State Vs. Sanjay Kumar Valmiki

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Court : Delhi

Decided On : Feb-21-2014

Judge : S. Muralidhar

Appellant : State

Respondent : Sanjay Kumar Valmiki

Judgement :

IN THE HIGH COURT OF DELHI AT NEW DELHI DEATH SENTENCE REF. No.3 of 2012 Reserved on: February 6, 2014 Decision on: February 21, 2014 STATE ..... Appellant Through: Ms. Richa Kapoor, APP. Inspector Bijender Singh, PS: Maurya Enclave. versus SANJAY KUMAR VALMIKI ..... Respondent Through: Mr. Bhupesh Narula, Advocate. AND CRIMINAL APPEAL No.1146 of 2012 and CRL.MB. No.1772 of 2012 Crl. M.A No.561 of 2013 SANJAY KUMAR VALMIKI ..... Appellant Through: Mr. Bhupesh Narula, Advocate. versus STATE ..... Respondent Through: Ms. Richa Kapoor, APP. Inspector Bijender Singh, PS: Maurya Enclave. CORAM: HONBLE DR. JUSTICE S. MURALIDHAR HONBLE MS. JUSTICE MUKTA GUPTA

JUDGMENT
2102.2014 Dr. S. Muralidhar, J:

1. By judgment dated 11th May 2012 in Session Case No.166 of 2011, the Additional Sessions Judge-II (North-West), Rohini Courts, Delhi convicted Sanjay

Kumar Valmiki of the offences under Sections 302, 363, 376 (2)(f), 376 and 201 IPC for kidnapping the prosecutrix/deceased U, aged about eight years, from the lawful guardianship of her parents with an intention to rape her; committed rape on her and thereafter hammered her to death with a steel rod; and then caused the disappearance of evidence of the commission of the offence by washing his clothes and the weapon of offence and concealing the body of the deceased. By an order on sentence dated 31st May 2012, the learned Additional Sessions Judge (ASJ) sentenced Sanjay Kumar Valmiki to death for the offence punishable under Section 302 IPC and imposed a fine of Rs.1 lakh, and in default of the payment of the fine directed him to undergo simple imprisonment (SI) for a period of three months and further directed the fine amount to be given to the family of the deceased as compensation under Section 357 of Code of Criminal Procedure (Cr PC). The accused was further sentenced to undergo Rigorous Imprisonment (RI) for five years and a fine of Rs.5,000 for the offence punishable under Section 363 IPC and in default of the payment of the fine, to undergo SI for a period of one month. He was sentenced to RI for life i.e. the rest of his life and a fine of Rs.10,000 for offences punishable under Sections 376(2) (f) IPC and in default of the payment of the fine, to undergo SI for two months with the clarification that he shall not be considered for a grant of remission. Finally, he was sentenced to RI for three years and a fine of Rs.1,000 for the offence punishable under Section 201 IPC and in default of the payment of the fine, to undergo SI for a period of 15 days.

2. Death Sentence Reference No.3 of 2012 has been preferred by the State seeking confirmation of the death sentence awarded to the accused. Independently, the accused has filed Criminal Appeal No.1146 of 2012.

3. The case of the prosecution is that on 11th July 2012, the deceased prosecutrix, a female child U, aged about 8 years, was left along with her younger siblings in the park at KU Block behind the North Delhi Power Limited (NDPL) office, Pitampura by her mother Sunita (PW-21) who used to do domestic work. When PW-21 returned at around 4 pm and did not find U, she informed her husband Shyam Paswan (PW-15) who then lodged a missing report with the Police Station (P.S.) at Maurya Enclave.

4. On 13th July 2011 at around 6.15 pm, information was received at the P.S. through the police control room (PCR) that the dead body of the prosecutrix was lying in the electric panel room (also called the switch gear room) at the NDPL office, KU Block, Pitampura. ASI Raju Yadav (PW-30) and the Station House Officer (SHO) located the dead body which was found head down in one corner near the switch gear room with her panty pulled down to her thighs. The body was in a highly decomposed condition. PW-15 was then called up to identify the dead body. The crime team led by SI Devender (PW7) reached the spot and photographs of the crime scene were taken by Constable Dalbir (PW-2).

