Reserved

A.F.R.

Court No. - 31

Case :- JAIL APPEAL No. - 242 of 2013

Appellant :- Rakesh
Respondent :- State Of U.P.
Counsel for Appellant :- From Jail,Raj Kumar Dhama

Hon'ble Mrs. Vijay Lakshmi,J.
Hon'ble J.J. Munir,J.

(Delivered by Hon'ble J.J. Munir, J.)

1. This criminal appeal is directed against a judgment and order of Sri Rajendra Babu Sharma, the then Ist Additional Sessions Judge, Baghpat dated 9th July, 2012 in Sessions Trial No.167 of 2008 (State Vs. Bablu and others) convicting the appellant Rakesh of an offence punishable under Section 302 read with Section 34 IPC and sentencing him to suffer imprisonment for life with a fine in the sum of Rs.10,000/- attended with a direction that in the event of default in the payment of fine, the appellant would have to undergo a further term of one year rigorous imprisonment.

2. It may be mentioned at the outset that the present appeal was filed from Jail by the appellant through the Senior Superintendent, District Jail, Meerut in the prescribed proforma dated 19.12.2012 forwarded by the Senior Superintendent along with a covering memo addressed to the Deputy Registrar of this Court. The appeal was belated. This Court by an order dated 15.01.2013 condoned the delay, admitted the appeal to hearing and summoned the record.

3. Heard Sri Raj Kumar Dhama, learned counsel for the appellant and Sri Saghir Ahmad, learned A.G.A. on behalf of the State.

4. It must be placed on record here that this appeal was heard during a single stretch of hearing on 17.03.2018 and judgment was reserved.

5. It is also required to be said at the outset that three accused

were arraigned at the trial, to wit, Bablu son of Pem Nath, Nandu son of Jasveer and Rakesh son of Dharmveer. Bablu was murdered pending trial, whereas Nandu died pending trial a natural death. Thus, the trial proceeded against the present appellant Rakesh alone leading to the impugned judgment of conviction.

6. The facts giving rise to the present appeal of the earliest account are best given out by the First Information Report. It is stated by the first informant, one Kanwarpal son of Ratan Singh that the informant was a native of Village Dhikauli. The sister of one Bablu son of Prem, another native of the same village is said to have eloped with one Mukesh, a native of Bijraul. According to the informant, his brother Omveer (the deceased) was frequented by Mukesh, who had eloped with Bablu's sister, on account of which Bablu harboured ill will against the deceased. In the evening hours of 29th September, 2007 the informant and his brother Omveer were proceeding to their *Gher* carrying meal for their father. His brother Omveer was walking a few paces ahead of the informant; the two, as they reached the house of one Satyapal @ Ballam son of Nanak Harijan, Bablu son of Prem, Rakesh son of Dharmveer (the appellant) and Nandu son of Jasveer waylaid the informant's brother wielding country-made pistols, where each of them in order to do his brother Omveer (now deceased), to death, opened fire, which hit Omveer. It is said that on hearing Omveer cry out, witnesses Devendra son of Sheeshpal, Ranpal son of Risal, Satish son of Mahak Singh arrived at the scene of occurrence and witnessed the incident. Bablu and others fired indiscriminately, which led the gathered multitude into a state of commotion and stampede while residents of the locality closed their doors out of fear and while some were peeping through their windows; the accused still firing to scare, brandishing their weapons, moved away. The occurrence is said to have taken place at 17:30 hours. The informant mentions that his brother Omveer was injured in consequence of the assault, and, while he along with others were carrying him for medical aid to Meerut, he died on way. With the informant saying further that his brother's dead

body was placed in his *Gher* he requested that his report may be lodged for necessary action.

7. On the basis of a written report, Ex. Ka-1, by the informant, case crime no.180 of 2007 was registered against the accused Bablu, Rakesh (appellant) and Nandu for the offence under Section 302 IPC, which was entered in the General Diary as G.D. Entry No.48 at 20.50 hours on 29.09.2017.

8. The investigation was handed over to S.O. Sunil Kumar Sharma, who inspected the place of incident, recorded the statements of the witnesses, prepared the site plan of the place of occurrence Ex. Ka-3, and, after inviting *Panchas*, drew up the inquest report, Ex. Ka-2 and other relating documents i.e. photograph of the body (Photo *Lash)*, Ex. Ka-5, Report to the Reserve Inspector, Ex. Ka-6, *Challan Lash*, Ex. Ka-7 and a letter written to the C.M.O., Ex. Ka-8, and, thereafter, the cadaver was sent for autopsy.

9. PW-4, Dr. Yatish Kumar conducted autopsy on the dead body of deceased Omveer and found following anti-mortem injuries on his person:-

> *(1) Gunshot wound of entry 1.5cm x 1cm x muscle deep on lateral aspect of right forearm just 1.5 cm below elbow. Blackening was found around the wound of size 5 cm x 3 cm. Margins were inverted.*
>
> *(2) Gunshot wound of exit size 2cm x 15 cm x muscle deep on medial aspect of right upper arm just 1 cm above the elbow margins everted. This wound correspond to injury no.1 by prob.*
>
> *(3) Gunshot wound of entry 1.5cm x 1cm x cavity deep on the right side of the chest, 17 cm below right nipple at 7 o' clock position. Colour of abrasion was present around the wound. Margins were inverted.*
>
> *(4) Gunshot wound of exit 2.5cm x 1.5cm on left side of*

abdomen 12 cm lateral to umbilicus at 3 o' clock position. Margins everted and a small piece of gut appeared outside the wound. This wound correspond to injury no.3 by prob.

(5) Lacerated wound size 1.5cm x 1cm x muscle deep on medial aspect of left ankle joint."

10. After conclusion of investigation, the Investigating Officer submitted a charge-sheet, Ex. Ka-9 against the accused Bablu, Rakesh and Nandu for the offence under Section 302 IPC. The case being exclusively triable by the Court of Sessions, it was committed to the Sessions, where charges under Section 302 read with Section 34 IPC were framed against the appellant as well as two other co-accused, who denied the same and claimed trial. As already noted above, co-accused Nandu died and co-accused Bablu was murdered. Hence the trial against these co-accused, to wit, Nandu and Bablu abated and the appellant Rakesh alone stood his trial.

11. During the course of trial, the prosecution examined four witnesses:-

(i) PW-1, Kunwarpal is brother of the deceased. He is also the first informant;

(ii) PW-2, Satish is an eye witness, whose name finds place in the F.I.R. as a witness;

(iii) PW-3, SI Sunil Kumar Sharma is the Investigating Officer of the case;

(iv) PW-4, Dr. Yatish Kumar, conducted the autopsy.

12. After conclusion of the prosecution evidence, the statement of the appellant under Section 313 Cr.P.C. was recorded, wherein he denied the prosecution story. He did not enter defence.

13. In his examination-in-chief on 13.04.2011, Kunwarpal, the first informant deposing as PW-1 said that on 29.08.2007 at about half past 5 in the evening, he and his brother Omveer were proceeding to their *Gher* carrying dinner for their father. Omveer was proceeding a few paces ahead of him. As soon as Omveer reached about the front of the

house of one Satyapal @ Ballam, Bablu son of Prem (since deceased), Rakesh son of Dharmveer (the appellant) and Nandu son of Jasveer (since deceased) brandishing country-made pistols waylaid his brother and with an intent to kill, opened fire that hit him. It is stated that the deceased Omveer on being shot, cried out, in consequence of which, Devendra son of Shishpal, Ranpal son of Risal, Satish son of Mahak Singh, reached the scene of occurrence and all of them witnessed it. It is stated by the witness that the accused firing away made good their escape.

14. The witness goes on to say that those present there including himself lifted the fallen Omveer, placed him in a car (as he was alive) and proceeded to Meerut to secure medical aid, but on way Omveer breathed his last. The witness further says that he gave a written information the same day about the occurrence, which he dictated to one Dharmpal Singh, who is the scribe of the First Information Report and handed it over to the Police.

