

S.Yuvaraj Vs. State

S.Yuvaraj Vs. State

SooperKanoon Citation : sooperkanoon.com/1168635

Court : Chennai

Decided On : Oct-01-2013

Judge : P.Devadass

Appellant : S.Yuvaraj

Respondent : State

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED :

01. 10.2013 CORAM: THE HON'BLE MR.JUSTICE P.DEVADASS
Crl.O.P.No.7142 of 2013 and M.P.Nos.1,2 & 3 of 2013 S.Yuvaraj ...
Petitioner/Accused Vs. State rep. by The Inspector of Police, Gobichettypalayam.
... Respondent/Complainant Prayer: Petition filed under Section 482 of the
Criminal Procedure Code to transfer the case in S.C.No.14 of 2013 from the file of
Principal Sessions Judge, Erode to any other Sessions Court. For Petitioner :
Mr.R.Sankarasubbu For Respondent : Mr.C.Emalias Addl. Public Prosecutor For
intervener : Mr.Ramalingam

ORDER

Yuvaraj, the sole accused, in the sessions case in S.C.No.14 of 2013, pending before the learned Principal Sessions Judge, Erode, seeks transfer of the sessions case to some other Court since he was denied of fair trial.

2. On 17.8.2012, in her house, in Balaji Nagar, Lakkampatti Village, Gobichettipalayam, one Santhamani was found murdered. Her jewels were also found missing. It is murder for gain. Initially, a case in Crime No.539 of 2012 under Section 174 Cr.P.C. was registered. Later, in the course of investigation, it was altered to Section 302 and 380 IPC.

3. In this connection, Yuvaraj, the petitioner was arrested. He was remanded to judicial custody. On conclusion of his investigation, the Investigation Officer filed final report under Section 173(2) Cr.P.C. for offences under Sections 302 and 380 IPC, before the learned Judicial Magistrate No-I, Gobichettipalayam. The learned Magistrate committed the case to the Court of Principal Sessions Judge, Erode.

4. The learned Sessions Judge directed the prosecution to produce its witnesses on 11.03.2013. On 11.03.2013, as part of certain Nationwide agitation, the Advocates in Erode and in other places have boycotted the Courts. On that day, as directed, prosecution produced the witnesses. The learned Principal Sessions Judge, examined P.Ws.1 to 13, marked Exhibits 1 to 10 and material objects 1 to 5.

5. At this juncture, the accused wants transfer of the sessions case from the said Court to some other Court on the ground that there was no fair trial before the learned Sessions Judge.

6. In the circumstances, a report has been called for from the learned Principal Sessions Judge, Erode. Accordingly, the learned Judge submitted his report.

7. From the said report, it is seen that as part of a nationwide agitation, Advocates have boycotted the Courts. On 11.03.2013, when the prosecution produced witnesses, learned Public Prosecutor was present. However, the learned defence counsel from Gobichettipalayam Bar and the local counsel Mrs.N.Manju Menaka Rajeswari were not present. In their absence, the learned Sessions Judge conducted trial. Examined 13 witnesses and marked some exhibits and material objects.

8. The witnesses were examined in chief only, giving opportunity to the defence counsel to cross examine the witnesses, the case was adjourned. It is also stated in the report that whenever the Advocates boycotted the Courts and prosecution produced witnesses. it is usual to examine them in chief and adjourn the case for cross examination by the defence counsel.

9. The learned counsel for the petitioner Mr.R.Sankarasubbu, would submit that the procedure adopted by the learned Principal Sessions Judge in conducting the trial is not fair. The right of the accused to be defended by a lawyer has been violated, thus, the entire trial is vitiated. Therefore, it is calls for transfer of the case to another Sessions Judge. In this connection, the learned counsel cited SUDARSANAM AND ORS. VS. STATE, D.S.P., PONNERI (1987 L.W. (CrI) 419) and MOHD.HUSSAIN @ JULFIKAR ALI Vs. STATE (GOVT. OF NCT), DELHI [2012 CRI.L.J.

1069]..

10. The learned Additional Public Prosecutor and Mrs.Sudha Ramalingam, the learned counsel for intervenor/defacto complainant would submit that witnesses were examined only in chief, still the accused has the opportunity to test the veracity of the evidence of those witnesses through the touchstone of cross examination with the assistance of his counsel. However, both the learned counsels submit that the trial court is bound to follow a fair procedure and also taking into account the right of the accused in conducting the trial.

11. Now, it is seen that the trial was conducted, namely, witnesses were examined in chief, in the absence of the defence counsel. In the circumstances, the question is whether the right of the accused is infringed and whether the procedure adopted by the learned Principal Sessions Judge is fair and whether the trial is vitiated.