5. A child witness, Master Saroj (PW-25), aged about 10-11 years, informed his uncle Dalip Paswan (PW-14) on 14th July 2011, and then the police on the same date between 8.45 and 9 am, that he saw the accused with the deceased at the site of the crime around the time when the deceased went missing. He further stated that he had heard screams and cries of a child coming from inside the switch gear room and when he peeped inside the room he saw the accused who asked him to run away.

6. The accused was arrested at approximately 7.35 pm on 14th July 2011. He is stated to have been working as a sweeper with the NDPL. The accused is stated to have made a confessional statement during the interrogation disclosing the location where he had hidden the clothes he was wearing while committing the offence and the weapon used to inflict the fatal injuries on the child. His medical examination was conducted at 11.45 pm.

7. The police team that conducted the search, seizure and arrest comprised of Constable Sohanbir (PW-29), Inspector Satyender Gosain, the Investigating Officer (IO) (PW-31) and ASI Raju Yadav (PW-30). The Security Guard Kuldeep Singh (PW-27) joined the investigation at around 9 pm when the accused led the police team to the switch gear room to show how he had committed the crime. The exhibits were handed over to HC Anand Swaroop (PW-5) who in turn handed them over to the IO. The Senior Scientific Officer of the Forensic Science Laboratory (FSL) Ms. Manisha Upadhyaya (PW-18) received from Constable Bijender (PW-9) four sealed parcels containing the victims clothes and the

underwear of the accused. She discovered the semen stains of the accused on his underwear and blood stains of the victim. The Forensic Expert (DNA Fingerprints) Ms. Shashi Bala (PW-19) received eight sealed parcels from Constable Sandeep Kumar (PW8) which included the cotton wool swab taken from the victim and she found that the seminal stains therein were those of the accused. Draftsman SI Mahesh Kumar (PW-1) prepared a site plan on 3rd September 2011 at the behest of the IO (PW-31).

8. On 11th January 2012 the arguments on charge were heard without the counsel for the accused being present. On that date, an order framing charges was passed. The learned ASJ directed that Head Constable Radhey Kishan, MHCM (PW-12), PWs-14 to 22 and PW-26 would be examined by way of affidavits under Section 296 Cr PC. Their affidavits were directed to be filed by 29th February 2012 with an advance copy to the defence counsel. The case was listed on 7th March 2012 for recording the evidence of the prosecution, i.e. PWs-1, 3, 4, 23, 24 and 25. The order sheet dated 11th January 2011 reveals that later on the learned ASJ warned the defence counsel, when he appeared, to be regular for the sake of his client.

9. On 7th March 2012, none was present for the accused. The accused present in Court expressed his inability to afford a counsel. Thereupon, an Advocate was instantly appointed by the learned ASJ as amicus curiae for the accused. However, instead of postponing the trial, the learned ASJ proceeded with the recording of the evidence of the prosecution witnesses.

10. 7th March 2012 was also the date on which the FSL report was made available to the trial Court. The learned ASJ recorded that the said report was not disputed by the accused. The FSL report is a scientific document and if it was received on that very day, it was obviously required to be gone through by the defence counsel. The accused could hardly be expected to study it himself and form an opinion. The amicus curiae appointed for him on that very day obviously would not have been aware of the entire facts of the case much less would he have been able to get familiar with the record of the case. The question of his forming an opinion as regards the FSL report on that very day obviously did not

arise. The learned ASJ was oblivious to the above difficulties and proceeded to call the FSL witnesses on the next date of hearing.