15. It is recorded in the examination-in-chief of PW-1 that his written information was shown to this witness, who saw it and acknowledged it to be the same First Information Report that he had dictated and signed. Upon his identification, the written information was marked Ex. Ka-1. The witness has further down in his examination-in-chief said that the inquest report (*Panchayatnama*) was filled up by the police in his presence and below the signatures of other *Pancha* witnesses, he was also asked to sign as a witness. He appended his signatures to the inquest. The inquest report bearing paper no.7-A/3 was shown to the witness, who after perusal of the same said that it bore his signatures on the reverse of the document and that he was asked to sign the said document when it was drawn up. He identified the inquest report under reference, whereupon the same was marked Ex. Ka-2.

16. At this stage of the proceeding, learned counsel appearing for the accused instead of proceeding to cross-examine the witness sought adjournment, and, in consequence cross-examination was

deferred to the adjourned date, which appears to be 24.05.2012.

17. It is indeed intriguing that on the adjourned date, which was specifically set down for the cross-examination of PW-1, the witness took stand in the dock to be cross-examined, but the learned counsel appearing for the accused declined to cross-examine. The trial court recorded the following order, that would, otherwise, have been the space, which would have been replete with record of the cross-examination. The order of the court of the day reads:-

> *"Adequate and sufficient time given, Declined to cross-examine, hence declared NIL. Chief was postponed on request of accused appro.. more than one year before.*
>
> *Signed: illegible*
>
> *24.5.12"*

18. It appears that on the same day i.e. 24.05.2012, the prosecution produced Satish son of Mahak Singh, PW-2, who said in his examination-in-chief that on 29.09.2007 in the evening hours at about 5.30, Kunwarpal and his brother Omveer were carrying meal for their father to the *Gher*. When Omveer reached in front of the house of Satyapal @ Ballam, Bablu son of Prem, Rakesh son of Dharmveer and Nandu son of Jasveer waylaid Omveer brandishing country-made pistols and opened fire, that hit him. Omveer cried out for help, hearing which Devendra son of Shishpal, Ranpal son of Risal and PW-1 reached the place of occurrence. The witness states that he saw the entire occurrence. He further said that having shot the deceased, the accused firing away (presumably to be scare those, who might have attempted to apprehend) made good their escape. Omveer while being rushed to medical aid, died on way.

19. It is all the more surprising that this witness, who was the second and the only remaining witness of fact, also was not cross-examined by learned counsel for the accused. The court proceeded to record the following order on the running sheets in the space meant for recording the cross-examination:-

“Adequate and sufficient occasion given upto 4.35 PM, cross-examination declined by accused, hence declared NIL.

Signed: illegible

24.5

(Seal of the Judge)”

20. The third witness to be called in by the prosecution was Sub-Inspector Sunil Kumar Sharma, who took stand in the witness box on 30.05.2012. He said in his examination-in-chief shorn of unnecessary detail that on that day (date of registration of the crime) case crime no.180 of 2007, under Section 302 IPC against Bablu, Nandu and Rakesh, was registered in his presence. The investigation was done by him. He said that on 29.09.2007, he had copied out contents of *Chik*, copy of the G.D. entry, statement of the scribe of the FIR, Head Moharrir Gopal Singh and the statement of the first informant Kunwarpal. He went on to depose that on 30.09.2007, he recorded the statements of witnesses Devendra, Ranpal and Satish and further at the pointing out of the informant and the witnesses inspected the place of occurrence, and, drew up a site plan. He proved the site plan before paper no.831/1, which he said was the document that was before him and bore his signature. Upon that the site plan was marked Ex. Ka-3. He further stated that he recorded other relevant evidence in the Case Diary, in particular, copied out the *Panchayatnama*.

21. On 07.10.2007, he received a carbon copy of the postmortem relating to deceased Omveer, which the Investigating Officer stated that he perused. He went on to say that on 05.10.2007, he recorded the statements of *Pancha* witnesses Prempal Singh, Devendra, Mahaveer Singh, Kisanpal and the informant Kunwarpal (who was also a *Panch* witness). The Investigating Officer went on to state that on 07.11.2007 with prior leave of the court, he went to the District Jail, Meerut and recorded the statement of accused Vipin @ Nandu on 08.11.2007 from 2 o' clock in the morning hours to 09.11.2007 upto 2 o' clock in the afternoon hours. The Investigating Officer took Nandu into Police

Custody Remand and on his pointing out, recovered the weapon of offence, a country-made pistol of .315 bore that had the empty stuck into its barrel. He drew up a memorandum of recovery, which was copied in the case diary. The witness stated that he investigated this case until 22.11.2007, whereafter on account of his transfer, the investigation went out of his hands. The witness further said that Head Constable Bhopal Singh had been posted along with him at the Police Station. He had seen Bhopal Singh write and sign and, therefore, recognizes his signature and handwriting. The witness was shown the *Chik* FIR relating to case crime no.180 of 2007 and on seeing the same he states that it was in the handwriting of HCP Bhopal Singh and signed by him. He identified it. According the *Chik* FIR was exhibited and marked Ex. Ka-4. The witness also stated that Bhopal Singh had recorded a summary of the *Chik* in the GD. A certified copy of an extract of the GD, that is on record, was proved by the witness, and was marked Ex. Ka-5.

22. The witness went on to say that Sub-Inspector Ramdas had been posted along with him at the Police Station. He had seen him read and write and, therefore, was well acquainted with his signatures as well as his handwriting. The witness stated that on his instructions, Sub-Inspector Ramdas had carried out the inquest. The inquest report was marked Ex. Ka-2 upon the witness identifying his signatures and that of Sub-Inspector Ramdas. The witness was shown Photo *Nash*, report to the Reserve Inspector, *Challan Nash* and letter to the Chief Medical Officer. The witness stated that on his instructions, Sub-Inspector R.D. Singh (earlier referred to a Ram Das) had drawn up these documents. He further stated that on those documents, he identifies the signatures of SI R.D. Singh, that were marked respectively as Exs. Ka-5 to Ka-8.

23. The witness further deposed that after the investigation went out of his hand, it was taken up by SO M.M. Ansari, who had been posted in the district along with him. He had seen him (SO M.M. Ansari) read, write and sign and, therefore, he was well acquainted with his

handwriting and signatures. The witness on perusal of record and being shown the charge sheet paper no.331/1, said that the same bore signatures of SO M.M. Ansari and was in his handwriting, which he recognizes. Thereupon the charge-sheet was marked Ex. Ka-9.

24. At this state of proceeding, the witness was made over to cross-examination by the accused, but the counsel for the accused did not appear nor did accused himself come forward to cross-examine, as a result of which, the opportunity to cross-examine for the witness was closed by the trial judge with the following order recorded on the running sheet in the space reserved for recording of cross-examination:-

> *"For accused*
>
> *Not availed despite adequate occasion given and there are 2 ld. counsel on record for the accused. Hence declared NIL.*
>
> *Signed: illegible*
>
> *(Seal of the Judge)"*

25. The last witness produced on behalf of the prosecution was Dr. Yatish Kumar, PW-4, who entered the witness box on 30.05.2012. He stated that on 30.09.2007, he was posted as Medical Officer, CHC Baghpat. On that day, the dead body of Omveer aged about 35 years son of Ratan Singh, resident of Village Dhikauli, Chandinagar, District Baghpat was forwarded by the police of Police Station Chandi Nagar for the purpose of autopsy. He stated that he conducted the postmortem examination on the dead body of the deceased Omveer and found the following injuries:-

(description of injuries translated from Hindi vernacular into English)

> *(1) Gunshot wound of entry 1.5cm x 1cm x muscle deep on lateral aspect of right forearm just 1.5 cm below elbow. Blackening was found around the wound of size 5 cm x 3 cm. Margins were inverted.*
>
> *(2) Gunshot wound of exit size 2cm x 15 cm x muscle deep on medial aspect of right upper arm just 1 cm above the elbow*

margins everted. This wound correspond to injury no.1 by prob.

(3) Gunshot wound of entry 1.5cm x 1cm x cavity deep on the right side of the chest, 17 cm below right nipple at 7 o' clock position. Colour of abrasion was present around the wound. Margins were inverted.

(4) Gunshot wound of exit 2.5cm x 1.5cm on left side of abdomen 12 cm lateral to umbilicus at 3 o' clock position. Margins were everted and a small piece of gut appeared outside the wound. This wound correspond to injury no.3 by prob.

(5) Lacerated wound size 1.5cm x 1cm x muscle deep on medial aspect of left ankle joint.

