Azmal @ Aslam vs.state

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Court : Delhi

Decided On : Sep-14-2017

Appellant : Azmal @ Aslam

Respondent : State

Judgement :

* % + IN THE HIGH COURT OF DELHI AT NEW DELHI Judgment reserved on 11.08.2017 Judgment pronounced on:

14. 09.2017 CRL.A. 207/2016 RAFIQUE Through Mr.Aditya Guar, Adv. with Mr.Chandan Kumar, Adv. ..... Appellant versus THE STATE (GOVT OF NCT DELHI) ..... Respondent Through Mr.Tarang Srivastava, APP for State with SI Alok Bajpai, P.S. Kashmere Gate. + CRL.A. 208/2016 NAZIM ..... Appellant Through Mr.Ritesh Bahri, Adv. with Mr.Vipin Bansal and Mr.Pradeep Prajapati, Advs. versus THE STATE (GOVT OF NCT DELHI) ..... Respondent Through Ms.Aashaa Tiwari, APP for State with SI Alok Bajpai, P.S. Kashmere Gate. Crl. Appeals 207/2016, 208/2016, 345/2016, 467/2016 &530/2016 Page 1 of 20 + CRL.A. 345/2016 RAHIS Through Mr.Gaurav Vashistha, Adv. with Mr.Jagdish Chandra, Adv. ..... Appellant versus STATE (GOVT OF NCT OF DELHI) ..... Respondent Through Mr.Tarang Srivastava, APP for State with SI Alok Bajpai, P.S. Kashmere Gate. + CRL.A. 467/2016 AZMAL @ ASLAM STATE ..... Appellant Through Mr.Aditya Guar, Adv. with Mr.Chandan Kumar, Adv. versus ..... Respondent Through Mr.Tarang Srivastava, APP for State with SI Alok Bajpai, P.S. Kashmere Gate. + CRL.A. 530/2016 MAKSUD AHMED ..... Appellant Through Mr.Aditya

Guar, Adv. with Mr.Chandan Kumar, Adv. versus Page 2 of 20 Crl. Appeals 207/2016, 208/2016, 345/2016, 467/2016 &530/2016 THE STATE (GOVT OF NCT DELHI) ..... Respondent Through Mr.Tarang Srivastava, APP for State with SI Alok Bajpai, P.S. Kashmere Gate. CORAM: HON'BLE MR. JUSTICE VINOD GOEL VINOD GOEL, J.

1. 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. This is so held by the Honble Supreme Court in a case of Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid vs. State of Maharashtra, (2012) 9 SCC1 2. A constitutional amendment was carried out by inserting Article 39-A in the Constitution by the Constitution 42nd Amendment Act, 1976 with effect from 3rd January, 1977 as part of the Crl. Appeals 207/2016, 208/2016, 345/2016, 467/2016 &530/2016 Page 3 of 20 Directive Principles of the State Policy. The Article reads as under:-

"Article 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. 3. In order to achieve the object of the amendment of the Constitution by 42nd Amendment Act, 1976, the Parliament enacted the Legal Services Authorities Act, 1987, which came into force from 9th November, 1995. The Statement of Objects and Reasons of the Act, insofar as relevant for the present, reads as under: Article 39A of the Constitution provides that 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. 4. The Honble Supreme Court in Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid (supra), noted that this development by way of insertion of Article 39-A in the Constitution and enactment of Legal Services Authorities Act, 1987 and its enforcement from 9th November, 1995 indicates the Crl. Appeals 207/2016, 208/2016, 345/2016, 467/2016 &530/2016 Page 4 of 20 direction in which the law relating to access to lawyers/legal aid has developed and continues to develop. 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.

5. While upholding the right of the accused to be represented through a lawyer, the Honble Supreme Court in Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid (supra), observed as under: 474. 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 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. from Articles 21 and 22(1) of Crl. Appeals 207/2016, 208/2016, 345/2016, 467/2016 &530/2016 Page 5 of 20 475. It needs to be clarified here that the right to consult and be defended by a legal practitioner is not to be construed as sanctioning or permitting the presence of a lawyer during police interrogation. According to our system of law, the role of a lawyer is mainly focused on court proceedings. The accused would need a lawyer to resist remand to police or judicial custody and for granting

of bail; to clearly explain to him the legal consequences in case he intended to make a confessional statement in terms of Section 164 Cr PC; to represent him when the court examines the chargesheet submitted by the police and decides upon the future course of proceedings and at the stage of the framing of charges; and beyond that, of course, for the trial. It is thus to be seen that the right to access to a lawyer in this country is not based on the Miranda principles, as protection against self-incrimination, for which there are more than adequate safeguards in Indian laws. The right to access to a lawyer is for very Indian reasons; it flows from the provisions of the Constitution and the statutes, and is only intended to ensure that those provisions are faithfully adhered to in practice. 6. It is trite that a failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence.

7. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty, stage- managed, tailored and partisan trial. The fair trial for a criminal offence consists not only in technical observance of the frame Crl. Appeals 207/2016, 208/2016, 345/2016, 467/2016 &530/2016 Page 6 of 20 and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice. This was observed by the Honble Supreme Court in Zahira Habibulla Sheikh (5) and Anr. v. State of Gujarat and Ors., (commonly known as Best Bakery Case) (2004) 4 SCC158 This was reiterated by the larger Bench of the Honble Supreme Court in Mohd. Hussain Alias Julfikar Ali v. State (Government of NCT of Delhi), (2012) 9 SCC408 8. Honble Supreme Court in Jayendra Vishnu Thakur v. State of Maharashtra, (2009) 7 SCC104 has held that an accused has not only a valuable right to represent himself, he has also the right to be informed thereabout. The Apex Court further held that Section 137 of the Indian Evidence Act, 1872 provides for examination-in-chief, cross-examination and re-examination. Section 138 of the 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.

9. While holding right of the accused to cross-examine the prosecution witnesses, the Apex Court has held in P. Sanjeeva Rao v. State of A.P., (2012) 7 SCC56as under: 18. Denial of an opportunity the witnesses for cross-examination would amount to to recall Crl. Appeals 207/2016, 208/2016, 345/2016, 467/2016 &530/2016 Page 7 of 20 condemning the appellant without giving him the opportunity to challenge the correctness of the version and the credibility of the witnesses. It is trite that the credibility of witnesses whether in a civil or criminal case can be tested only when the testimony is put through the fire of cross-examination. Denial of an opportunity to do so will result in a serious miscarriage of justice in the present case keeping in view the serious consequences that will follow any such denial. 10. These are the questions which are involved in adjudication of these five criminal appeals. The appellants were convicted by the impugned judgment dated 23rd January, 2016 under section 120-B r/w
IPC passed by the learned ASJ-03 (Central), Tis Hazari Courts, Delhi, in Session Case No.158/2011 vide FIR No.253/2008, Police Station Kashmere Gate, under Section 394/397/120-B/4
IPC.

11. The order on sentence was passed by the trial court on 29th January, 2016.

12. Even during the course of arguments, learned counsels for the appellants brought to the notice of this Court that out of 15 witnesses examined by the prosecution, there are at least six witnesses who were not cross-examined by the respective counsels for the appellants.

13. It is submitted that when these witnesses were examined, the counsels for the appellants were not present in the Court and the trial court after recording the examination-in-chief of these six Crl. Appeals 207/2016, 208/2016, 345/2016, 467/2016 &530/2016 Page 8 of 20 witnesses had written cross-examination by accused persons, Nil, opportunity given and thus the trial court has denied fair trial to the appellants. Learned counsel for appellants submitted that the star witness/victim who was examined as PW-1 Sh.Naveen Kumar and another important witness PW-11 HC Pramod, who apprehended the accused Rafiq and in whose presence some of the robbed money was recovered, were not cross-

examined.

14. They submitted that similarly PW-2 SI Ms.Upkar Kaur, PW-13 Dr.Priya Ranjan and PW-14 Sh.Dharmender Rana and PW-15 Ms.Suman were not allowed to be cross-examined by the trial court as the counsels for the appellants were not present in the court at the relevant time.

15. They further pointed out that the appellants even moved an application under Section 311 Cr.P.C. before the trial court to allow them to cross-examine the star witness PW-1 Sh.Naveen Kumar which was dismissed by an order dated 12th February, 2015 without any justifiable reason.