11. Another significant feature of the proceedings on 7th March 2012 was that the learned ASJ proceeded with the recording of the evidence of as many as 17 prosecution witnesses. These included a key witness Dalip Paswan (PW14) (the uncle of the child witness PW-25 who purportedly corroborated the latters testimony). The complete list of witnesses examined on 7th March 2012, as presented by the learned APP in a tabular form, reads thus: PW No.Name of the Nature of examination witness PW1 SI Mahesh Formal witness on 1 Kumar affidavit who has proved the preparation of scaled site plan Yes PW2 Ct. Dalbir Formal witness on 1 affidavit and a member of the Crime Team who has proved having taken the photographs of the spot of the incident Yes PW3 Ct. Satish Formal witness on 1 affidavit who has proved Inspector No DSR No.3 of 2012 & CRL. A. No.1146 of 2012 No.Whether of Satyender Gosain that he went to BSA Hospital mortuary where doctor handed over to him a total of nine exhibits relating to the deceased which he in turn handed over to Inspector Satyender Gosain who seized the same. PW4 Ct. Rajbir Formal witness on 1 affidavit who has proved that on 12.7.2011 at about 9:10 AM Duty Officer W/HC Usha gave him an original Teharir along with an FIR to deliver to ASI Raju Yadav and accordingly he delivered the same to ASI Raju Yadav at KU Block Park, Pitampura. According to him, ASI Raju Yadav recorded the statement of the complainant at 10 AM and he remained with ASI Raju Yadav during the search for the missing girl. Yes PW5 HC Anand Formal witness on 1 Swaroop affidavit who has proved having got conducted the medical examination of the Yes accused Sanjay Kumar. The Doctor handed over to him a sealed box containing exhibits/ samples, sample seal and MLC of the accused Sanjay which he in turn produced before the Investigating Officer who seized the same. PW6 W/HC Usha Formal witness on 1 affidavit who has proved having recorded the FIR and her endorsement on the rukka Yes PW7 SI Devender Yes PW8 Ct. Sandeep Formal witness on 1 Kumar affidavit who has proved that on 24.8.2011 he took seven exhibits and two sample seals from the MHCM and deposited the same in the FSL Rohini. No PW9 Ct. Bijender Formal witness on 1 affidavit who has proved that on 19.8.2011 on the directions of Inspector Yes Formal witness on 1 affidavit who has proved the Crime Team

Report which he handed over to ASI Raju Yadav. Satyender Gosain he received four exhibits and one sample seal duly sealed vide RC No.88/21/11 and seven exhibits and two sample seals duly sealed vide RC No.89/21/11 from the MHCM and deposited the four exhibits and sample seals in FSL, Rohini. He has further proved that on 23.8.2011 he took an exhibit along with a request letter and went to mortuary, BSA Hospital for the issue of a sample seal where Dr. J.V.Kiran handed over to him a sealed envelope which he (the witness) handed over to the Investigating Officer who seized the same. PW10 W/Ct. Archana Formal witness on 1 affidavit who has proved that on 13.7.2011 while posted in PCR, PHQ information was received from mobile No.9818100432 regarding a dead body of a small girl aged about 10 years lying in KU Block, Ramlila DSR No.3 of 2012 & CRL. A. No.1146 of 2012 Ground, NDPL Sub Station Pitampura, on which she completed the PCR form and passed on the information. PW11 HC Hoshiyar Singh Formal witness on 1 affidavit who has proved that on 13.7.2011 while working as Duty Officer at Police Station Maurya Enclave at about 6:15 PM the Wireless Operator informed him that information was received that a dead body of a girl aged about 10 years was lying in NDPL Substation pursuant to which information he recorded vide DD No.31A No PW12 HC Radhey Formal witness on 3 Kishan affidavit who has proved the various entries made in the Register No.19 and 21. Yes PW13 Mahesh Paswan Formal witness i.e. 1 relative of the deceased who has identified the dead body of the child which is not disputed. No PW14 Dalip Public witness/owner of 4 Yes Paswan the tea stall outside the NDPL Office (not an eye witness nor witness of last seen) only proved that he was running a Tea Stall outside the NDPL Office where his nephew Master Saroj i.e. witness of last seen. PW15 Shyam Pawan PW16 Dr. Kiran Public witness/father of 3 the deceased Yes J.V. Doctor from BSA2Hospital who has given the opinion regarding the weapon of offence. Yes PW17 Dr. Florence Almeida Doctor from BSA2Hospital who has examined the accused and has given his opinion. Yes 12. It is seen from the above table that the following witnesses were not cross-examined by the amicus curiae on that day: Constable Satish (PW-3) who had joined the investigation; Constable Sandeep (PW-8) police witness who had joined the investigation; Woman Constable Archana (PW-10), the PCR official who had filled up the PCR form; Head Constable Hoshiyar Singh (PW-11) the Duty