26. The witness further stated that on internal examination he found the head and the thorax to be normal, but in the abdomen he found about 1200 milliliter coagulated and uncoagulated blood. The intestines were empty, the liver was ruptured due to bullet injury and the urinary bladder was filled and normal. The witness further said that the entire body had rigor mortis and the probable time of death was about 18 hours before autopsy was conducted. The witness also said that in his opinion the cause of death was the bullet injury that led to excessive bleeding. The witness further stated that the postmortem report on record was before him that was in his handwriting and signed by him. He identified the same, on the basis of which, it was marked Ex. Ka-10.

27. At the conclusion of the examination-in-chief of PW-4, he was made over to the cross-examination of the accused, but no one appeared to cross-examine him, resulting in the opportunity to cross-examine being closed. The judge recorded the following order on the running sheet, where cross-examination would have been scribed:-

> *"Not availed despite adequate occasion given and 2 ld. counsel are on record for accused. Hence declared NIL.*
>
> *Signed: illegible*
>
> *30.5.12*

28. The proceedings of the trial show that prosecution witnesses were examined, two of fact and two formal, but all of immence consequence. It is on the basis of their unchallenged evidence that the

appellant has come to be convicted and sentenced to life. The record of the trial does not spare a shadow of doubt that four witnesses were not at all cross-examined. The learned defence counsel, who appeared for the appellant, arraigned as the accused, did not come forward at all to cross-examine. Rather, on the first day i.e. 13.04.2011, at the conclusion of the examination-in-chief when the witness Kunwarpal, PW-1 was made over to the defence to be cross-examined, learned counsel for the accused was present, but instead of proceeding to cross-examine him forthwith, he requested for an adjournment for the purpose of cross-examination, that was granted. The witness next entered the dock for his cross-examination on 24.05.2012, when cross-examination was declined, presumably, as the counsel did not appear or he appeared, but refused. The order dated 24.05.2012 passed by the court does not make it vivid whether the counsel appeared and refused or he just absented. In either case, the effect would be the same for the accused, who is decidedly not a lawyer by training, and, scantily educated could not be expected to cross-examine a witness in a Sessions Trial with the consequence of a capital charge hanging over his head. More about this aspect of the matter would be said lateron in this judgment.

29. Likewise, in the case of PW-2, it is recorded by the trial Judge that adequate and sufficient opportunity was given to cross-examine, but declined by the accused, and, therefore, the cross-examination is declared NIL. The hearing of the two formal witnesses, the Doctor and the Investigating Officer, also carry similar orders in a similar situation where no cross-examination was undertaken on behalf of accused, and, therefore, opportunity was closed. It may also be noticed that on 30.05.2012 when the case of PW-4, after the examination-in-chief was over, and, the witness was made over to be cross-examined, the accused did not avail opportunity, but the learned Trial Judge in his order has recorded that two learned counsel appear on record, but the opportunity to cross-examine has not been availed. The record does not indicate as to who were those two learned counsels appearing on

behalf of the accused before the trial court. It is also not clear whether they were counsel engaged by him privately through the resources of his family and friends or they were counsel engaged at State expense. The fact that before this Court the accused has not been able to manage a regular appeal being filed from conviction and has filed a Jail Appeal belatedly, does show that he is a man possessed of no financial resource and of little social connection. No friend or family have volunteered to appeal on behalf of appellant to this Court leaving him to the option of a Jail Appeal that is the resort of the most indigent, the most neglected and the most marginalized section of the society.

30. The question, therefore, that would arise in the circumstances is whether the appellant was given a fair trial and effective opportunity to defend himself as postulated by Articles 21, 22(1) and 39A of the Constitution? And, if not, what would be the effect of the deprivation on the validity of the judgment, and, the further course of action. By further course of action what the Court has in mind is whether the trial held would remain intact (upto the stage of the examination-in-chief) held in absence of counsel or in his presence, which was such a disinterested or disabled presence, that he refused to cross-examine the witnesses. In case the trial is to be held valid, but the judgment vitiated, the matter would go back to the trial court to be resumed from the stage where the deprivation of opportunity occurred, and, that denial made up for by provision of a competent, willing and enthusiastic lawyer at State expense to enter at the stage of proceedings, where they were truncated, to faithfully undertake and conclude his/her duties to the best of his/ her abilities. If this course of action is to be adopted, there would be no *de novo* trial. However, in case it is held by us that the absence or the virtual presence of defence counsel during time when the prosecution examined their witnesses leading to the impugned judgment vitiates the entire trial, a *de novo* trial would have to be ordered. The first question to be dealt with as set out above is what is the impact of the absence or the virtual presence of the counsel for the accused on the validity of the impugned judgment.

31. We proceed on the assumption that whoever was the defence counsel, private or one provided through legal aid, either remained actually absent after 13.04.2011 when he had sought adjournment to cross-examine or virtually absent throughout the trial, even if he was physically present. Not much has to be reasoned by us to reach these conclusions as to the course of proceedings before the Trial Court speak for themselves.

32. It is by far now well settled for a legal proposition that it is duty of the Court to see and ensure that an accused put on a criminal trial is effectively represented by a defence counsel, and, in the event on account of indigence, poverty or illiteracy or any other disabling factor, he is not able to engage a counsel of his choice, it becomes the duty of the Court to provide him legal aid at State expense. What is meant by the duty of the State to ensure a fair defence to an accused is not the employment of a defence counsel for namesake. It has to be the provision of a counsel, who defends the accused diligently to the best of his abilities. While the quality of the defence or the caliber of the counsel would not militate against the guarantee to a fair trial sanctioned by Articles 21 & 22 of the Constitution, a threshold level of competence and due diligence in the discharge of his duties as a defence counsel would certainly be the constitutional guaranteed expectation. In the present case we find that the consistent abstinence from his duties and obligations by the learned counsel appearing for the defence are far for fulfillment of that constitution guarantee. The Court in that situation was under an obligation to take a proactive role limited to the facet of provision of opportunity of effective defence to the accused by atleast offering him alternate counsel at State expense, who would faithfully and diligently discharge his duties in defending the accused. This Court is of opinion that finding the accused going absolutely undefended against the prosecution witnesses on two successive occasions, the statutory obligation in Section 304(1) Cr.P.C. could not have been ignored by the Trial Judge by being content to record that the accused was represented by two counsel as he has

said in his order dated 30.05.2012. The presence of counsel on record means effective, genuine and faithful presence and not a mere farcical, sham or a virtual presence that is illusory, if not fraudulent. In the present case it was in the consistent cognizance of the Trial Judge that the accused was going undefended and whoever was the defence counsel on record had forsaken their basic duties and not that they were just performing poorly. The counsel had absolutely refused to act leaving the accused undefended.

33. In that kind of a situation, we are of opinion that it was the duty of the Trial Judge to enquire of the accused if he had means to engage another counsel and if he did not have those means, to provide him legal assistance at State expense of a counsel, who would faithfully, diligently and to the best of his abilities discharge his duties in defence of the accused/ appellant at the trial. To our minds the words employed in Section 304(1) Cr.P.C. "…… the accused is not represented by a pleader, …… do not and cannot mean a kind of paper and sham representation as distinguished from a substantial, *bona fide* and diligent representation. Not ensuring the reasonable and diligent representation by counsel or pleader to the accused would not relieve the State of its obligation under Section 304(1) Cr.P.C. and could not pass the test of fairness which every action of the State must withstand in keeping with the obligation under Articles 14 and 21 of the Constitution.

