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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Decided on : September 1, 2022*

+ **CRL.A. 378/2015 & CRL.M.B. 1604/2021**

RUSY @ SURENDER Appellant

Represented by: Mr.Kanhaiya Singhal, Advocate with
Ms. Priyal Garg, Mr. Prasanna, Mr.
Chetan Bhardwaj, Mr. Udit Bakshi,
Ms.Saumya Sharma, Advs.
Appellant through VC.

versus

STATE (GNCT OF DELHI) Respondent

Represented by: Ms. Shubhi Gupta, APP for State with
Inspector Gaje Singh, PS South
Rohini.

+ **CRL.A. 652/2015 & CRL.M.B. 1605/2021**

RAJESH @ TINKU Appellant

Represented by: Mr. Pramod Kumar Dubey, Sr. Adv.
DHCLSC with Mr. Biswajit Patra,
Ms. Pinky Dubey, Mr. Kaustubh
Chauhan, Ms. Harpreet Kalsi,
Mr.Prince Kumar Tiwari, Ms.Aditi,
Advocates.
Appellant through VC.

versus

STATE NCT OF DELHI Respondent

Represented by: Ms. Shubhi Gupta, APP for State with
Inspector Gaje Singh, PS South
Rohini.



+ **CRL.A. 890/2016 & CRL.M.B. 1287/2021**

RAVINDER @TUNDA

..... Appellant

Represented by: Mr. Pramod Kumar Dubey, Sr. Adv.
DHCLSC with Mr. Biswajit Patra,
Ms. Pinky Dubey, Mr. Kaustubh
Chauhan, Ms. Harpreet Kalsi,
Mr. Prince Kumar Tiwari, Ms. Aditi,
Advocates.
Appellant through VC.

versus

STATE OF DELHI

..... Respondent

Represented by: Ms. Shubhi Gupta, APP for State with
Inspector Gaje Singh, PS South
Rohini.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MR. JUSTICE ANISH DAYAL

MUKTA GUPTA, J (ORAL)

CRL.A. 378/2015, CRL.A. 652/2015 & CRL.A. 890/2016

1. By these three appeals, the appellants have challenged the impugned judgment dated 5th August 2014 whereby they were convicted for offences punishable under Sections 302/460/392 read with 34 IPC and the appellant Rajesh @ Tinku was also convicted for offence punishable under Sections 392 read with 397 IPC and 27 of the Arms Act. Vide the order on sentence dated 12th August 2014, they were awarded sentence of imprisonment for life for offences punishable under Sections 302 and 460 IPC besides the sentences on the other count.



2. Case of the prosecution in nutshell is that on 24th July 2012 at about 2.45 am, an information recorded vide DD No. 4-B was received at police station South Rohini pursuant where to, Inspector Anil Kumar along with SI Ravi Kumar and Constable Sanjay reached at the spot at D-17/252, Sector 3, Rohini, where they found blood scattered inside and around the room. The injured Resham Rani had been shifted to Baba Saheb Ambedkar Hospital by PCR officials. On reaching the hospital, injured Resham Rani was declared unfit for statement. Statement of Shishu Pal Singh, son-in-law of the injured who was present in the hospital was recorded who informed that at around 2--2.15 AM, he heard loud voices of the injured mother-in-law who was screaming and calling for his wife and shouting Jyoti, daughter of the injured, on which, he rushed downstairs and found blood scattered all over the place, inside and outside the door of the house. He found his mother-in-law lying on the bed and crying in pain. His mother-in-law was bleeding heavily from the left side of the stomach. He asked her as to what happened, on which, she informed that two persons had come who were wearing black clothes, stabbed her and ran away. The almirah, the drawers of the TV trolley were open, the window under the A.C. was broken and the articles of the house were lying scattered. While the statement of Shishu Pal Singh was being recorded, the injured died and thus FIR No. 153/2012 was registered on the statement of Shishu Pal Singh. Crime team and forensic expert were called at the spot and statement of Jyoti Satija, daughter of the deceased was recorded who stated that she had seen the three assailants running away and also gave their description. At the spot, one purse was found which Jyoti Satija informed did not belong to them.