12. In this connection, it is relevant to note Article 21,22(1), 39-A of the Constitution of India and Sections 280, 309(2) Cr.P.C. and its second proviso, Sections 303 and 304 Cr.PC. They runs as under:- (i) 21. Protection of life and personal liberty. No person shall be deprived of his life or personal liberty except according to procedure established by law. (ii) 22. Protection against arrest and

detention in certain cases. (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice. (iii) 303. Right of person against whom proceedings are instituted to be defended. Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code, may of right be defended by a pleader of his choice. (iv) 39-A. Equal justice and free legal aid. The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. (v) 304. Legal aid to accused at State expense in certain cases. Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the court that the accused has not sufficient means to engage a pleader, the court shall assign a pleader for his defence at the expense of the State. (vi) 280. Remarks respecting demeanour of witness. When a Presiding Judge or Magistrate has recorded the evidence of a witness, he shall also record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination. (vii) 309. Power to postpone or adjourn proceedings. (2) If the court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody. Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing.....".

13. No one shall be condemned unheard. Thus, 'hear before condem'. This is a basis of 'principles of natural justice'. This is 'minimum justice' to be followed before taking any drastic action. It will ensure fairness and exclude arbitrariness. It will be a check on the exercise of powers by the judicial and quasi-judicial authorities.

14. One's innocence itself is his basic human right, until it is displaced beyond all reasonable doubts. Thus, every Judicial Forum inquiring, trying indictment/imputations/allegations/charges is bound to provide reasonable opportunity to the person concerned.

15. Thus, in Article 21, Constitution of India, our founding fathers, included certain 'positive declaration'. It is 'no one shall be deprived of his life and liberty'. This is a Constitutional promise to the people by our Republic Constitution. It is an assurance to every one. Article 21 is bedrock of Civil Liberties. It is a germ out of which the human rights Jurisprudence has developed and is developing. It is a moving spirit/soul of the Indian Constitution a living organism an organic charter. Such valuable constitutional right can be abridged, taken away only by a procedure established by law. But, the procedure must be 'fair, reasonable and just'. (See: MANEKA GANDHI Vs. UNION OF INDIA (AIR 1978 SC597)..

16. 'Hearing' a person, who is accused of having committed certain offences should not be a 'mere hearing'. Hearing him without the assistance of a legally trained person is like hearing a deaf and dumb person. It will not be giving him a 'reasonable opportunity'. It will be an 'empty formality'. It will be negation of principles of natural justice. Thus, Article 22(1) Constitution of India provides right to accused persons to be defended by a lawyer of their choice.

17. Assuring their constitutional right to legal representation enshrined in Article 22(1), Section 303 Cr.P.C. has been inserted in the New Code of Criminal Procedure, 1973. It provides for right of accused to be defended by a lawyer of his choice. Article 22(1) r/w Article 21 and Section 303 Cr.P.C. reiterates a facet of human right of the accused persons. It is really a matter of 'access to justice'.

18. Such right cannot be denied nor deprived due to financial constraints. Thus, a duty is cast on the State to provide legal assistance, legal aid to the needy. Section 304 Cr.P.C. is for providing legal aid to persons more particularly who are facing trial in a Sessions Court. This has also been strengthened by the introduction of Article 39-A in the Constitution through the 42 Amendment.

19. It is pertinent here to mention that in 1981, in Khatri (II) case relating to the infamous Bhalpur blinding of prisoners in certain Bihar jail, Hon'ble Apex Court directed all the Magistrates and the Sessions Judges to inform the accused persons of their constitutional right to be defended by a lawyer. But, in practice, this mandate has been observed much in breach than observance.

20. In INDAR NARAIN v. THE STATE [AIR 1952 PUNJAB53, prosecution witnesses were produced, since the defence counsel suddenly took ill, he could not be present in Court, an adjournment sought for by the accused was rejected and the Court examined the witnesses, as the prosecution produced the witnesses.