34. What an accused put on a criminal trial in relation to his rights to be effectively represented by a defence counsel would mean now in the contemporary times can well be imagined by the following observations of Sutherland, J. almost 78 years ago in **Powell Vs. Alabama**[1] in the context of a hurried defence of accused undertaken by counsel in a case involving a capital charge:-

> *"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. Neither they nor the court could say what a prompt and thorough-going investigation might*

1 77 L Ed 8158: 287 US 45

disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given. Defendants were immediately hurried to trial. Chief Justice Anderson, after disclaiming any intention to criticize harshly counsel who attempted to represent defendants at the trials, said: "The record indicates that the appearance was rather pro forma than zealous and active." Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities". This conclusion finds ample support in the reasoning of an overwhelming array of state decisions, among which we cite the following: Sheppard v. State, 165 Ga. 460, 464, 141 S.E. 196; Reliford v. State, 140 Ga. 777, 79 S.E. 1128; McArver v. State, 114 Ga. 514, 40 S.E. 779; Sanchez v. State, 199 Ind. 235, 246, 157 N.E. 1; Batchelor v. State, 189 Ind. 69, 76, 125 N.E. 773; Mitchell v. Commonwealth, 225 Ky. 83, 7 S.W.(2d) 823; Jackson v. Commonwealth, 215 Ky. 800, 287 S.W. 17; State v. Collins, 104 La. 629, 29 So. 180, 81 Am.St.Rep. 150; State v. Pool, 50 La.Ann. 449, 23 So. 503; People ex rel. Burgess v. Risley, 66 How.Pr.(N.Y.) 67; State ex rel. Tucker v. Davis, 9 Okl.Cr. 94, 130 P. 962, 44 L.R.A.(N.S.) 1083; Commonwealth v. O'Keefe,

**[59]*

298 Pa. 169, 148 A. 73; Shaffer v. Territory, 14 Ariz. 329, 333, 127 P. 746."

(Emphasis by us)

35. At this juncture we must pause and mention that during the course of hearing of this appeal though it did occur to us after a short while into the hearing and perusal of records that it appears to be a case where reasonable opportunity to be defended at the trial has been denied to the appellant, it did hang heavy on our conscience that any kind of remand order would result in delay of the trial reaching its final conclusion and justice requited. This is, particularly, so as much is made to appear in contemporary times that delay in criminal justice which, of course, should be eschewed in all eventualities is a phenomenon of the present day that has come with explosion of litigation which courts combat in every possible manner under the law. It is absolutely sound and true that there should not be any delay in delivery of any justice, let alone criminal justice. The right to speedy trial is a necessary concomitant of Article 21 of the Constitution. It is by accident that we chanced upon an observation in **Powell** just following what was relied upon by us, in the context in the present of this case that is illuminating to read:-

> *"It is true that great and inexcusable delay in the enforcement of our criminal law is one of the grave evils of our time. Continuances are frequently granted for unnecessarily long periods of time, and delays incident to the disposition of motions for new trial and hearings upon appeal have come in many cases to be a distinct reproach to the administration of justice. The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob."*
>
> *(Emphasis by us)*

36. Though we are not solaced or encouraged by what was said 78 years ago in the context of American justice, it nevertheless remains true that a fair trial has to be ensured balancing it reasonably with concern for speedy justice.

37. We may place on record here that whatever was said about the right to a fair trial in Powell and in many American decisions thereafter was in the context of the due process clause under the American Constitution, which in the earlier authorities in India was held to be very different, in fact, generically different from the guarantee in Article 21 of the Constitution of India that speaks only about the procedure established by law distinguished from the due process laws in the 14th Amendment of the U.S. Constitution. But by now with the expanding scope of procedural fairness brought in about by authority of their Lordships of the Hon'ble Supreme Court beginning with the decisions in **Maneka Gandhi Vs. Union of India**[2], a concept of procedural fairness as now almost bordered on to substantive fairness, if precisely substantive due process. The lateron decisions of their Lordships of the Hon'ble Supreme Court, in particular, the one in **Om Kumar Vs. Union of India**[3] expands the concept of procedural fairness to almost the levels of substantive due process, particularly, where what is at stake is a fundamental right of the citizen to life and liberty guaranteed under Article 21 of the Constitution of India.

38. Reverting to the more precise issue of the right of an accused to

2 1978(1) SCC 248
3 1981(2) SCC 335

a fair hearing and what is the content of it in the context of effective legal representation, one of the earlier decisions of the Hon'ble Supreme Court though not the earliest is in **Ranjan Dwivedi Vs. Union of India**[4] where their Lordships after noticing earlier authority and dwelling upon the content of the right to aid of counsel took note of the decision in **Powell** and held thus:-

> *"10. Read with Article 21, the Directive Principle in Article 39-A has been taken cognizance of by the court in M.H. Hoskot v. State of Maharashtra [(1978) 3 SCC 544 : 1978 SCC (Cri) 468 : AIR 1978 SC 1548 : (1979) 1 SCR 192 : 1978 Cri LJ 1678] , State of Haryana v. Darshana Devi [(1979) 2 SCC 236 : AIR 1979 SC 855 : (1979) 3 SCR 184] and Hussainara Khatoon (IV) v. Home Secretary, State of Bihar, Patna [(1980) 1 SCC 98 : 1980 SCC (Cri) 40 : AIR 1979 SC 1369 : (1979) 3 SCR 532 : 1979 Cri LJ 1045] 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 case [AIR 1951 SC 217 : 1951 SCR 344 : 1951 SCJ 320 : 52 Cri LJ 736] . "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 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."*
>
> *But he did not stop there. If the accused were unable to get counsel, even though opportunity was 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*

4 (1983) 3 SCC 307

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.

12. *There was a clear departure by the Supreme Court of the United States in Betts v. Brady [86 L Ed 1595 : 316 US 455 : 62 S Ct 1252 (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 circumstances of a case indicated that the absence of counsel would result in a trial lacking 'fundamental fairness'. Ever since the decision in Betts case [(1980) 1 SCC 98 : 1980 SCC (Cri) 40 : AIR 1979 SC 1369 : (1979) 3 SCR 532 : 1979 Cri LJ 1045] 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 Gideon v. Wainwright [9 L Ed 2d 799 : 372 US 335 : 83 S Ct 792 (1963)] . Under the rule laid down in Betts case [(1980) 1 SCC 98 : 1980 SCC (Cri) 40 : AIR 1979 SC 1369 : (1979) 3 SCR 532 : 1979 Cri LJ 1045] 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 case [86 L Ed 1595 : 316 US 455 : 62 S Ct 1252 (1942)] explicitly rejected the rule laid down in Betts case [(1980) 1 SCC 98 : 1980 SCC (Cri) 40 : AIR 1979 SC 1369 : (1979) 3 SCR 532 : 1979 Cri LJ 1045] 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.*

14. *The Law Commission in its Forty-eighth Report suggested for making provision for free legal assistance by the State for all accused who are undefended by a lawyer for want of means. This recommendation still remains to be implemented. Many a time, it may be difficult for the accused to find sufficient means to engage a lawyer of competence. In such a case, the court possesses the power to grant free legal aid if the interests of justice so require. The remedy of the petitioner therefore is to make an application before the Additional Sessions Judge making out a case for the grant of free legal aid and if the learned Additional Sessions Judge is satisfied that the requirements of sub-section (1) of Section 304 of the Code are*

> *fulfilled, he may make necessary directions in that behalf. While fixing the fee of counsel appearing for the petitioner, the learned Additional Sessions Judge shall fix the amount of fee having regard to the interim orders passed by this court. But if he feels that he is bound by the constraints of the rules framed by the Delhi High Court prescribing scales of remuneration for empanelled lawyers, he shall make a reference to the High Court for suitable directions. On such reference being made, the High Court shall consider in its undoubted jurisdiction under Article 227(3) of the Constitution whether the scales of remuneration prescribed for empanelled lawyers appearing in sessions trials are not grossly insufficient and call for a revision. That however is a matter which clearly rests with the High Court and we wish to say no more."*

39. It may be pointed out that we have spoken in earlier part of this judgment that the accused in the present case was not a trained lawyer and, in that context, let down by his counsel, he was a cast away at the trial when the witnesses for the prosecution deposed against him. The appellant by all that is on record is a man with little education, if any. In a court of law, contrary to what many men of learning from other fields seem to believe, the most highly educated of men other than a trained lawyer would be as helpless to defend himself as an uneducated man. Being learned in the science of law is a life times acquisition that involves assimilation of a vast learning of different principles in an organized manner. Advocacy is an art that is built upon day by day on the foundation of that knowledge of law. No layman, educated or uneducated, can be expected to defend himself at a criminal trial, particularly, one involving complicated legal issues, and, on a capital charge at that. It is gratifying to note that their Lordships of the Hon'ble Supreme Court in paragraph 10 of the report in **Ranjan Dwivedi** recognized this inherent handicap of a man, not trained in the law quoting again from the words of Sutherland, J. in **Powell** that express the position in the most eloquent terms:-

> *"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 adequate y 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."*

