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**Sunil Kumar vs.state**

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**SooperKanoon Citation** : sooperkanoon.com/1203087

**Court** : Delhi

**Decided On :** Jan-30-2017

**Appellant** : Sunil Kumar

**Respondent** : State

**Judgement** :

* % + IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on:

24. h January, 2017 Decided on:

30. h January, 2017 CRL.A. 634/2001 SUNIL KUMAR STATE Represented by: Ms. Shradha Karol, ..... Appellant Versus Represented by: Ms.Vasundhara Nagrath and Mr. Varun Chawla, Advs. with appellant. ..... Respondent Mr. Ashok Kumar Garg, APP for the State. CORAM: HON'BLE MS. JUSTICE MUKTA GUPTA1 Sunil Kumar challenges the impugned judgment dated 27th July, 2001 convicting him for offences punishable under Section 366/368/376 IPC and the order on sentence dated 3rd August, 2001 directing him to undergo rigorous imprisonment for a period of seven years with a fine of `500/- each for the offences punishable under Section 366/368/376 IPC.

2. The prosecution case springs out of a complaint lodged on 12th March 1998 by PW-11, father of the prosecutrix, wherein he stated that on 9th March, 1998 around 8:30 P.M., PW-1the prosecutrix left the home without informing anyone. On 10th March, 1998, he had lodged a missing complaint vide DD No.9. He tried

to search for her but he could not find her. He also stated that he suspected that Sunil, who stays opposite to his house, had enticed her. On the basis of his statement Ex. PW-5/A, FIR number 191/1998 was registered at PS Ambedkar Nagar under Section 363 IPC. On Crl.A. 634/2001 Page 1 of 8 27th March, 1998, the prosecutrix PW-1 was recovered from Anand Vihar bus stand. Sunil Kumar was arrested by PW-12 HC Balbir. Both the prosecutrix and Sunil Kumar were medically examined. Statement of the prosecutrix was recorded under Section 164 Cr.P.C. Charges for offences punishable under Sections 363/368/376 IPC were framed against Sunil Kumar. After recording statements of 12 witnesses including the prosecutrix, learned trial court convicted the appellant as above.

3. Learned amicus curiae, at the very outset, submits that since the appellant was not given the right to legal aid, the trial was conducted in violation of Article 21 of the Constitution of India. In order to substantiate her submission, she points out that the appellant was not given an adequate opportunity to cross examine the prosecution witnesses and since he was not represented by a counsel, none of the prosecution witnesses were cross examined. She further stated that out of the 12 prosecution witnesses, only one prosecution witness being PW-10 Dr. Kirti Ram, Record Clerk, AIIMS could be cross examined.

4. A perusal of the order sheets of the learned Trial Court reveals that when arguments were heard on charge, counsel for the appellant was not present. The order sheet dated 29th April, 1999 notes that the counsel for the appellant entered appearance only after charge was framed and since his vakalatnama was not on record, production of the appellant was directed who had already been sent to custody. On the next date, learned counsel for appellant took the plea of juvenility which was rejected vide order dated 25th May, 1999 in view of the age of the juvenile noted in the conviction slip. The matter was adjourned for several dates as the CFSL report was not received. On 27th July, 1999, statement of PW-1 was recorded in part in the pre-lunch session however post lunch learned counsel for the appellant was not present hence the matter was adjourned to the next date Crl.A. 634/2001 Page 2 of 8 i.e. 30th August, 1999 on which date also since despite pass over, counsel for the accused was not present as he was not well, witnesses were examined and discharged. Thereafter, no counsel appeared for

the appellant and at no stage, the appellant was informed the right to legal aid. Examination-in-chief of the witnesses was recorded and no cross-examination on behalf of the appellant was conducted as the appellant had no counsel. It is thus evident that during the course of trial, the appellant was not represented by any lawyer.

5. The issue with respect to the legal consequences on failure to provide legal aid to an accused was dealt with by the Supreme Court in the decision reported as (2012) 9 SCC1Mohd. Ajmal Amir Kasab v. State of Maharashtra wherein it was held: 477. Every accused unrepresented 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 an informed decision 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 (see Suk Das v. UT of Arunachal Pradesh [(1986) 2 SCC401:

1986. SCC (Cri) 166]. ).

478. But the failure to provide a lawyer to the accused at the pre- trial stage may not have the same consequence of vitiating the trial. It may have other consequences like making the delinquent Magistrate liable to disciplinary proceedings, or giving the accused a right to claim compensation against the State for failing to provide him legal aid. But it would not vitiate the trial unless it is shown that failure to provide legal assistance at the pre-trial stage had resulted in some material prejudice to the accused in the course of the trial. That would have to be judged on the facts of each case. Crl.A. 634/2001 Page 3 of 8 In the present case, though the appellant was duly represented by the 6. lawyer, however, the lawyer didn't appear in the midst of trial as a result of which the prosecution witnesses could not be cross examined. It was the duty of the learned Additional Sessions

Judge to inform the appellant about his right to legal aid which is enshrined within the mandate of Article 21 of the Constitution of India. The duty of the Court does not end by offering of a lawyer, the accused should be informed about the consequences and danger of waiver. The present case is not one where the appellant was offered a counsel at State expense which he refused. The appellant was not informed about his right of legal aid and without providing legal aid, the opportunity to cross examine the prosecution witnesses was closed. Since the appellant was not represented by a lawyer, he could not even file an application to recall the witnesses whose cross-examination in the least was essential.