21. In this connection, a learned Judge of the Punjab High Court observed as under:- 8.....The reason given by the Magistrate that if he had allowed this petition, the State would have incurred a good deal of unnecessary expenses in so far as their witnesses were present, loses sight of the constitutional right of a citizen. In all civilized countries, wherever English system of Jurisprudence prevails, Courts have always tried to give, every kind of facility to an accused to defend himself. Merely because, there were certain witnesses for the prosecution present, does not seem to me, to be a sufficient reason, why the case should not have been postponed and the prayer of the petitioner granted, if that was necessary in the interests of justice as I think that in this case it was. 22. In RAJ KISHORE v. STATE [1969 CRL.L.J.860]., under similar circumstances, the Calcutta High Court held as under:- 9. We must say at once, that we do not appreciate that reason, to be sufficient or proper for insisting that the trial, which was one, on a charge of murder punishable with death, should proceed in the absence of the defence lawyer, who has suddenly fallen ill. Adjourning a sessions trial is a serious matter indeed, but absence of defence lawyer, for the reason of sudden illness, is no less. In the present trial, it was much more important that the person on trial, facing a capital charge, should have the assistance of a lawyer, who had the opportunity to prepare the brief, for proper defence by effective cross examination, that the trouble and cost to which, State would have been subjected, by an adjournment of the trial. 23. In SAMBHUNATH BHATTACHARJEE v. STATE OF SIKKIM [1980 CRL.L.J.789]., the defence counsel was not present,

however, six prosecution witnesses were produced, thus, the trial Court examined the witnesses. When this was challenged on the ground that the procedure of fair trial has been violated, the Hon'ble Chief Justice put the legal position as under:-

11..... I should not, however, be understood to lay down as a blanket proposition, that adjournment should be granted to the accused, whenever it is prayed for on the ground of the absence of a lawyer of his choice. If in a given case, the Court feels that the absence of the defence lawyer, is wholly unjustified and/or the accused has not taken proper and diligent steps to secure or ensure his presence, an adjournment prayed on the ground of the absence of the lawyer, may be refused. But, by and large, the Court must see that the accused is not denied the right to be defended by a legal practitioner of his choice and is given reasonable opportunities to secure the presence of such lawyer and where, as here, the lawyer chosen by the accused has suddenly fallen ill, which has incapacitated him from attending the Court to defend the accused, the Court, should not hesitate to grant adjournment. After all that has been said about speedy disposal of cases and arrears in Courts, one must not forget that, though speed is good and is very much desirable, it is depreciable when it amounts to rash speed and however good, speedy disposal of a case may be, it can never be desired, if it is achieved at the cost of established notions of justice which cannot always be, administered by the hands of the clock. 24. In SUDARSANAN AND OTHERS VS. D.S.P., PONNERI [1978 L.W.(CrI.)419]., prosecution witnesses were produced, the defence counsel was not present and the reasons for the same has been given. However, the learned Sessions Judge examined the prosecution witnesses in chief. But, the Court held that it is violative of the constitutional right of the accused guaranteed under Article 22(1) of the Constitution.

25. In SUK DAS v. UT OF ARUNACHAL PRADESH [1986(2) SCC401 the Hon'ble Apex Court observed as under:- Every accused un represented by a lawyer has to be provided a lawyer at the commencement of the trial, engaged to represent him during the entire course of the trial. Even if the accused does not ask for a lawyer or he remains silent, it is the constitutional duty of the Court to provide him with a lawyer before commencing the trial. Unless the accused voluntarily makes and tells the Court, in clear and unambiguous words, that he does not want the assistance of any lawyer and would rather defend himself personally, the

obligation to provide him with a lawyer at the commencement of the trial is absolute, and failure to do so would vitiate the trial and the resultant conviction and sentence, if any, given to the accused. 26. Recently, our Hon'ble Apex Court, in MOHAMMED AJMAL MOHAMMAD AMIR KASAB @ ABU MUJAHID Vs. STATE OF MAHARASHTRA [MANU/SC/0681/2012]., held that the obligation to provide legal assistance to accused persons is very much part of our Criminal Law Procedure.

27. In MOHD.HUSSAIN @ JULFIKAR ALI Vs. STATE (GOVT. OF NCT), DELHI [2012 CRI.L.J.

1069]., a three-Judge Bench of the Hon'ble Apex Court observed as under:- 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 later stage, was either to 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 and 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 by 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 appointments of a counsel was a denial of due process of law. It is equally 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 Code of Criminal Procedure. 28. Thus, it is seen that in view of the constitutional frame work and subsequent statutory promises, trial of a person, who has been accused of having committed certain offences without the assistance of a lawyer or legal aid militates against the constitutional promises made to them.

29. The right to have the assistance of a lawyer, to be defended by a lawyer, becomes very significant and important when the witnesses are examined. The demeanour of the witnesses are required to be noted. It could be either during chief examination, cross examination or re-examination of the witnesses. This has also been emphasised in Section 280 Cr.P.C.