3. In the same area, one more similar incident had taken place just prior to the incident at D-17/252, Sector 3, Rohini for which, FIR No. 152/2012 was registered. The purse which was found at the spot in FIR No. 153/2012 belonged to the family of the victim in FIR No. 152/2012. Based on the description given by the witnesses in FIR No. 152/2012, the three assailants were arrested and recoveries were made pursuant to their disclosures. During the course of trial, prosecution examined 35 witnesses. Statements of accused were recorded under Section 313 CrPC, however, they led no defence evidence. The appellants were convicted for the offences as noted above and sentenced to undergo imprisonment for life. Hence, the present appeals.

4. During the course of arguments, one of the grounds urged by the learned Senior Counsel for the appellants Ravinder @ Tunda and Rajesh @ Tinku and learned counsel for the appellant Rusy @ Surrender was with regard to the manner in which the trial was conducted by the learned Additional Sessions Judge which has seriously prejudiced the appellants. It is contended that the examination-in-chief of number of witnesses was conducted by way of affidavits and in compliance thereof, affidavits of PW1 Anil, PW2 Constable Manoj, PW3 HC Satish, PW4 HC Narender, PW5 Constable Mahendra, PW6 Constable Sanjay, PW7 Constable Umesh, PW8 HC Ram Parvesh, PW9 SI Manohar Lal, PW10 Sushil Kumar, PW11 Constable Arvind, PW12 HC Raj Kumar, PW13 Constable Vishram, PW14 Ram Sevak, PW15 Constable Amar and PW28 HC Virender were handed over to the defence counsels on 13th May 2013 at 12 PM. PW1 to PW15 tendered their affidavits same day and the witnesses PW1 to PW15 were asked to be cross examined on the same day which cross examination



concluded by 4.45 pm. Further, on 13th May 2013 itself, examination-in-chief of PW18 Parshuram Singh, PW19 Dr.Manoj, PW20 Dr.Manish, PW21 Surender Kumar, PW22 Shishu Pal Satija, PW23 Pawan Kumar Satija, PW24 Dharmender Sehrawat, PW25 Jyoti Satija and PW26 Dr.Vijay Dhankar were recorded and they were asked to be cross examined and since the learned counsel was not prepared with all the cross examinations, the cross examinations noted 'NIL. Opportunity given'. The chart of witnesses examined on affidavit and cross examined as well as examined-in-chief and cross examined before the Court on 13th May 2013 is as under:-

WITNESSES EXAMINED ON AFFIDAVIT

Exhibit No.	Name	Role	Cross-examination
PW-1 Ex.PW1/1	SI Anil (I/C Crime Team)	Inspected the place of the incident thoroughly.	Suggestions have been made.
PW-2 Ex.PW-2/1	Ct. Manoj (Crime Team Photographer)	Took photographs of the place of the incident.	NIL.
PW-3 Ex.PW-3/1	HC Satish (Finger Print Proficient, Mobile Crime team)	Took chance prints from the spot after inspecting it thoroughly.	NIL.
PW-4 Ex.PW-4/1	HC Narender (Duty Officer)	Registered FIR No.153/2012 U/s 302/460/34 IPC on the basis of the Rukka.	Suggestion has been made.
PW-5	Ct. Mahendra (Computer	Feed the original Rukka in computer in the	NIL