40. In the context of what would be the duty of the court to an accused, who did not apply for the free legal aid, but in the notice of the court, is placed in a situation where he is going unrepresented, a beacon light authority of the Hon'ble Supreme Court is the decision of their Lordships in **Suk Das Vs. Union Territory of Arunachal Pradesh**[5] where the obligation of the judge, duty to the accused (of the Judge and the State) and the right of fair and effective representation at the trial has been expressed thus:-

> "*6. But the question is whether this fundamental right could lawfully be denied to the appellant if he did not apply for free legal aid. Is the exercise of this fundamental right conditioned upon the accused applying for free legal assistance so that if he does not make an application for free legal assistance the trial may lawfully proceed without adequate legal representation being afforded to him? Now it is common knowledge that about 70 per cent of the people living in rural areas are illiterate and even more than that percentage of the people are not aware of the rights conferred upon them by law. Even literate people do not know what are their rights and entitlements under the law. It is this absence of legal awareness which is responsible for the deception, exploitation and deprivation of rights and benefits from which the poor suffer in this land. Their legal needs always stand to become crisis-oriented because their ignorance prevents them from anticipating legal troubles and approaching a lawyer for consultation and advice in time and their poverty magnifies the impact of the legal troubles and difficulties when they come. Moreover, because of their ignorance and illiteracy, they cannot become self-reliant: they cannot even help themselves. The law ceases to be their protector because they do not know that they are entitled to the protection of the law and they can avail of the legal service programme for putting an end to their exploitation and winning their rights. The result is that poverty becomes with them a condition of total helplessness. This miserable condition in which the poor find themselves can be alleviated to some extent by creating legal awareness amongst the poor. That is why it has always been recognised as one of the principal items of the programme of the legal aid movement in the country to promote legal literacy. It would in these circumstances 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. This is the reason why in Khatri (II) v. State of Bihar [(1981) 1 SCC 627 : 1981 SCC (Cri) 228 : (1981) 2 SCR 408] , we ruled that the Magistrate or the Sessions Judge before*

5 (1986) 2 SCC 401

whom an 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. We deplored that in that case where the accused were blinded prisoners the Judicial Magistrates failed to discharge their obligation and contented themselves by merely observing that no legal representation had been asked for by the blinded prisoners and hence none was provided. We accordingly directed "the Magistrates and Sessions Judges in the country to inform every accused who appear 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 of the free legal services provided by the State. We also gave a general direction to every State in the country "to make provision for grant of free legal service to an accused who is unable to engage a lawyer on account of reasons such as poverty, indigence or incommunicado situations," the only qualification being that the offence charged against an 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. It is quite possible that since the trial was held before the learned Additional Deputy Commissioner prior to the declaration of the law by this Court in Khatri (II) v. State of Bihar [(1981) 1 SCC 627 : 1981 SCC (Cri) 228 : (1981) 2 SCR 408] the learned Additional Deputy Commissioner did not inform the appellant that if he was not in a position to engage a lawyer on account of lack of material resources, he was entitled to free legal assistance at State cost nor asked him whether he would like to have free legal aid. But it is surprising that despite this declaration of the law in Khatri (II) v. State of Bihar [(1981) 1 SCC 627 : 1981 SCC (Cri) 228 : (1981) 2 SCR 408] on December 19, 1980 when the decision was rendered in that case, the High Court persisted in taking the view that since the appellant did not make an application for free legal assistance, no unconstitutionality was involved in not providing him legal representation at State cost. It is obvious that in the present case the learned Additional Deputy Commissioner did not inform the appellant that he was entitled to free legal assistance nor did he inquire from the appellant whether he wanted a lawyer to be provided to him at State cost. The result was that the appellant remained unrepresented by a lawyer and the trial ultimately resulted in his conviction. This was clearly a violation of the fundamental right of the appellant under Article 21 and the trial must accordingly be held to be vitiated on account of a fatal constitutional infirmity, and the conviction and sentence recorded against the appellant must be set aside."

41. We may observe here that in the facts of **Suk Das**, their Lordships found for the Judges and the Magistrates a duty to be offer legal aid to the accused if they were going without the assistance of a lawyer on account of poverty, ignorance or illiteracy instead of leaving it to the litigant to ask for legal aid. Section 304(1) Cr.P.C. more or less takes care of the situation in the case where the accused is not

represented by a pleader as said in the earlier part of this Judgment. True like as it is said there, the duty would also extend for the court to ensure the availability of diligent and effective defence counsel for the accused, where there is a counsel representing him on record, but in fact is only a sham as in the facts of the present case.

42. In a later authority of the Hon'ble Supreme Court where the accused was absolutely unrepresented by a lawyer facing trial for an offence punishable under Section 304 IPC, their Lordships in **Tyron Nazareth Vs. State of Goa**[6] in a short judgment relying on **Khatri (II) Vs. State of Bihar**[7] and **Suk Das Vs. Union Territory of Arunachal Pradesh (supra)**, held that since accused was not assisted by any lawyer and perhaps he was not aware about the fact that minimum sentence provided under the statute was 10 years' rigorous imprisonment besides the fine of Rs.1 lakh, remanded the case to the trial court for trial *de novo*. The paragraph 2 of the report in **Tyron Nazareth** reads:-

> *"2. We have heard the learned counsel for the State. We have also perused the decisions of this Court in Khatri (II) v. State of Bihar [(1981) 1 SCC 627 : 1981 SCC (Cri) 228] and Sukh Das v. Union Territory of Arunachal Pradesh [(1986) 2 SCC 401 : 1986 SCC (Cri) 166] . We find that the appellant was not assisted by any lawyer and perhaps he was not aware of the fact that the minimum sentence provided under the statute was 10 years' rigorous imprisonment and a fine of Rs 1 lakh. We are, therefore, of the opinion that in the circumstances the matter should go back to the tribunal. The appellant if not represented by a lawyer may make a request to the court to provide him with a lawyer under Section 304 of the Criminal Procedure Code or under any other legal aid scheme and the court may proceed with the trial afresh after recording a plea on the charges. The appeal is allowed accordingly. The order of conviction and sentence passed by the Special Court and confirmed by the High Court are set aside and a de novo trial is ordered hereby."*

43. In the context of what would be the impact on the right to a fair trial resulting from absence of counsel, whether deliberate or negligent, and, the impact on the outcome of a criminal proceeding against an accused at the appellate stage, where a criminal appeal is heard in the absence of counsel, their Lordships of the Hon'ble Supreme Court in

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6 1994 Supp (3) SCC 321
7 (1981) 1 SCC 627

Mohd. Sukur Ali Vs. State of Assam[8], made illuminating observations, which say:-

> *"**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.*
>
> ***6.** In our opinion, a criminal case should not be decided against the accused in the absence of a counsel. We are fortified in the view we are taking by a decision of the US Supreme Court in Powell v. Alabama [77 L Ed 158 : 287 US 45 (1932)] , in which it was observed: (L Ed pp. 170-71)*
>
> > *"What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by the 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. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a State or Federal Court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."*
>
> *The above decision of the US Supreme Court was cited with approval by this Court in A.S. Mohammed Rafi v. State of T.N. [(2011) 1 SCC 688 : (2011) 1 SCC (Cri) 509 : AIR 2011 SC 308] vide para 24.*
>
> ***9.** In Maneka Gandhi v. Union of India [(1978) 1 SCC 248 : AIR 1978 SCC 597] , it has been held by a Constitution Bench of this Court that the procedure for depriving a person of his life or liberty should be fair,*

8 (2011) 4 SCC 729

> *reasonable and just. We are of the opinion that it is not fair or just that a criminal case should be decided against an accused in the absence of a counsel. It is only a lawyer who is conversant with law who can properly defend an accused in a criminal case. Hence, in our opinion, if a criminal case (whether a trial or appeal/revision) is decided against an accused in the absence of a counsel, there will be violation of Article 21 of the Constitution.*
>
> ***10.** The right to appear through counsel has existed in England for over three centuries. In ancient Rome there were great lawyers e.g. Cicero, Scaevola, Crassus, etc. who defended the accused. In fact the higher the human race has progressed in civilisation, the clearer and stronger has that right appeared, and the more firmly has it been held and asserted. Even in the Nuremberg trials the Nazi war criminals, responsible for killing millions of persons, were yet provided counsel. Therefore when we say that the accused should be provided counsel we are not bringing into existence a new principle but simply recognising what already existed and which civilised people have long enjoyed.*
>
> ***14.** In Gideon v. Wainwright [9 L Ed 2d 799 : 372 US 335 (1962)] , Mr Hugo Black, J. of the US Supreme Court delivering the unanimous judgment of the Court observed: (L Ed p. 805)*
>
> *"… lawyers in criminal courts are necessities, not luxuries."*