Officer/DD writer; Mahesh Paswan (PW-13), a relative of the deceased who identified her body and Dr. Florence Almeida (PW-17) from BSA Hospital who had examined the accused and had given his opinion. Also, although the other witnesses in the above list are shown to have been cross-examined, a careful perusal of the transcript of evidence recorded shows that their cross-examination was, at best, cursory.

13. The Court notes with some degree of concern that on a single day the evidence of as many as 17 prosecution witnesses was sought to be recorded by the learned ASJ without ensuring that the amicus curiae appointed by the Court on that very day had sufficient time to prepare the case and to conduct a proper cross-examination of the said witnesses. What is surprising is that in the entire impugned judgment, the learned ASJ does not refer to the fact of the defence counsel not being present in the Court on 7th March 2012 and the learned ASJ, therefore, having to appoint an amicus curiae who incidentally was a lawyer enrolled only six years earlier. The learned ASJ does not appear to have even paused to reflect on whether it was humanly possible for any advocate to instantly get acquainted with a case involving a grave and serious charge of rape and murder on a single day and to acquaint himself with the entire record of the case so as to be even able to ask relevant questions to the prosecution witnesses by way of cross-examination.

14. The unusual haste with which the learned ASJ proceeded is all the more surprising since the law on the subject is well settled. A similar approach adopted by a Fast Track Court (FTC) in the Best Bakery Case was frowned upon by the Supreme Court in Zahira Habibullah Sheikh v. State of Gujarat (2004 Crl LJ2855 There, the FTC failed to halt the trial despite the prosecution witnesses, including the eye witness Zahira Sheikh, turning hostile in quick succession leading to a total collapse of the trial and the acquittal of all the accused. The Supreme Court had no hesitation in declaring mistrial and directing a re-trial to take place before an appropriate court in Maharashtra. The Supreme Court observed:

35. .....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. Interests of society are not to be treated completely with disdain and as persona non grata. 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. 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's eye to the needs of the 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 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.

15.1 Recently in Mohd. Hussain v. State (Govt. of NCT of Delhi) (2012) 2 SCC584(hereafter Mohd. Hussain-I), the Supreme Court was faced with a similar situation in a case that arose from a judgment delivered by a Sessions Court in Delhi. Again it was a serious case involving a bomb blast on a blue line bus causing the death of 4 persons and injuries to 24 others. In that case the Supreme Court on going through the record of the proceedings and the order passed by the Sessions Court found that the accused was initially assisted by a counsel appointed by the learned Sessions Judge. However, midway through the case the said counsel disappeared from the scene i.e. before the conclusion of the trial. The accused was not asked whether he would be able to engage a counsel or wished to have a counsel appointed for him. In that case out of the 65 witnesses examined by the prosecution the evidence of 56 of them was recorded without providing counsel to the accused. None of the said 56 witnesses were examined by the accused either. Only thereafter, was another counsel appointed to defend the accused and the evidence of witnesses 57 to 65 were recorded in the presence of the newly appointed counsel, who for some reason thought it fit not to cross-examine any of those witnesses. 15.2 The two learned Judges who comprised the Bench in Mohd. Hussain-I agreed that there had been a grave miscarriage of justice as a result of the accused not having the services of a counsel throughout the trial. However, the two learned judges differed on what the consequential order should be. Justice H.L. Dattu noted that the right of access to justice was a fundamental right as explained in several earlier decisions of the Supreme Court including M. H. Hoskot v. State of Maharashtra (1978) 3 SCC544 Mohd. Sukur Ali v. State of Assam (2011) 4 SCC729and Hussainara Khatoon v. State of Bihar (1980) 1 SCC98 Justice Dattu concluded that the accused was not provided the assistance of a counsel in a substantial and meaningful sense and that to hold otherwise would be simply to ignore actualities and also would be to ignore the fundamental postulates, already adverted to.

