Chaluvegowda & Others

v.

State by Circle Inspector of Police

(Supreme Court Of India)

HON'BLE MR. JUSTICE H.L. DATTU HON'BLE MR. JUSTICE ANIL R. DAVE

Criminal Appeal No. 274 Of 2002 | 22-03-2012

In Seneca's Medea (4 B.C.-A.D. 65), it is said "A Judge is unjust who hears but one side of a case, even though he decides justly." With this preface, let us deal with the issue raised in this appeal.

1. The appellants (27 persons) were tried on the charge of having murdered Rajegowda and causing injuries to several other persons. The trial court had passed on order of acquittal, acquitting all the 27 accused persons on the ground that the prosecution has failed to establish any of the charges against the accused.

2. The impugned judgment holds the appellants guilty of committing the offence punishable under Section 302/149 of the Indian Penal Code (the 'IPC' for short) as well as for the offences punishable under Sections 143, 148, 324 r/w Section 149, 448 and 427 r/w Section 149 of the 'IPC' and each of them is sentenced to undergo imprisonment for life and they are not awarded separate sentence for other minor offences.

3. We do not find it necessary to notice minutely the factual details as the same have been noted in the impugned judgment. The gist of the prosecution case, as noticed in the impugned 2 judgment, is as follows : On 4.7.1987, at about 7 am near the Hithalu of one Kalegowda PW-17, situate by the side of a road leading from Doddahalli to Doddahalli Shandy Maidan, all these respondents/appellants formed themselves into an unlawful assembly, with the common object of committing the murder of one Rajegowda and they did infact commit the offence of rioting and at that time, they were also armed with deadly weapons like clubs, sickles and stones and in prosecution of the common object of such

unlawful assembly, one of the members of such unlawful assembly viz. the appellant No.1 committed the murder of the said Rajegowda and the appellants A2 to A27 caused simple injuries to PW-1 Cheluvegowda, PW-5 Annaji Gowda, PW-6 Marigowda, PW-9 Ramu, PW-12 Daddegowda, PW-13 Rajegowda and PW- 15 Puttaswamy Gowda with deadly weapons and that further, they proceeded to the house of PW-9 and after trespassing into the house of PW-9 in the village, caused damaged to the door of his house, causing wrongful loss to pw-9 to an extent of ? 50/- and also caused simple injuries. With these charges, the respondents were put on trial before the Trial Court.

4. Upon being charged of the offences punishable under Sections 143, 148, 324, 302 r/w 149, 448, 327 r/w 149 of the 'IPC', the appellants had claimed trail.

5. In order to substantiate its case against the appellants/accused, the prosecution had examined at the trial PWs-1 to 21 and placed on record exs. P-1 to P-17, and the defence examined DW-1.

6. When confronted with the incriminating evidence, the stand of the appellants/accused was of bald denial. The trial concluded with the acquittal of the appellants.

7. Aggrieved by the judgment and order so passed by the trial Judge, the State moved the High Court by filing Criminal Appeal no. 777/1996. After hearing the learned Additional Public Prosecutor, the High Court found it fit to grant leave to appeal and admitted the appeal on 19.09.1996. Further, the High Court issued non-bailable warrants against the appellants herein, and the same was duly executed and the appellants were granted bail by the learned Addl. Sessions Judge, Hassan, in terms of Section 390 of the Code of Criminal Procedure, 1973 ("the Code" for short).

8. After preparation of paper books, the appeal was listed before the Court on 30.01.2001 for appointment of learned counsel for the respondents/accused in the appeal, since they were unrepresented. The High Court thought it fit to appoint one Smt. Pushpakantha, learned counsel, to appear on their behalf as amicus curiae vide order dated 31.01.2001. The order sheet maintained by the

High Court suggests that the paper book was notified on 08.02.2001. Thereafter, the matter was posted before the Court on 12.10.2001 for hearing. Since the amicus-curiae appointed earlier was not present on that day, before beginning the hearing of learned Additional Public Prosecutor, the Court appointed one Smt. Manjula Kamadolli, advocate, as amicus-curiae to represent the respondents/accused on the same day which was the date fixed for hearing of the appeal and in fact hearing completed on the very same day and the matter was reserved for judgment. The judgment was delivered by the High Court on 17.10.2001 convicting the respondents/accused for the offence of murder punishable under Section 302/149 IPC and sentencing them to undergo life imprisonment. It is this judgment which is the subject matter of this appeal.