44. With all the evolution in the law that has taken place over the years regarding the right of an accused to an effective defence in a criminal trial, particularly, with a proactive regime of legal aid that has now become not only a well established concept, but a system backed by institutional support established under the Legal Services Authorities Act, 1987, a relatively contemporary and authoritative guidance by the Hon'ble Supreme Court is to be found in two successive decisions of their Lordships in the same case that is to say **Mohd. Hussain Zulfikar Ali Vs. State (Government of NCT of Delhi)**[9] and in **Mohd. Hussain Zulfikar Ali Vs. State (Government of NCT of Delhi)**[10]; the latter is a decision where the court answered the question whether finding the trial vitiated on different counts including violation of the right to a fair and effective defence by legal counsel, the matter required to be remanded for trial *de novo* or the conviction merited be set aside. This happened as in **Mohd. Hussain Zulfikar Ali Vs. State (Government of NCT of Delhi), (2012) 2 SCC 584,** the Hon'ble Judges comprising the Bench though agreeing on most question of fact and law, had

9 (2012) 2 SCC 584
10 (2012) 9 SCC 408

disagreed on the point whether a remand was the course to be adopted or acquittal by their Lordships. As such, the matter was placed before a Bench of 3 Hon'ble Judges, who went into the merits of the matter also on those questions that had already been examined by their Lordships in the two Judge Bench and decided to opt for a remand of the case, but all that is not the issue and has been mentioned as an introduction to the background, in which two sequel authorities have come in the same case. For the sake of convenience, **Mohd. Hussain Zulfikar Ali Vs. State (Government of NCT of Delhi)** reported in **(2012) 2 SCC 584** will hereinafter be referred to as "**Mohd. Hussain Zulfikar Ali (I)**, whereas **Mohd. Hussain Zulfikar Ali Vs. State (Government of NCT of Delhi), (2012) 9 SCC 408** will be referred to as "**Mohd. Hussain Zulfikar Ali (II)**.

45. The case of **Mohd. Hussain Zulfikar Ali (I)** that carries copious reference to facts, in which the issue arose, is very close on facts to the case in hand except certain very different features there, like the one that it was a case of death sentence being handed down by the trial court and confirmed by the High Court. It bears resemblance on facts and also in the context of what effective legal representation would mean in that, that in **Mohd. Hussain Zulfikar Ali (I)**, the accused had the assistance of a counsel during proceeding before the Magistrate and for some period of time after committal to the court of sessions, however, as put by their Lordships "midway, the learned counsel disappeared from the scene, that is, before the conclusion of the trial". The prosecution examined 65 witnesses, out of whom 56 witnesses, both of fact and formal, had their evidence recorded at a time when the accused did not have his counsel by his side and none of those 56 witnesses were, therefore, cross-examined on behalf of the accused. No further facts of the case need be detailed for the purpose of elucidating the principle of law about a fair representation at the trial that was laid by their Lordships in **Mohd. Hussain Zulfikar Ali (I)** and **Mohd. Hussain Zulfikar Ali (II)**.

46. In **Mohd. Hussain Zulfikar Ali (I)**, His Lordship Hon'ble Dattu, J

(as His Lordship then was) writing a separate, but concurring judgment on the issue of a right to a fair trial, particularly, in the context of cross-examination (or the absence of it due to unavailability of counsel) held as under:-

> ***13.*** *It will, thus, be seen that the trial court did not think it proper to appoint any counsel to defend the appellant-accused, when the counsel engaged by him did not appear at the commencement of the trial nor at the time of recording of the evidence of the prosecution witnesses. The accused did not have the aid of the counsel in any real sense, although, he was as much entitled to such aid during the period of trial. The record indicates, as I have already noticed, that the appointment of the learned counsel and her appearance during the last stages of the trial was rather pro forma than active. It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case, to confront the witnesses against him not only on facts but also to discredit the witness by showing that his testimony-in-chief was untrue and unbiased.*
>
> *(Emphasis by us)*
>
> ***14.*** *The purpose of cross-examination of a witness has been succinctly explained by the Constitution Bench of this Court in Kartar Singh v. State of Punjab [(1994) 3 SCC 569 : 1994 SCC (Cri) 899] : (SCC p. 686, para 278)*
>
> > *"278. Section 137 of the Evidence Act defines what cross-examination means and Sections 139 and 145 speak of the mode of cross-examination with reference to the documents as well as oral evidence. It is the jurisprudence of law that cross-examination is an acid-test of the truthfulness of the statement made by a witness on oath in examination-in-chief, the objects of which are:*
> >
> > *(1) to destroy or weaken the evidentiary value of the witness of his adversary;*
> >
> > *(2) to elicit facts in favour of the cross-examining lawyer's client from the mouth of the witness of the adversary party;*
> >
> > *(3) to show that the witness is unworthy of belief by impeaching the credit of the said witness;*
> >
> > *and the questions to be addressed in the course of cross-examination are to test his veracity; to discover who he is and what is his position in life; and to shake his credit by injuring his character."*
>
> ***15.*** *The aforesaid view is reiterated by this Court in Jayendra Vishnu Thakur v. State of Maharashtra [(2009) 7 SCC 104 : (2010) 2 SCC (Cri) 500] wherein it is observed: (SCC p. 117, para 24)*

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

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

17. *This Court in Zahira Habibullah Sheikh (5) v. State of Gujarat [(2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8] has explained the concept of fair trial to an accused and it was central to the administration of justice and the cardinality of protection of human rights. It is stated: (SCC pp. 394-96, paras 35-37)*

"35. This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crime being public wrong in breach and violation of public rights and duties, which affects the whole community as a community and is harmful to society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interest of society is not to be treated completely with disdain and as persona non grata. The courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice—often referred to as the duty to vindicate and uphold the 'majesty of the law'. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. The courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.

36. The principles of rule of law and due process are closely linked

with human rights protection. Such rights can be protected effectively when a citizen has recourse to the courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning a Nelson eye to the needs of society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.

37. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact in issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny."

18. *In M.H. Hoskot v. State of Maharashtra [(1978) 3 SCC 544 : 1978 SCC (Cri) 468] this Court has held: (SCC p. 553, para 14)*

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

'What does it profit a poor and ignorant man that he is equal to his strong antagonist before the law if there is no one to inform him what the law is? Or that the courts are open to him on the

same terms as to all other persons when he has not the wherewithal to pay the admission fee?'"

19. *In Mohd. Sukur Ali v. State of Assam [(2011) 4 SCC 729 : (2011) 2 SCC (Cri) 481] it is observed: (SCC pp. 731-32, paras 9-10)*

"9. In Maneka Gandhi v. Union of India [(1978) 1 SCC 248] , it has been held by a Constitution Bench of this Court that the procedure for depriving a person of his life or liberty should be fair, reasonable and just. We are of the opinion that it is not fair or just that a criminal case should be decided against an accused in the absence of a counsel. It is only a lawyer who is conversant with law who can properly defend an accused in a criminal case. Hence, in our opinion, if a criminal case (whether a trial or appeal/revision) is decided against an accused in the absence of a counsel, there will be violation of Article 21 of the Constitution.

10. The right to appear through counsel has existed in England for over three centuries. In ancient Rome there were great lawyers e.g. Cicero, Scaevola, Crassus, etc. who defended the accused. In fact the higher the human race has progressed in civilisation, the clearer and stronger has that right appeared, and the more firmly has it been held and asserted. Even in the Nuremberg trials the Nazi war criminals, responsible for killing millions of persons, were yet provided counsel. Therefore when we say that the accused should be provided counsel we are not bringing into existence a new principle but simply recognising what already existed and which civilised people have long enjoyed."