15.3 Concurring with the above view, Justice C.K. Prasad in Mohd. HussainI observed:

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 39A of the Constitution by the 42nd Amendment Act of 1976 and enactment of SubSection (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 right to be heard through Counsel.

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 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 of 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.

15.4 Justice Dattu was of the view that the case should be remanded to the trial Court with a specific direction that the trial Court would assist the accused in employing a State counsel before the commencement of the trial till its conclusion. Justice Prasad was of the view that after such a distance of time it shall be travesty of justice to direct for the Appellants de novo trial. As a result of the above difference of opinion, the matter was placed before a larger Bench of three learned Judges of the Supreme Court. 15.5 In their unanimous verdict in Mohd. Hussain v. State (Govt. of NCT of Delhi) (2012) 9 SCC408(hereafter Mohd. Hussain-II), the three-Judge Bench held that since the offences with which the accused had been charged were of a serious nature, the prosecution had to be taken to its logical conclusion. If there had to be no failure of justice the retrial of the Appellant in the

facts and circumstances is indispensable. It was held that it is imperative that justice is secured after providing the Appellant with a legal practitioner if he does not engage a lawyer of his choice. 15.6 On the aspect of the direction for a retrial, the Supreme Court in Mohd. Hussain-II referred to the following observations in Satyajit Banerjee v. State of West Bengal (2005) 1 SCC115

25. Since strong reliance has been placed on Best Bakery case (Gujarat riots case) it is necessary to record a note of caution. That was an extraordinary case in which this Court was convinced that the entire prosecution machinery was trying to shield the accused i.e. the rioters. It was also found that the entire trial was a farce. The witnesses were terrified and intimidated to keep them away from the court. It is in the aforesaid extraordinary circumstances that the court not only directed a de novo trial of the whole case but made further directions for appointment of the new prosecutor with due consultation of the victims. Retrial was directed to be held out of the State of Gujarat.

26. The law laid down in Best Bakery case in the aforesaid extraordinary circumstances, cannot be applied to all cases against the established principles of criminal jurisprudence. Direction for retrial should not be made in all or every case where acquittal of accused is for want of adequate or reliable evidence. In Best Bakery case the first trial was found to be a farce and is described as "mock trial". Therefore, the direction for retrial was in fact, for a real trial. Such extraordinary situation alone can justify the directions as made by this Court in Best Bakery case. 15.7 The three-Judge Bench in Mohd. Hussain-II then held as under:

41. The appellate court hearing a criminal appeal from a judgment of conviction has power to order the retrial of the accused under Section 386 of the Code. That is clear from the bare language of Section 386(b). Though such power exists, it should not be exercised in a routine manner. A de novo trial or retrial of the accused should be ordered by the appellate court in exceptional and rare cases and only when in the opinion of the appellate court such course becomes indispensable to avert failure of justice. Surely this power cannot be used to allow the prosecution to improve upon its case or fill up the lacuna. A retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding

factor for retrial must always be demand of justice. Obviously, the exercise of power of retrial under Section 386(b) of the Code, will depend on the facts and circumstances of each case for which no straitjacket formula can be formulated but the appeal court must closely keep in view that while protecting the right of an accused to fair trial and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked.

16. In Mohd. Ajmal Amir Kasab v. State of Maharashtra AIR 2012 SC3565 the Supreme Court reiterated the non-derogability of the fundamental right of an accused facing criminal trial for grave charges to be represented by counsel at every stage of the trial. The following passages from the said decision are relevant:

476..It is common knowledge, of which we take judicial notice, that there is a great hiatus between what the law stipulates and the realities on the ground in the enforcement of the law. The abuses of the provisions of the Code of Criminal Procedure are perhaps the most subversive of the right to life and personal liberty, the most precious right under the Constitution, and the human rights of an individual. Access to a lawyer is, therefore, imperative to ensure compliance with statutory provisions, which are of high standards in themselves and which, if duly complied with, will leave no room for any violation of Constitutional provisions or human rights abuses.