9. Though several contentions are taken in the memorandum of appeal filed by the appellants, Shri. Anoop G. Choudhary, learned senior counsel appearing for the appellants, would submit that the appellants were not given sufficient opportunity by the High Court to defend themselves in the criminal appeal filed by the State against the order of acquittal passed by the learned Additional Sessions Judge. He further submits that the High Court failed to give adequate time to the newly appointed Amicus Curiae to study and prepare the case and she was made to follow arguments of the learned Public Prosecutor and thereafter, was asked to reply to the said arguments. The procedure so adopted by the leaned Judges, according to learned counsel, is in violation of the principles of effective representation and fair trial and the same has caused 'miscarriage of justice' to the appellants.

10. Shri. V.N. Raghupathy, learned counsel appearing for the respondent-State, very fairly submits, that, he is unable to defend the procedure adopted by the High Court.

11. To appreciate the submission of the learned senior counsel, we have perused the judgment impugned and the order sheet of the proceedings before the High Court. From the order sheet maintained by the High Court and the impugned judgment, it appears that Smt. Pushpakantha, learned counsel, was appointed as amicus curiae earlier, but she was not present before the Court on the date when the matter was posted for hearing. On the same day, the High Court thought it fit to appoint Smt. Manjula Kamadolli, learned counsel, as the amicus curiae

and proceeded with the hearing of the State's appeal. The noting made by the High Court is extracted :

"Learned Advocate Smt. Pushpakantha, appointed as Amicus Curiae for the respondents has not turned up to argue the matter and failed to represent the respondents when the matter has reached for hearing and hence, on the peculiar facts and circumstances of the case, having waited for the arrival of the learned Counsel Smt. Pushpakantha for quite sometime and when ultimately she did not turn up, we invited Smt. Manjula Kamdolli to appear as Amicus curiae on behalf of the respondents and gave her sufficient time to go through the case papers. Accordingly, the learned Counsel Smt. Manjula Kamadolli, who followed the arguments of the learned Addl. S.P.P. and also having prepared herself in the case, argued the matter on behalf of the respondent.

2. We have heard the arguments of the learned Addl. S.P.P. for the appellant-State and the learned Amicus Curiae Smt. Manjula Kamadolli for the respondents at a considerable length and carefully perused the entire case papers including the evidence and the impugned judgment of the Trial Court, with their assistance....."

12. In our opinion, the High Court rightly thought it fit to appoint yet another learned counsel as amicus curiae to assist the accused-appellants as Smt. Pushpakantha, appointed as amicus curiae earlier had not turned up to argue the case and failed to represent the accused. However, having thus appointed another amicus curiae, it was incumbent upon the High Court to have given sufficient time and opportunity to Smt. Manjula Kamadolli to go through the papers and prepare her brief, and only then make her submissions. We do not approve the method in which Smt. Kamadolli was made to argue the case on the very day she was asked to represent the respondent/accused. We cannot loose sight of the fact that the accused were acquitted by learned Sessions Judge after a lengthy trial where prosecution had examined 21 witnesses and had marked numerous exhibits in aid of the prosecution case. The ground realities are even the best of brains in criminal law jurisprudence would certainly take some time to scan through prosecution case, lengthy cross-examination of material witnesses, nuances of the prosecution case and the possible reasons and conclusion reached by the learned Sessions Judge. This aspect appears to have

been lost sight of the learned Judges who had vast experience as learned Judges, who had conducted and decided the cases arising under the criminal law jurisprudence. Even otherwise also, a learned counsel who was sitting in the Court, for some other case, if he or she is asked to accept a brief, which has it's own complexities and make the submission either for the prosecution or for the defence, the counsel may accept the brief out of sheer humility and respect to the Court, but may not be in a position to do any justice either to himself/herself, to the brief and to the Court. Therefore, in our opinion, sufficient time and complete papers should have been made available, so that the Advocate chosen may serve the cause of justice with all ability at her/his command.

13. Before considering the issue raised in this case, it is necessary to refer to Rules relating to the appointment of an amicus curiae. These Rules find a place in the High Court of Karnataka Rules, 1959 ["the Rules" for short]. Rule 2A was introduced by Notification No. LCA-1/480/92 dated 1.06.1999 w.e.f. 24.06.1999, and reads as under:

"2-A. (i) Wherein a criminal case before the High Court the accused is not represented by an Advocate and if the Court is satisfied that the accused has no sufficient means to engage an Advocate or where the accused remains absent and the interest of justice so requires, the Court may appoint any Advocate from the panel prepared under Clause (iv) below to represent the accused in such case at the expense of the State.

(ii) The fact and the date of appointment of the amicus curiae under clause (i) above shall be noted in the order sheet.

