only at the stage of trial but also at the stage when he is first produced before the magistrate as also when he is remanded from time to time.

5. But even this right to free legal services would be illusory for an indigent accused unless the magistrate or the Sessions Judge before whom he is produced informs him of such right. It is common knowledge that about 70 per cent of the people in the rural areas are illiterate and even more than that percentage of people are not aware of the rights conferred upon them by law. There is so much lack of legal awareness that it has always been recognised as one of the principal items of the programme of the legal aid movement in this country to promote legal literacy. It would make a mockery of legal aid if it were to be left to a poor ignorant and illiterate accused to ask for free legal services. Legal aid would become merely a paper promise and it would fail of its purpose. The magistrate or the sessions judge before whom the accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. Unfortunately, the judicial magistrates failed to discharge this obligation in the case of the blinded prisoners and they merely stated that no legal representation was asked for by the blinded prisoners and hence none was provided. We would, therefore, direct the magistrates and Session Judges in the country to inform every accused who appears before them and who is not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal services at the cost of the State. Unless he is not willing to take advantage every other State in the country to make provision for grant of free legal services to an accused who is unable to engage a lawyer on account of reasons such as poverty, indigence or incommunicado situation. The only qualification would be that the offence charged against the accused is such that, on conviction, it would



result in a sentence of imprisonment and is of such a nature that the circumstances of the case and the needs of social justice require that he should be given free legal representation. There may be cases involving offences such as economic offences or offences against law prohibiting prostitution or child abuse and the like, where social justice may require that free legal services need not be provided by the State.

22. Because of the fact that there happens to be direction at the end of the Supreme Court to the Magistrate as well as Sessions Judge in the country to inform every accused who appears before them and who is not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal service at the cost of State. The courts were/are under obligation to comply the same. Unless there happens to be refusal at the end of the accused, the accused must be provided legal representative at the cost of the State. The direction of Hon'ble Apex Court is binding upon all court all over India as provided under Article 141 of the Constitution. Therefore, it is expected at the end of all concern to have proper compliance thereof.

23. In order to verify whether learned lower court had complied with or not, the order sheets have been properly verified. After going through the same, it is evident that neither on the date on which charge was framed, nor subsequently, the court had inquired whether he is to be defended by a counsel having been engaged by



him, nor the learned P.O. divulged that he is to be provided at the State cost. No order-sheet is there to justify the activity at the end of the learned lower court on that very score. However, from the deposition of PW-1, it is evident that there happens to be some sort of remark relating thereto.

24. Having regard to the facts and circumstances of the case, inconsonance with the direction of Hon’ble Apex Court as referred hereinabove, it is apparent that the trial before the learned lower court had sailed in utter violation of mandate of Section 303 as well as 304 of the IPC that means to say, virtually, appellant remained undefended, whereupon the judgment would not survive, as a result thereof, is set aside. Consequent thereupon, appeal is allowed.

25. The matter is remitted to the learned lower court to proceed with *de novo* trial with a direction to have a counsel at the State cost who would represent the appellant during trial.

(Aditya Kumar Trivedi, J)

I agree
(Rajendra Kumar Mishra, J)

perwez

(Rajendra Kumar Mishra, J)

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