Ex.PW-5/1	Operator)	supervision of the duty officer.	
PW-6 Ex.PW-6/1	Ct. Sanjay (Posted at PS South Rohini)	-Reached at BSA Hospital. -Handed over the rukka to the duty officer. -Handed over the copy of FIR and original Rukka after registration of the case to the IO.	NIL
PW-7 Ex. PW-7/1	Ct. Umesh (Posted at PS South Rohini)	Witness to the Formal Arrest and Recording of the Disclosure Statement by the IO on 09.08.2012	NIL
PW-8 Ex. PW-8/1 (Pg. 11; 470)	HC Ram Pravesh (Posted at PS North Rohini)	Handed over the pulanda of clothes of injured Smt.Rasham Rani to IO.	NIL
PW-9 Ex. PW-9/1	SI Manohar Lal (Draughtsman, North West District, Delhi)	Prepared Rough notes for the scaled site plan of the sport and thereafter prepared a scaled site plan on 15.09.2012 and handed over the same to the IO.	NIL
PW-10 Ex. PW-10/1	Sh. Sushil Kumar (Finger Print Expert)	Prepared report regarding comparison of chance prints on 18.10.2012.	NIL
PW-11 Ex. PW-11/1	Ct. Arvind (Posted at PS South Rohini)	-Deposited the exhibits of the present case in FSL on 27.09.2012.	NIL



		-Handed over the receipt of acknowledgement to MHC (M) case property.	
PW-12 Ex. PW-12/1	HC Raj Kumar (Posted at PS South Rohini as constable.)	Took the exhibits containing weapon of offence of the present case of Mortuary BSA Hospital along with the application for subsequent opinion and deposited the same there and handed over the receipt of acknowledgement to MHC (M) case property.	NIL
PW-13 Ex. PW-13/1	Ct. Vishram (Posted at PS South Rohini)	Supplied the copies of present case FIR to DCP/Outer Jt. C.P/NR and M.M.	Suggestions have been made
PW-14 Ex. PW-14/1	Ct. Ram Sewak (Posted in PCR Unit and was deputed in PCR duty at PHQ)	Received an information from D-17/252, Sec-3, Rohini and recorded the same in PCR form.	NIL
PW-15 Ex. PW-15/1	Ct. Amar (Posted at PS South Rohini)	-On receipt of information received on 24.07.2012, alongwith ASI Surender reached at D-17/252, Sec-3, Rohini, Delhi. -At the instance of IO,	NIL



NEUTRAL CITATION NO: 2022/DHC/003464

		took care of the scene of the crime and preserved it for the purpose of investigation.	
PW-28 Ex. PW-28/1	HC Virender	Register No.19	One suggestion

5. Witnesses examined in Court and not cross examined are as under:-

WITNESSES NOT CROSS-EXAMINED

Exhibit No.	Name	Role	Cross-examination
PW-16	Sh. Indresh Kumar Mishra	Crime Scene examined	NIL
PW-17	Naresh Kumar	Forensic Expert-FSL	NIL, on recall – one suggestion was given
PW-18	Parshuram Singh	Forensic Expert-SOC	NIL
PW-19	Dr. Manoj	Post Mortem	NIL
PW-20	Dr. Manish	Cause of death	NIL
PW-21	Surender Kumar	Handed over blood sample etc. of deceased	NIL
PW-23	Pawan Kumar	Identification of dead body	NIL
PW-24	Dharmendra Sehwat	Ahalmad who produced the records of other FIR	NIL



PW-26	Dr.Vijay Dhankar	Post Mortem Doctor	NIL
PW-27	Dr. Bhawna Jain	MLC	NIL

6. It is in the light of the facts noted above that the appellants claim denial of a fair trial.

7. Faced with the similar situation, Hon'ble Supreme Court in the decision reported as (2012) 2 SCC 584 Mohd. Hussain Vs. State (Govt. of NCT of Delhi) (hereinafter Mohd. Hussain-I), on going through the record of proceedings and the orders passed by the Sessions Court, noted that though the accused was initially assisted by counsel appointed by the learned Sessions Judge, however, in the midst of the trial, the said counsel disappeared from the scene i.e. before the conclusion of the trial and the accused was not asked whether he would be able to engage a counsel or wish to have a counsel appointed for him. In the said case, evidence of 56 witnesses out of 65 witnesses cited by the prosecution was recorded without providing counsel to the accused. Thus, though the two learned Judges comprising the Bench in Mohd. Hussain-I agreed that there were grave miscarriage of justice, however, differed on the consequential order to be passed. In view of the difference of opinion in the consequential order, the matter was placed before a larger Bench of three Hon'ble Judges of the Supreme Court in which a unanimous verdict was rendered reported as (2012) 9 SCC 408 Mohd. Hussain Vs. State (Govt. of NCT of Delhi) (hereinafter Mohd. Hussain-II) and it was held that since the offences for which the accused had been charged are of a serious nature, the prosecution had to be taken to its logical conclusion. It was further observed that if there