(iii) The amicus curiae shall be entitled to inspect the records of the case, the office shall furnish him with necessary papers and the Court shall allow him adequate time for presenting the case for the accused.

(iv) Panel of Advocates of not more than ten, who are willing and suitable, may be prepared and approved by the Chief Justice every year in January. However, a panel once prepared shall remain in force until fresh panel of Advocates is prepared. No Advocate who has put in not less than five years of practice at the Bar shall be included in the panel.

(v)....."

14. The Clause 2-A(i) of the Rules mandates the High Court in criminal cases, where accused is not represented by an Advocate and is not possessed with sufficient means to engage an Advocate or where the accused remains absent though notified of hearing of the appeal to appoint any Advocate from the panel of Advocates prepared, as provided under Clause IV of the Rules. Though Clause 2-A(i) uses the expression "may", the same requires to be interpreted as laying down mandatory direction to the Court to engage an Advocate, if the conditions laid down in the Rule are otherwise satisfied. See Bashira v. State of U.P., AIR 1968 1313.

15. Clause 2-A(iii) imposes an obligation on the High Court to furnish the relevant papers to the person appointed as amicus curiae counsel for the purpose of defence and give adequate time for presenting the case for the accused. The language used in this clause is 'shall'. On the basis of the language used, it is mandatory for the High Court, firstly, to appoint an amicus-curiae, if the conditions laid down in the Rule are satisfied and allow sufficient time to the counsel so appointed to prepare for the defence of the accused. The grievance of Sri Choudhary is not that the amicus curiae was not at all engaged to represent the appellants in the High Court; but not providing sufficient time to the counsel so appointed to prepare and present the case of the defence of the accused. In the present case, the facts mentioned by us clearly shows that Smt. Manjula Kamadolli was appointed amicus-curiae on 12th October, 2001, which was the date fixed for hearing of the appeal and in fact hearing of the appeal completed on the same day and the matter was reserved for judgment. The course adopted by the High Court was in breach of Clause 2-A(iii) of the Rules; which clause requires that the Advocate appointed under the Rules shall be allowed sufficient time to prepare and present for the defence. The purpose of following the mandatory requirement of the aforesaid rules is to prevent mis-carriage of justice and observance thereof is the pragmatic requirement of fairness in action.

16. We may now refer the decisions on which reliance is placed by leraned senior counsel Shri. Anoop Choudhary. In Bahira v. State of U.P., AIR 1968 SC

1313, this Court, while interpreting Rule 37 of the Allahabad High Court General Rules (Criminal) 1957, has held:

"8. There is nothing on the record to show that, after his appointment as counsel for the appellant, Sri. Shukla was given sufficient time to prepare the defence. The order-sheet maintained by the Judge seems to indicate that, as soon as the counsel was appointed, the charge was read out to the accused and, after his plea has been recorded, examination of witnesses began. The counsel, of course, did his best cross-examine the witnesses to the extent it was possible for him to do in the very short time available to him. It is true that the record also does not contain any note that the counsel asked for more time to prepare the defence, but that, in our opinion, is immaterial. The Rule casts a duty on the court itself to grant sufficient time to the counsel for this purpose and the record should show that the Rule was complied with by granting him time which the court considered sufficient in the particular circumstances of the case. In this case, the record seems to show that the trial was proceeded with immediately after appointing the amicus curiae counsel and that, in fact, in any time at all was granted, it was nominal. In these circumstances, it must be held that there was no compliance with the requirements of this Rule."

17. In the aforesaid decision, this Court has referred to the decision of Andhra Pradesh High Court in the case of Alla Nageswara Rao, AIR 1957 AP 505, where, Subba Rao, C.J. (as he then was), had held:

"(2) It must be borne in mind that the accused should be given every reasonable opportunity to put forward their case and their defence, particularly when a charge for a grave offence is leveled against them. Rule 228 of the Criminal Rules of Practice reads:

"A pleader will be engaged at the cost of the State to defend an accused person who does not engage a pleader himself and who is under sentence of death or has been called upon to show cause why a sentence of death should not be passed upon him or against whom an appeal has been filed under S. 417, Criminal Procedure Code, in cases involving imprisonment, and may, if necessary, be engaged in a case involving lesser sentence.

(3) A mere formal compliance with this rule will not carry out the object underlying the rule. A sufficient time should be given to the advocate engaged

on behalf of the accused to prepare his case and conduct it on behalf of his client. We are satisfied that the time given was insufficient and, in the circumstances no real opportunity was given to the accused to defend himself."