16. The record revealed that examination-in-chief of PW-1 Sh.Naveen Kumar and PW-2 SI Ms.Upkar Kaur were recorded on 20th April, 2013. The order of the trial court dated 20th April, 2013 reads as under: FIR No.2
PS: Kashmere Gate Crl. Appeals 207/2016, 208/2016, 345/2016, 467/2016 &530/2016 Page 9 of 20 All the accused persons on bail. 20.04.2013 Present: Shri G.S. Guraya, ld. Addl. PP for State. Three PWs are present out of them two have been examined, cross examined and discharged. One PW SI Mam Chand is present but the said witness has been dropped by the ld. Addl. PP as unnecessarily witness of the case. 24.5.2013. ASJ-03 (Central)/20.04.2013 Let this matter is listed for entire PE on Sd/- (.) 17. In the statement of PW-1 Naveen Kumar, the trial court had mentioned regarding the cross-examination as xxxxx by Shri Sushil Kumar, ld. Counsel for the accused Maqsood. Nil. Opportunity given. xxxx by all the remaining accused persons. Nil. Opportunity given. The Court had although waited upto 1.25 p.m. 18. Regarding PW-2 SI Ms.Upkar Kaur, the trial court had mentioned regarding the cross-examination as xxxxx by Shri Sushil Kumar, ld. Counsel for the accused Maqsood. Nil. Opportunity given. xxxx by all the remaining accused persons. Nil. Opportunity given. Crl. Appeals 207/2016, 208/2016, 345/2016, 467/2016 &530/2016 Page 10 of 20 19. Similarly statement of PW-11 HC Pramod was recorded on 4th March, 2015 and the trial court had mentioned in the statement regarding the cross-examination as xxxxx by accused persons. Deferred as the ld. Counsel is not available. 20. The statements of PW-13, PW-14 and PW-15 were recorded on 4th March, 2015 and they were also not

cross-examined. Order of the trial court dated 4th March, 2015 reads as under: State vs. Maksood Ahmed etc. FIR No.2
PS: Kashmere Gate 04.03.2015 Present: Shri Alok Saxena, Ld. Addl. PP for the State. All the accused persons on bail. Three PWs are present. HC Pramod, SI Rajesh have been examined in chief and their cross-examination is deferred as the Ld. Counsel is not available. Dr.Priya Ranjan has been examined, cross-examined and discharged. Put up for PE on 04.04.2015. Sd/- (..) ASJ-03 (Central), Delhi. 21. Admittedly, the trial court in its impugned judgment had referred to the statements and relied upon the testimonies of all these six witnesses i.e. PW-1, PW-2, PW-11, PW-13, PW-14 and PW-15 to convict the appellants. Such a trial unknown to law has been conducted by the trial court. The appellants were convicted by Crl. Appeals 207/2016, 208/2016, 345/2016, 467/2016 &530/2016 Page 11 of 20 the trial court without providing an opportunity to be represented by their counsels or by providing legal aid counsel if their counsels were not available at the relevant time and without these said six witnesses being cross-examined.

22. The principle laid down in Jayendra Vishnu Thakur (supra) was reiterated by the Supreme Court in Mohd. Hussain Alias Julfikar Ali (supra) that every person 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.

23. Even application of the appellants under section 311 of Cr.P.C. was dismissed by the trial court by a perverse and whimsical order dated 12th February, 2015 without realizing that the appellants were denied fair trial by not giving them an opportunity to cross-examine the said six prosecution witnesses. The Trial Court concluded that the accused had not moved an application for re-examination of PW-1 under Section 311 of the Cr.P.C. till PW-9 was not examined as PW-9 did not support the prosecutions case because the accused Nazim, Rahis and their counsel along with two or three persons had visited the house of the complainant/PW-1 and threatened him not to depose. Crl. Appeals 207/2016, 208/2016, 345/2016, 467/2016 &530/2016 Page 12 of 20 24. The record revealed that on informing the trial court by PW-1 regarding the visit by one of the accused

and his counsel, he was taken into the custody and later on he was released on bail. Even if there were attempts on behalf of any of the appellants to win over or overawe the witness, the trial court could have taken other stringent measures including providing protection to the witness and taking into custody the concerned accused/appellant. Be that as it may, certainly the trial court could not have denied their right to be represented by a counsel and cross-examine the witnesses.

25. At the time of final arguments, the learned counsel representing the appellants requested the trial court that the appellants were not given an opportunity to cross-examine the said witnesses and their testimonies should not be considered.