477. In any case, we find that the issue stands settled long ago and is no longer open to a debate. More than three decades ago, in Hussainara Khatoon (IV) v. Home Secretary, State of Bihar (1980) 1 SCC98 this Court referring to Article 39-A, then newly added to the Constitution, said that the article emphasised that free legal aid was an unalienable element of a "reasonable, fair and just" procedure, for without it a person suffering from economic or other disabilities would be deprived from securing justice. In paragraph 7 of the Judgment the Court observed and directed as under:

....The right to free legal services is, therefore, clearly an essential ingredient of "reasonable, fair and just", procedure for a person accused of an offence and it

must be held implicit in the guarantee of Article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer. We would, therefore, direct that on the next remand dates, when the undertrial prisoners, charged with bailable offences, are produced before the Magistrates, the State Government should provide them a lawyer at its own cost for the purpose of making an application for bail, provided that no objection is raised to such lawyer on behalf of such under-trial prisoners and if any application for bail is made, the Magistrates should dispose of the same in accordance with the broad outlines set out by us in our Judgment dated February 12, 1979. The State Government will report to the High Court of Patna its compliance with this direction within a period of six weeks from today.

478. Two years later, in Khatri (II) relating to the infamous case of blinding of prisoners in Bihar, this Court reiterated that the right to free legal aid is an essential ingredient of due process, which is implicit in the guarantee of Article 21 of the Constitution. .

481. The resounding words of the Court in Khatri (II) are equally, if not more, relevant today than when they were first pronounced. In Khatri (II) the Court also alluded to the reasons for the urgent need of the accused to access a lawyer, these being the indigence and illiteracy of the vast majority of Indians accused of crimes.

482. As noted in Khatri (II) as far back as in 1981, a person arrested needs a lawyer at the stage of his first production before the magistrate, to resist remand to police or jail custody and to apply for bail. He would need a lawyer when the chargesheet is submitted and the magistrate applies his mind to the chargesheet with a view to determine the future course of proceedings. He would need a lawyer at the stage of framing of charges against him and he would, of course, need a lawyer to defend him in trial.

483. To deal with one terrorist, we cannot take away the right given to the indigent and under-privileged people of this country by this Court thirty one (31) years ago.

484. We, therefore, have no hesitation in holding that the right to access to legal aid, to consult and to be defended by a legal practitioner, arises when a person arrested in connection with a cognizable offence is first produced before a magistrate. We, accordingly, hold that it is the duty and obligation of the magistrate before whom a person accused of committing a cognizable offence is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the State. The right flows from Articles 21 and 22(1) of the Constitution and needs to be strictly enforced. We, accordingly, direct all the magistrates in the country to faithfully discharge the aforesaid duty and obligation and further make it clear that any failure to fully discharge the duty would amount to dereliction in duty and would make the concerned magistrate liable to departmental proceedings.

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

18. After the extraordinary haste displayed by the trial Court in recording the evidence of as many as 17 witnesses on one day i.e. 7th March 2012, the next date was fixed as 26th March 2012 when the evidence of 11 more witnesses was recorded. Four of those witnesses were not cross-examined. As regards certain key witnesses i.e. PW-25, the child witness, PW-21, the mother of the deceased, PWs-18 and 19 who conducted the Forensic and DNA test respectively, PW-23 who conducted the post-mortem, PW-22 at whose instance the body of the deceased was found and PW-24 who found the body, the transcript of their cross-

examination shows that the amicus curiae was unable to be fully prepared. It is obvious that even at that stage, i.e. less than twenty days after his appointment, he was yet to come to grips with the case. By 26th March 2012 as many as 28 prosecution witnesses had already been examined and discharged. The next date of hearing was 2nd April 2012 which was less than one week thereafter. Again three witnesses were examined and discharged. These witnesses included the IOs PW-30, PW-31 and PW-29. Within a fortnight, on 17th April 2012, the statement of the accused was recorded under Section 313 Cr PC. On 2nd May 2012, spot inspection was carried out and on 11th May 2012 the trial Court delivered a 166-page judgment convicting the accused.