20. *In Hussainara Khatoon (4) v. State of Bihar [(1980) 1 SCC 98 : 1980 SCC (Cri) 40] it is held: (SCC pp. 103-05, para 6)*

"6. Then there are several undertrial prisoners who are charged with offences which are bailable but who are still in jail presumably because no application for bail has been made on their behalf or being too poor they are unable to furnish bail. It is not uncommon to find that undertrial prisoners who are produced before the Magistrates are unaware of their right to obtain release on bail and on account of their poverty, they are unable to engage a lawyer who would apprise them of their right to apply for bail and help them to secure release on bail by making a proper application to the Magistrate in that behalf. Sometimes the Magistrates also refuse to release the undertrial prisoners produced before them on their personal bond but insist on monetary bail with sureties, which by reason of their poverty the undertrial prisoners are unable to furnish and which, therefore, effectively shuts out for them any possibility of release from pre-trial detention. This unfortunate situation cries aloud for introduction of an adequate and comprehensive legal service programme, but so far, these cries do not seem to have evoked any response. We do not think it is possible to reach the benefits of the legal process to the poor, to protect them against injustice and to secure to them their constitutional and statutory rights unless there is a nation-wide legal service programme to provide free legal services to them. It is now well settled, as a result of the decision of this Court in Maneka Gandhi v. Union of India [(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 under which a person may be deprived of his life or liberty should be 'reasonable, fair and just'. Now, a procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as 'reasonable, fair and just'. It is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the court's process that he should have legal services available to him. This Court pointed out in M.H. Hoskot v. State of Maharashtra [(1978) 3 SCC 544 : 1978 SCC (Cri) 468] : (SCC p. 553, para 14)

> *'14. … Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise; and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side. Our judicature, moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer-power for steering the wheels of equal justice under the law.'*

Free legal services to the poor and the needy is an essential element of any 'reasonable, fair and just' procedure. It is not necessary to quote authoritative pronouncements by judges and jurists in support of the view that without the service of a lawyer an accused person would be denied 'reasonable, fair and just' procedure. Black, J., observed in Gideon v. Wainwright [9 L Ed 2d 799 : 372 US 335 (1962)] : (L Ed 2d p. 805)

> *'… Not only these precedents but also reason and reflection require us to recognise that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both State and Federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, 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 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 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 Argersinger v. Hamlin [32 L Ed 2d 530 : 407 US 25 (1971)] : (L Ed 2d pp. 535-36 & 554)

*'"… 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." [**Ed.**: Powell v. Alabama, 77 L Ed 158, p. 170 : 287 US 45 (1932)]*

* * *

Both Powell [The reference is to Powell v. Alabama, 77 L Ed 158 : 287 US 45 (1932)] and Gideon [9 L Ed 2d 799 : 372 US 335 (1962)] involved felonies. But their rationale has relevance to any criminal trial, where an accused is deprived of his liberty.

* * *

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

21. *In Khatri (2) v. State of Bihar [(1981) 1 SCC 627 : 1981 SCC (Cri) 228] this Court has held: (SCC pp. 630-32, paras 5-6)*

"5. 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 (4) case [(1980) 1 SCC 98 : 1980 SCC (Cri) 40] . This Court has pointed out in Hussainara Khatoon (4) case [(1980) 1 SCC 98 : 1980 SCC (Cri) 40] which was decided as far back as 9-3-1979 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 throughout 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 difficult 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 this 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 [377 F Supp 995 (SDNY 1974)] '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 Blackmum in Jackson v. 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.

6. 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 the Sessions 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 of the free legal services provided by the State, he must be provided legal representation at the cost of the State. We would also direct the State of Bihar and require 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. *In Ram Awadh v. State of U.P. [1999 Cri LJ 4083 (All)] the*

Allahabad High Court held: (Cri LJ p. 4086, para 14)

> *"14. The requirement of providing counsel to an accused at the State expense is not an empty formality which may be not by merely appointing a counsel whatever his calibre may be. When the law enjoins appointing a counsel to defend an accused, it means an effective counsel, a counsel in real sense who can safeguard the interest of the accused in best possible manner which is permissible under law. An accused facing charge of murder may be sentenced to death or imprisonment for life and consequently his case should be handled by a competent person and not by a novice or one who has no professional expertise. A duty is cast upon the judges before whom such indigent accused are facing trial for serious offence and who are not able to engage a counsel, to appoint competent persons for their defence. It is needless to emphasis that a Judge is not a prosecutor and his duty is to discern the truth so that he is able to arrive at a correct conclusion. A defence lawyer plays an important role in bringing out the truth before the Court by cross-examining the witnesses and placing relevant materials or evidence. The absence of proper cross-examination may at times result in miscarriage of justice and the Court has to guard against such an eventuality."*

23. *The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result, the accused charged with a serious offence must not be stripped of his valuable right of a fair and impartial trial. To do that, would be negation of concept of due process of law, regardless of the merits of the appeal. The Criminal Procedure Code provides that in all criminal prosecutions, the accused has a right to have the assistance of a counsel and the Criminal Procedure Code also requires the court in all criminal cases, where the accused is unable to engage counsel, to appoint a counsel for him at the expenses of the State. Howsoever guilty the appellant upon the inquiry might have been, he is until convicted, presumed to be innocent. It was the duty of the court, having these cases in charge, to see that he is denied no necessary incident of a fair trial.*

(Emphasis by us)

24. *In the present case, not only was the accused denied the assistance of a counsel during the trial but such designation of counsel, as was attempted at a late stage, was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard. The court ought to have seen to it that in the proceedings before the court, the accused was dealt with justly and fairly by keeping in view the cardinal principles that the accused of a crime is entitled to a counsel which may be necessary for his defence, as well as to facts as to law. The same yardstick may not be applicable in respect of economic offences or where offences are not punishable with substantive sentence of imprisonment but punishable with fine only. The fact that the right involved is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our judicial proceedings, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of a*

counsel was a denial of due process of law. It is equally true that the absence of fair and proper trial would be violation of fundamental principles of judicial procedure on account of breach of mandatory provisions of Section 304 CrPC.

(Emphasis by us)

***25.** After carefully going through the entire records of the trial court, I am convinced that the appellant-accused was not provided the assistance of a counsel in a substantial and meaningful sense. To hold and decide otherwise, would be simply to ignore actualities and also would be to ignore the fundamental postulates, already adverted to.*

***26.** The learned counsel for the respondent State, Shri Attri contends that since no prejudice is caused to the accused in not providing a defence counsel, this Court need not take exception to the trial concluded by the learned Sessions Judge and the conviction and sentence passed against the accused. I find it difficult to accept the argument of the learned Senior Counsel. The Criminal Procedure Code ensures that an accused gets a fair trial. It is essential that the accused is given a reasonable opportunity to defend himself in the trial. He is also permitted to confront the witnesses and other evidence that the prosecution is relying upon. He is also allowed the assistance of a lawyer of his choice, and if he is unable to afford one, he is given a lawyer for his defence. The right to be defended by a learned counsel is a principal part of the right to fair trial. If these minimum safeguards are not provided to an accused; that itself is "prejudice" to an accused.*

(Emphasis by us)

47. In **Mohd. Hussain Zulfikar Ali (I)**, further in his concurring judgment His Lordship Hon'ble C.K. Prasad, J held as under:-

***42.** While holding the appellant guilty the trial court has not only relied upon the evidence of the witnesses who have been cross-examined but also relied upon the evidence of witnesses who were not cross-examined. The fate of the criminal trial depends upon the truthfulness or otherwise of the witnesses and, therefore, it is of paramount importance. To arrive at the truth, its veracity should be judged and for that purpose cross-examination is an acid test. It tests the truthfulness of the statement made by a witness on oath in examination-in-chief. Its purpose is to elicit facts and materials to establish that the evidence of the witness is fit to be rejected. The appellant in the present case was denied this right only because he himself was not trained in law and not given the assistance of a lawyer to defend him. Poverty also came in his way to engage a counsel of his choice.*

(Emphasis by us)

***43.** Having said so, it needs consideration as to whether assistance of the counsel would be necessary for fair trial. It needs no emphasis*

that conviction and sentence can be inflicted only on culmination of the trial which is fair and just. I have no manner of doubt that in our adversary system of criminal justice, any person facing trial can be assured a fair trial only when the counsel is provided to him. Its roots are many and find places in manifold ways. It is internationally recognised by covenants and the Universal Declaration of Human Rights, constitutionally guaranteed and statutorily protected.