7. The next issue which crops up before this Court is that since the appellant was not given legal aid, whether the matter should be remanded back or this Court can hear the appeal and decide the same. This issue is no longer res integra.

8. The Supreme Court in the decision reported as (2012) 2 SCC584Mohd. Hussain Vs. State (Govt. of NCT of Delhi) in a similar situation noting from the order sheets all the proceedings before the Sessions Court observed that the counsel for the accused 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. Out of 65 witnesses examined by the prosecution, the evidence of 56 witnesses was recorded without providing a counsel to the accused. The two learned Crl.A. 634/2001 Page 4 of 8 Judges unanimously thus 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, difference of opinion arose on the consequential order required to be passed. 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 the decisions reported as (1978) 3 SCC544M.H. Haskot Vs. State of Maharashtra, (2011) 4 SCC729Mohd. Sukur Ali Vs. State of Assam and (1980) 1 SCC98Hussainara Khatoon Vs. State of Bihar and concluded that accused was not provided the assistance of a counsel in a substantial and meaningful sense and to hold otherwise would be simply to ignore actualities and also would be to ignore the fundamental postulates already adverted to. Justice Dattu opined that the case was required to be remanded back to the Trial Court with a specific

direction that the Trial Court would assist the accused in employing a State counsel before commencement of the trial till its conclusion. However, Justice C.K. 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. In view of the difference of opinion on the procedure to be followed after unanimously holding that the trial was vitiated, the matter was placed before the larger bench of three learned Judges of the Supreme Court.

9. In the decision reported as (2012) 9 SCC408Mohd. Hussain Vs. State (Govt. of NCT of Delhi) (hereinafter referred to as Mohd. Hussain-II) the three learned Judges unanimously 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 and the retrial of the Appellant in the facts and circumstances is indispensable. The Court held- Crl.A. 634/2001 Page 5 of 8 44. It cannot be ignored that the offences with which the appellant has been charged are of very serious nature and if the prosecution succeeds and the appellant is convicted under Section 302 IPC on retrial, the sentence could be death or life imprisonment. Section 302 IPC authorises the court to punish the offender of murder with death or life imprisonment. Gravity of the offences and the criminality with which the appellant is charged are important factors that need to be kept in mind, though it is a fact that in the first instance the accused has been denied due process. While having due consideration to the appellant's right, the nature of the offence and its gravity, the impact of crime on the society, more particularly the crime that has shaken the public and resulted in death of four persons in a public transport bus cannot be ignored and overlooked. It is desirable that punishment should follow offence as closely as possible. In an extremely serious criminal case of the exceptional nature like the present one, it would occasion in failure of justice if the prosecution is not taken to the logical conclusion. Justice is supreme. The retrial of the appellant, in our opinion, in the facts and circumstances, is indispensable. It is imperative that justice is secured after providing the appellant with the legal practitioner if he does not engage a lawyer of his choice. 10. The Division Bench of this Court in the decision reported as 2014 SCC OnLine Del 794 State v. Sanjay Kumar Valmiki while dealing with the concept of fair trial and consequences for not providing the opportunity to cross examine the prosecution

witnesses, remanded back the matter to the Trial Court to conduct a fresh trial expeditiously. The relevant extract is reproduced hereinbelow:

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 Crl.A. 634/2001 Page 6 of 8 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. *** 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 arnicas 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. 11. Thus, in view of the aforesaid, the matter is remanded back to the Trial Court for fresh trial which would be completed as expeditiously as possible.

12. Appeal is disposed of accordingly. When the appellant was convicted, he was in custody and his sentence was suspended pending hearing of the present appeal. Since the appellant has already undergone nearly four years and six months of imprisonment when his sentence was suspended by this Court, on appearance of the appellant before learned Trial Court on 3rd March, 2017, the appellant be released on bail on his furnishing personal bond in the sum of 15000/- with one surety of the like amount to the satisfaction of the learned Trial

Court. Crl.A. 634/2001 Page 7 of 8 13. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

14. TCR be returned. JANUARY30 2017 vkm (MUKTA GUPTA) JUDGE Crl.A. 634/2001 Page 8 of 8

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