18. Reference is also made to the decision of the High Court in the case of Mathai Thommen v. State, AIR 1959 Ker 241, wherein it is held:

"14... It need hardly be said that in a case of this nature in which the accused ran the risk of being sentenced to the extreme penalty of law - and the sentence was actually passed on him by the Sessions Judge - the time allowed to the counsel to prepare the case and obtain instructions was totally insufficient. The learned Judge could have appointed a counsel immediately after the receipt of the records or at least some 10 to 15 days in advance of the trial.....

Practices like this would reduce to a farce the engagement of counsel under Rule 21 of the Criminal Rules of Practice which has been made for the purpose of effectively carrying out the duty cast on courts of law to see that no one is deprived of life and liberty without a fair and reasonable opportunity being afforded to him to prove his innocence. We consider that in cases like this counsel should be engaged at least some 10 to 15 days before the trial and should also be furnished with copies of the records....."

19. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for an accused is presumed to be innocent until proved to be otherwise in a fairly conducted trial. This right would include that he defended by a competent counsel. The provision of an amicus curiae for an accused, in case the accused is unable to engage an Advocate to conduct his defence, is to ensure the goal of a fair trial which is a guarantee provided in the constitution. We may recall the often quoted passage of Potter Stewart "Fairness is what justice really is".

20. The right to be represented by a lawyer must not be an empty formality. It must not be a sham or an eye-wash. The appointment of an amicus curiae for the defence of an accused person must be in true letter and spirit, with due regard to the effective opportunity of hearing that is to be afforded to every

accused person before being condemned. The due process of law incorporated in our constitutional system demands that a person not only be given an opportunity of being heard before being condemned, but also that such opportunity be fair, just and reasonable.

21. It is appropriate to recall the case of Powell v. State of Alabama, 287 US 45, in which nine black men were accused of raping two white women, and were charged with the same. Since the accused were from a different state, they did not have legal assistance, so the trial judge, in a very vague manner, appointed all the members of the Alabama Bar to defend the accused. However, when the actual trial was underway, none of the lawyers defended the accused, but only offered to provide assistance to the defence lawyer. Satisfied by this, the trial judge allowed the trial to proceed in the absence of an effective legal assistance for the accused, and the trial resulted in a conviction with the death sentence accorded on the accused. The US Supreme Court took strong exception to the procedure adopted by the trial Court. The Court held [at pg. 53]:

"It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice. Not only was that not done here, but such designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard."

22. The Court, speaking through Justice Sutherland, further held [at pg. 58]:

"...The defendants, young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them.

It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation."

23. In the case of Gideon v. Wainwright, 372 US 335, the US Supreme Court, approving the above observations, laid down following principles:

"...In returning to these old precedents, sounder we believe that the new, we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognize 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, few indeed, 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 trial in some countries, but it is in ours..."

24. This Court in Mohd. Sukur Ali v. State of Assam, (2011) 4 SCC 729, has held :

"5. We are of the opinion that even assuming that the counsel for the accused does not appear because of the counsel's negligence or deliberately, even then the court should not decide a criminal case against the accused in the absence of his counsel since an accused in a criminal case should not suffer for the fault of his counsel and in such a situation the Court should appoint another counsel as amicus curiae to defend the accused. This is because liberty of a person is the most important feature of our Constitution. Article 21 which guarantees protection of life and personal liberty is the most important fundamental right of the fundamental rights guaranteed by the Constitution. Article 21 can be said to be the "heart and soul" of the fundamental rights.

.....

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

25. In the case of Mohd. Hussain v. State, (2012) 2 SCC 584, this Court (of which one of us was a party) emphasized the importance of a fair trial and a meaningful assistance of legal counsel being given to an accused person, as these two are of paramount importance to uphold the rule of law.

26. In our considered view, the accused-appellants were not given an effective opportunity to defend themselves in a case as the one involved here, carry the possibility of a substantial prison sentence. Therefore, we say, the procedure adopted by the High Court is not only contrary to the Rules as quoted above, and also contrary to the fair trial which is the first imperative of dispensation of justice. Therefore, it is difficult for us to sustain the impugned judgment and order passed by the High Court.

27. Since we intend to remand the matter to the High Court for a fresh disposal in accordance with law after giving a sufficient opportunity to the appellants to defend themselves effectively, it is not necessary to notice the other contentions canvassed by the learned counsel on the merits of the case.

28. In view of the above discussions, we have no other alternative but to accept the appeal and set aside the impugned judgment and order passed by the High Court and remand the matter to the High Court for re-decision of the appeal in the light of the observations made by us and in accordance with law.

29. Ordered accordingly.