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

20. An application, Crl. M.A No.561 of 2013, has been filed by the accused under Section 391 Cr PC praying for the recall of the prosecution witnesses and to be given further opportunity for their cross-examination. A detailed reply has been filed to the said application by the State. This Court has heard the submissions of Mr. Bhupesh Narula, learned counsel for the Appellant, assigned to the Appellant by the Delhi High Court Legal Services Committee and Ms. Richa Kapoor, learned APP for the State. Ms. Kapoor, while not denying that an opportunity ought to be given to the accused to crossexamine the witnesses, sought to categorise the prosecution witnesses into those whose cross-examination had taken place in the

trial Court and those who had not been cross-examined.

21. However, the Court finds on going through the transcript of evidence, that it is not possible to make such a distinction for more than one reason. On 17th March 2012 when 17 prosecution witnesses were examined and discharged it must not have been possible for the counsel for the accused to even get familiar with the matter since he was appointed on that very date by the trial Court. Whatever cross-examination was done, therefore, cannot be said to be by a counsel who was in full grasp of the matter. Also it is possible that the answers given by witnesses who were examined and discharged may have had a bearing on the cross-examination of the other witnesses. It is difficult at this stage to assess whether the failure of the counsel for the accused to have a proper opportunity to examine the 17 prosecution witnesses on 7th March 2012 had an impact on the cross-examination of the remaining prosecution witnesses on the subsequent dates.

22. As far as the consequential order is concerned, with the incident in question taking place on 11th July 2011 and the accused being in custody since 14th July 2011, it cannot be said that there has been any delay in the case being processed and trial commencing. Further, the charge against the accused is indeed a very serious one. As explained in Mohd. Hussain-II the guiding factor for a retrial shall always be the demand of justice. It has further been explained in the said decision that a retrial is not a second trial; it is a continuation of the same trial and same prosecution. It has further been emphasised that the Appellate Court must keep in view that while protecting the right of an accused to fair trial and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked.

23. Accordingly the impugned judgment dated 11th May 2012 and the order on sentence dated 31st May 2012 passed by the learned trial Court are hereby set aside. Consequently, the Court remands the matter to the court of the learned ASJ for a retrial. In other words, the trial will commence with the examination and cross-examination of the prosecution witnesses. It is clarified that the transcript of the evidence already recorded will remain and can be referred to by counsel on

either side. A proper opportunity shall be given to learned counsel for the accused to cross-examine the prosecution witnesses afresh. This would include the right of the prosecution to seek reexamination of any of the witnesses in accordance with law. Further the right of the accused to lead evidence in accordance with law is also reserved. Crl. M.B. No.1772 of 2012 for suspension of sentence is dismissed. However, this will not preclude the accused from applying to the trial court for bail in accordance with law.

24. The Court appoints Mr. Bhupesh Narula as amicus curiae for the accused in the trial Court. The entire trial Court record will be returned forthwith through a Special Messenger and be placed before the District and Sessions Judge (D&SJ), Rohini Courts on 7th March 2014 for being assigned to the Court of a learned ASJ other than the one who delivered the impugned judgment of conviction and order on sentence which have been set aside by this judgment. The accused will also be produced from judicial custody in that Court. Mr. Bhupesh Narula will also remain present. It is made clear that if the accused wishes to engage any other counsel of his own choice, then that option will also be made available to him by the learned D&SJ.

It is hoped that the fresh trial process would be completed as expeditiously as possible, and not later than six months from the aforementioned date and a judgment delivered not later than a period of seven months thereafter.

25. Death Sentence Reference No.3 of 2012 is accordingly answered and Crl. A. No.1146 of 2012 the appeal is allowed in the above terms but in the circumstances with no order as to costs. Crl. M.A. No.561 of 2013 is also disposed of accordingly. S. MURALIDHAR, J.

MUKTA GUPTA, J.

FEBRUARY21 2014 dn