had to be no failure of justice, the retrial of the appellant in the facts and circumstances is indispensable.

8. The Division Bench of this Court had the occasion to deal with similar issue in the decision reported as (2014) SCC Online Del 794 Sanjay Kumar Valmiki Vs. State wherein, it was held as under:-

“17. The above decisions make it abundantly clear that the right of an accused to a fair hearing may be vitiated by an "overhasty, stage-managed, tailored and partisan trial". What has also been repeatedly emphasized is that providing an accused with the services of a lawyer is not an empty formality. The accused has a right "to have the guiding hand of the counsel at every step of the proceeding". In the present case, the failure by the learned trial Court to ensure that the accused was duly represented by a counsel even at the stage of the framing of charges was a serious infraction of his statutory and constitutional rights of access to justice.

18. After the extraordinary haste displayed by the trial Court in recording the evidence of as many as 17 witnesses on one day i.e. 7th March 2012, the next date was fixed as 26th March 2012 when the evidence of 11 more witnesses was recorded. Four of those witnesses were not cross-examined. As regards certain key witnesses i.e. PW-25, the child witness, PW-21, the mother of the deceased, PWs-18 and 19 who conducted the Forensic and DNA test respectively, PW-23 who conducted the post-mortem, PW-22 at whose instance the body of the deceased was found and PW-24 who found the body, the transcript of their cross-examination shows that the amicus curiae was unable to be fully prepared. It is obvious that even at that stage, i.e. less than twenty days after his appointment, he was yet to come to grips with the case. By 26th March 2012 as many as 28 prosecution witnesses had already been examined and discharged. The next date of hearing was 2nd April 2012 which was less than one week thereafter. Again three witnesses were examined and discharged. These witnesses included the IOs PW-30, PW-31 and PW-29. Within a fortnight, on 17th April 2012, the statement of the accused was recorded under Section 313 CrPC. On 2nd May 2012, spot inspection was



carried out and on 11th May 2012 the trial Court delivered a 166-page judgment convicting the accused.

19. The Court fails to understand why the learned trial Court was in such a tearing hurry to complete the entire trial without giving learned amicus curiae for the accused sufficient time to prepare himself and to conduct a proper trial. It must be remembered that the more serious the crime the greater the need to ensure that there is no compromise whatsoever on the fair trial procedures. Otherwise the constitutional guarantee enshrined in Article 21 of a just, fair and reasonable procedure established by law, would be rendered illusory. The manner in which the trial has been conducted in the present case by the learned trial Judge leaves no room for doubt that there has been a serious infraction of the fundamental right of the accused to a fair trial. It has, resulted in a grave miscarriage of justice and for that very reason the impugned judgment convicting the accused and the consequential order on sentence awarding him capital punishment cannot be sustained in law”.

9. This Court in Surender Kumar Mathur Vs. State, CrI.A. 268/2014 dated 19th August 2014, observed that ‘speedy trial is the hallmark of a fair, just and reasonable procedure inconformity with the constitutional obligations enshrined in Article 21, however, when the speedy trial results in the denial of a fair trial to the accused, the same would be violative of his constitutional rights’.