30. During chief examination of the witness, prosecution always tend to load its evidence with leading questions. There may be possibility of even adducing hearsay evidence, introduction of irrelevant and inadmissible documents. A trial Judge cannot be either on the side of the prosecution or on the side of the defence. He is a neutral. In such circumstances, it is imperative that a counsel on behalf of the accused/defence shall present/participate in the trial proceedings, note down the demeanour of the witnesses and draw the attention of the Sessions Judge to this aspect, object when prosecution put leading questions to the witnesses, when prosecution adduced hearsay evidence and tried to introduce irrelevant and inadmissible documents in evidence. So, the presence of a defence counsel at the very commencement of the trial as well as till the completion of the trial is very important. It is part of the right of the accused persons under Section 303 Cr.P.C., r/w Article 22(1) and 21 of Constitution and Section 304 Cr.P.C., r/w Article 39-A of the Constitution.

31. Now, in view of the Constitutional provisions and the statutory provisions in the New Code of Criminal Procedure 1973 and the survey of the case laws of various High Courts and Hon'ble Apex Court, it is seen that the procedure adopted by the learned Principal Sessions Judge, Erode, on 11.03.2013, examination of the witnesses, of course, in chief, in the absence of his counsel is not a fair procedure and it is in violation of right of the accused person.

32. Now, we have to see the consequences of the procedure adopted by the learned Principal Sessions Judge, Erode.

33. Now, the evidence of certain prosecution witnesses has been recorded without following a fair procedure. It is against law. In such circumstances, the evidence recorded is required to be effaced, washed off from the records and eschewed and denova trial, namely, fresh examination of witnesses have to be made.

34. It would be otherwise, when the accused himself voluntarily waived his right to be defended by a lawyer, it is always advisable that the Sessions Judges shall arrange for legal assistance for the accused, from the Legal Aid panel Advocates, when especially the accused is facing trial of very serious charges.

35. The learned Principal Sessions Judge, Erode in his report dated 16.04.2013, had stated that because of the Advocates boycott, the defence counsel was not present and as usual he had examined the witnesses in chief in the absence of the defence counsel.

36. We have seen elaborately, this is not a fair procedure. It is against law. It is seen from the report of the learned Principal Sessions Judge that most of the trial Court Judges, under similar circumstances, are in the habit of recording the evidence of prosecution witnesses in the absence of defence counsel. The Trial Court Judges are duty bound to take care of the constitutional right of the accused persons. They shall see that the accused is not prejudiced. Their right should not abridged, curtailed, jeopardised for reasons beyond their control. In such circumstances, the learned Sessions Judges can invoke their power under Section 309(2) Cr.P.C and adjourn the case to a future date without examining the witnesses produced on the ground that the accused remain undefended and bound over the witnesses to a future date. But, in the meanwhile, every efforts should be made to arrange for legal assistance to the accused. When the Sessions Judges had prior intimation as to the collapse of the sessions trial due to certain reasons beyond the control of the accused, the Sessions Judges can well in defence inform the police through the Public Prosecutor to stop production of the witnesses. During Advocates Boycott, the Advocates are not attending the Court. For that the accused should not be made to suffer and a procedure which is not fair should not be adopted. But, that may not be a situation in all the circumstances. But, there may be a situation where the absence of defence counsel is wanton, intentional, wilful and there was no sincere efforts to engage a defence counsel, the absence of the defence lawyers is unjustified and the absence of defence lawyer is a ploy to protract the trial. In such circumstances, the learned trial Court Judges must be very careful and they shall take every efforts to arrange for legal assistance to the accused and after giving reasonable

opportunity to the newly engaged counsel, the trial Court shall proceed with the trial of the case.

37. In view of the foregoings, the Sessions Case in SC.No.14 of 2013 pending on the file of the learned Principal Sessions Judge, Erode is transferred to the Court of the learned 1st Additional Sessions Judge, Erode. The entire evidence recorded by the Principal Sessions Judge, Erode on 11.03.2013 is eschewed. The learned 1st Additional Sessions Judge, Erode shall proceed to record the evidence of witnesses afresh in the presence of defence counsel and giving reasonable opportunity to both sides dispose of the Sessions Case in accordance with law at an early date. Accordingly, the criminal original petition is disposed of. Consequently, connected M.Ps. are closed. 1.10.2013 Index : Yes / No Internet : Yes / No rrg Note: As this order deals with certain aspects concerning trial of criminal cases by the Subordinate Courts, the Registry is directed to place this order before My Lord, the Hon'ble Chief Justice for orders to circulate this order to all the Judicial Officers working in the State of Tamil Nadu and Union Territory of Puducherry. To 1.The Principal Sessions Judge, Erode. 2.The 1st Additional Sessions Judge, Erode. 3.The Inspector of Police, Gobichettipalayam. 4.The Public Prosecutor, High Court, Madras. P.DEVADASS, J.

rrg PRE DELIVERY

ORDER

IN CrI.O.P.No.7142 of 2013 01.10.2013

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com