45. *It is accepted in the civilised world without exception that the poor and ignorant man is equal to a strong and mighty opponent before the law. But it is of no value for a poor and ignorant man if there is none to inform him what the law is. In the absence of such information that courts are open to him on the same terms as to all other persons the guarantee of equality is illusory. The aforesaid International Covenant on Civil and Political Rights guarantees to the indigent citizens of the member countries the right to be defended and right to have legal assistance without payment.*

48. *These salutary features forming part of the international convenants and the Universal Declaration of Humar Rights, 1948 are deep rooted in our constitutional scheme. Article 21 of the Constitution of India commands in emphatic terms that no person shall be deprived of his life or personal liberty except according to the procedure established by law and Article 22(1) thereof confers on the person charged to be defended by a legal practitioner of his choice. Article 39-A of the Constitution of India casts a duty on the State to ensure that justice is not denied by reason of economic or other disabilities in the legal system and to provide free legal aid to every citizen with economic or other disabilities.*

51. *In my opinion, the right of a person charged with crime to have the services of a lawyer is fundamental and essential to fair trial. The right to be defended by a legal practitioner, flowing from Article 22(1) of the Constitution has further been fortified by the introduction of the directive principles of State policy embodied in Article 39-A of the Constitution by the Forty-second Amendment Act of 1976 and enactment of sub-section (1) of Section 304 of the Code of Criminal Procedure. Legal assistance to a poor person facing trial whose life and personal liberty is in jeopardy is mandated not only by the Constitution and the Code of Criminal Procedure but also by international covenants and human rights declarations. If an accused too poor to afford a lawyer is to go through the trial without legal assistance, such a trial cannot be regarded as reasonable, fair and just. The right to be heard in criminal trial would be inconsequential and of no avail if within itself it does not include the right to be heard through counsel.*

(Emphasis by us)

52. *One cannot lose sight of the fact that even intelligent and educated men, not trained in law, have more than often no skill in the science of law if charged with crime. Such an accused not only lacks both the skill and knowledge adequately to prepare his defence but many a time loses his equilibrium in face of the charge. A guiding hand of the counsel at every step in the proceeding is needed for fair trial. If*

it is true of men of intelligence, how much true is it for the ignorant and the illiterate or those of lower intellect! An accused without the lawyer faces the danger of conviction because he does not know how to establish his innocence."

(Emphasis by us)

48. In **Mohd. Hussain Zulfikar Ali (II)**, their Lordships were concerned with the difference of opinion in **Mohd. Hussain Zulfikar Ali (I)** between the two Hon'ble Judges on the point whether the case was to be remanded for trial de novo or the appellant was to be acquitted. As there was, on this point, differing opinions in the Two Judge Bench, while taking a view that the matter looking to the gravity of the offence merited a retrial/ trial *de novo* in **Mohd. Hussain Zulfikar Ali (II)** also their Lordships were in no doubt that the absence of counsel of the accused resulted in the trial being vitiated, which would appear from the following observations of their Lordships in **Mohd. Hussain Zulfikar Ali (II)**:-

> **"*42.*** *Insofar as the present case is concerned, it has been concurrently held by the two Judges [Mohd. Hussain v. State (Govt. of NCT of Delhi), (2012) 2 SCC 584 : (2012) 1 SCC (Cri) 919] who heard the criminal appeal that the appellant was denied due process of law and the trial held against him was contrary to the procedure prescribed under the provisions of the Code since he was denied right of representation by counsel in the trial. The Judges differed on the course to be followed after holding that the trial against the appellant was flawed.*
>
> *43. We have to consider now, whether the matter requires to be remanded for a de novo trial in the facts and the circumstances of the present case. The incident is of 1997. It occurred in a public transport bus when that bus was carrying passengers and stopped at a bus-stand. The moment the bus stopped an explosion took place inside the bus that ultimately resulted in death of four persons and injury to twenty-four persons. The nature of the incident and the circumstances in which it occurred speak volume about the very grave nature of offence. As a matter of fact, the appellant has been charged for the offences under Sections 302/307 IPC and Section 3 and, in the alternative, Section 4(b) of the ES Act. It is true that the appellant has been in jail since 9-3-1998 and it is more than 14 years since he was arrested and he has passed through mental agony of death sentence and the retrial at this distance of time shall prolong the culmination of the criminal case but the question is whether these factors are sufficient for the appellant's acquittal and dismissal of indictment. We think not."*

49. Thus seen in the context of this case the firm requirement of the

law, the highest guarantees of the Constitution embodied in Articles 21, 22 & 39A besides international conventions on human rights, the right to a fair trial about which there is no doubt or dissent, would be a empty formality and an unrealized constitutional guarantee apart from a transgression of the statutory provisions embodied in Section 304(1) Cr.P.C. Rather, the feeble submission put forward on behalf of the State that the appellant stayed a mute spectator to the deliberate absence of two counsel, whose appearance was on record, cannot claim any right to appointment of counsel by the Court, who would diligently and dutifully defend him, is completely misplaced only to be swept away under the deluge consistent authority that enjoins the court, to come forward and ensure that an accused, particularly, like the appellant, who does not appear to be a very educated man or one possessed of good financial resources and provide him with effective legal assistance to defend him at the trial vigorously and dutifully.

50. The appellant, *ex facie*, was deserted by his counsel on record and it is in the considered opinion of this Court a folly on the part of Trial Judge not to have extended the facility of a counsel to effectively defend him at State expense, if he so desired. A perusal of orders recorded by the learned Trial Judge on 24.05.2012 and 30.05.2012 shows that no such offer was made to the appellant to defend him at State expense. The learned Trial Judge was aware that the accused had such a right in case of his counsel deserting him. He knew the consequences of the prosecution witnesses going unchallenged, and, that too in an offence involving a capital charge, that would either result in a sentence of death or imprisonment. However, instead of informing the accused that he was entitled to be defended at the expense of the State exchequer, the learned Trial Judge appears to have gone by the letter of Section 304(1) Cr.P.C., which says that the facility to be defended at State expense in a court of sessions is for the accused, who is not represented by pleader. Since the accused in this was, on record, represented by pleader/ counsel, who had appeared on 13.04.2011, but thereafter deserted the appellant altogether when the

entire trial went through, proved a sham by refusing to cross-examine any of the witnesses certainly attracted the provisions of Section 304(1) Cr.P.C. The Trial Judge under such a situation was duty bound to inform the appellant that he could be provided a counsel to defend him at State expense, if he did not have means to engage another counsel of his choice.

51. The appellant is apparently a man of no education and no means. He would not know what would be the consequence of his failure to cross-examine the prosecution witnesses. He would perhaps not know what to do when two of his counsel engaged, in whatever manner, deserted him. In all likelihood, going by the fact that he has filed a belated Jail Appeal, he did not have a financial or the social support when he was deserted to engage a counsel again. In the circumstances to pass orders of the kind that the Trial Judge has done at the end of each testimony of the prosecution witnesses, is wholesome and gross violation of the appellant's statutory right under Section 304(1) Cr.P.C. and his fundamental rights under Articles 21, 22(1) of the Constitution besides a nullification of the guarantee in Article 39A of the Constitution. This Court is, therefore, of the considered opinion that the absence of counsel to defend the appellant when he stood his trial and prosecution witnesses went unchallenged, the entire trial is vitiated. However, going by the principles of **Mohd. Hussain Zulfikar Ali (II)**, the present case though not one of such wide ramification as for one before their Lordship in **Mohd. Hussain Zulfikar Ali (II)** is nevertheless a heinous offence involving a capital charge that merits a direction for a retrial in accordance with law.

52. We may pause here to speak about a possibility of which we had thought at one stage; that is about remanding proceedings to the trial after setting aside the judgment, to be resumed from the stage of cross-examination. However, looking to the preponderance of authority about the impact on a trial where the accused faces it without aid of counsel, particularly, the law in this regard laid down in **Mohd. Hussain Zulfikar Ali (I)**, we think that a *de novo* trial is the right option that has

imprimatur of the law.

53. In the result, this appeal succeeds and is allowed. The impugned judgment and order passed by the First Additional Sessions Judge, Baghpat dated 09.07.2012 in Sessions Trial No.167 of 2008, is hereby set aside with a remand to the Trial Court to hold a trial *de novo*. Under the circumstances of the case, it is directed that the trial shall now be concluded, in all eventualities, within six months in accordance with law on communication of a certified copy of this judgment. Let this judgment be certified to the Trial Court forthwith.

Order Date :- 18.5.2018
Anoop