10. In view of the ground urged by the learned counsels, production warrants of the appellants were issued and pursuant to the instructions from the appellants, learned counsel for the appellants Ravinder @ Tunda and Rajesh @ Tinku states that the appellants be permitted to cross examine PW7 Constable Umesh and PW14 Constable Ram Sevak who had tendered their affidavits by way of evidence in their examination-in-chief. Learned



counsel for the appellant Rusy @ Surrender prays that the appellant be permitted to cross examine PW1 SI Anil, PW2 Constable Manoj, PW9 SI Manohar Lal, PW11 Constable Arvind, PW12 HC Raj Kumar, PW15 Constable Amar, PW16 Indresh Kumar Mishra and PW17 Naresh Kumar.

11. A perusal of the order sheets reveal that PW17 Naresh Kumar was examined by evidence by way of affidavit and on the said date, discharged with 'NIL. Opportunity given' for cross examination, however, further examination-in-chief of this witness was recorded on 16th September 2013 without there being any application under Section 311 CrPC and on the said date, in the cross examination only one formal suggestion was put to the witness. Further, when the matter came up before the learned Additional Sessions Judge on 13th May 2013, only amicus curiae appointed for Ravinder @ Tunda was present and learned counsel for accused Rusy @ Surrender and Rajesh @ Tinku were not present and on the same day, Mr.Subham, Advocate who was representing Ravinder @ Tunda was appointed as amicus curiae for accused Rusy @ Surrender and Rajesh @ Tinku as well and asked to cross examine these witnesses.

12. Undoubtedly, the learned Trial Court was within its jurisdiction to seek affidavits of the formal witnesses under Section 296 CrPC and some of the formal witnesses may not even require cross examination by the defence, but, it all depends upon the facts sought to be established by the witness concerned, the nature of depositions of the said formal witnesses and the defence of the accused. Where the prosecution case is based on recoveries witnessed by police officials with no independent persons available, the witnesses of recovery and the witnesses of crime team who have picked up essential evidence from the spot, cannot be said to be formal witnesses.



They are required to be cross examined effectively. Thus, it would be appropriate to permit recall of the such witnesses as held by the Hon'ble Supreme Court in the decision reported as (2012) 7 SCC 56 P. Sanjeeva Rao Vs. State of Andhra Pradesh.

13. In view of the facts noted above, this Court is of the considered opinion that undue haste in trial by the learned Additional Sessions Judge without granting the fair opportunity to cross examine the witnesses has seriously prejudiced the accused in effectively cross examining the witnesses.

14. We, therefore, set aside the impugned judgment of conviction and order on sentence and remand the matter back to the learned Trial Court for recalling PW1 SI Anil, Incharge Crime Team, PW2 Constable Manoj, PW7 Constable Umesh, PW9 SI Manohar Lal, PW11 Constable Arvind, PW12 HC Raj Kumar, PW14 Constable Ram Sevak, PW15 Constable Amar, PW16 Indresh Kumar Mishra and PW17 Naresh Kumar and permit the accused to cross examine the witnesses. The learned Trial Court would then follow the procedure prescribed by recording additional statements of the accused under Section 313 CrPC, if need be, and permit the accused to lead defence evidence, if any.

15. Since the appellants have been in custody now for nearly ten years, the learned Trial Court is requested to conclude the cross examination of these witnesses noted above preferably within a period of two months by conducting the same on day to day basis.

16. The Superintendent, Tihar Jail is directed to produce the appellants before the learned Trial Court on 9th September 2022 for further proceedings.



17. Appeals are accordingly disposed of.
18. The original Trial Court record, if not sent back be sent back by the registry by Special Messenger forthwith.
19. Copy of the judgment be uploaded on the website of this Court and be also communicated to the appellants through the Superintendent Jail.

CRL.M.B. 1604/2021 in CRL.A. 378/2015
CRL.M.B. 1605/2021 in CRL.A. 652/2015
CRL.M.B. 1287/2021 in CRL.A. 890/2016

In view of the order passed in the appeals, the applications are disposed of as infructuous.

(MUKTA GUPTA)
JUDGE

(ANISH DAYAL)
JUDGE

SEPTEMBER 1, 2022/akb