26. The powers of the appellate court are enumerated in Section 386 of Cr.P.C. which is reproduced as under: 386. Power of the Appellate Court. After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may- (a) in an appeal from an order or acquittal, reverse such order and direct that further inquiry be made, or that the accused be re- tried or committed for trial, as Crl. Appeals 207/2016, 208/2016, 345/2016, 467/2016 &530/2016 Page 13 of 20 the case may be, or find him guilty and pass sentence on him according to law; (b) in an appeal from a conviction- (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re- tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or (ii) alter the finding, maintaining the sentence, or (iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same; In in an appeal for enhancement of sentence- (i) reverse the finding and sentence and acquit or discharge the accused or order him to be re- tried by a Court competent to try the offence, or (ii) . 27. In the present case, it is beyond doubt that the trial court has not followed the due process of law while denying the appellants their valuable rights to be represented through counsel and to cross-examine PW-1, PW-2, PW-11, PW-13, PW-14 and PW-15 which has caused them serious prejudice and the trial was vitiated. Therefore, the impugned judgment dated 23rd January, 2016 thereby convicting the appellants and the consequential

order on sentence dated 29th January, 2016 against the appellants are hereby set aside. Crl. Appeals 207/2016, 208/2016, 345/2016, 467/2016 &530/2016 Page 14 of 20 28. In such a situation where the conviction and consequential sentence have been set aside, this Court has power to order the re-trial of the appellants/accused under Section 386(b) of the Cr.P.C.

29. In Zahira Habibullah Sheikh (5) and Anr. (supra), the Honble Supreme Court of India has held that whether a re- trial under section 386 of the Cr.P.C. or taking up of the additional evidence under section 391 of the Cr.P.c. in a given case is the proper procedure will depend upon the facts and circumstances of each case for which no straight jacket formula of universal and invariable application can be formulated.

30. While dealing with the issue of the re-trial, the Apex Court in Mohd. Hussain Alias Julfikar Ali (supra) has held as under: 41. Speedy trial and fair trial to a person accused of a crime are integral part of Article 21. There is, however, qualitative difference between the right to speedy trial and the accuseds right of fair trial. Unlike the accuseds right of fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. The right to speedy trial is in its very nature relative. It depends upon diverse circumstances. Each case of delay in conclusion of a criminal trial has to be seen in the facts and circumstances of such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment. The factors concerning the accuseds right to speedy trial have to be weighed vis-a-vis the impact of the crime on society and the confidence of the people in judicial Crl. Appeals 207/2016, 208/2016, 345/2016, 467/2016 &530/2016 Page 15 of 20 system. Speedy trial secures rights to an accused but it does not preclude the rights of public justice. The nature and gravity of crime, persons involved, social impact and societal needs must be weighed along with the right of the accused to speedy trial and if the balance tilts in favour of the former the long delay in conclusion of criminal trial should not operate against the continuation of prosecution and if the right of accused in the facts and circumstances of the case and exigencies of situation tilts the balance in his favour, the prosecution may be brought to an end. These principles must apply

as well when the appeal court is confronted with the question whether or not retrial of an accused should be ordered.

42. 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 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 the society are not altogether overlooked. interests of trial and the same Crl. Appeals 207/2016, 208/2016, 345/2016, 467/2016 &530/2016 Page 16 of 20 the offences and 43Gravity of 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 appellants 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 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. failure of in justice if xxxxxxxx 46. In what we have discussed above we answer the reference by holding that the matter requires to be remanded for a de novo trial. The Additional Sessions Judge shall proceed with

the trial of the appellant in Sessions Case No.122 of 1998 from the stage of prosecution evidence and shall further ensure that the trial is concluded as expeditiously as may be possible and in no case later than three months from the date of communication of this order. 31. In the present case, the appellants had faced the trial under section 120-B read with section 394 and 397 IPC which are serious offences. Once an accused is convicted under section 394 IPC, he can be incarcerated for life in jail while the minimum Crl. Appeals 207/2016, 208/2016, 345/2016, 467/2016 &530/2016 Page 17 of 20 punishment under section 397 shall not be less than seven years. Re-trial in the present case can result in the conviction either being confirmed or set aside but such a decision must be the outcome of the due process of law. The question of re-trial was earlier considered by a Constitution Bench of the Honble Supreme Court in Gopi Chand v. Delhi Administration, AIR 1959 SC609 wherein plea of the validity of the trial and of the orders of conviction and sentence was raised by the appellant. That was a case where the appellant was charged for three offences which were required to be tried as a warrant case by following the procedure prescribed in the Criminal Procedure Code, 1860 but he was tried under the procedure prescribed for the trial of a summons case. The procedure for summons case and warrants case was materially different. The Constitution Bench held that having regard to the nature of the charges framed and the character and volume of evidence led, the appellant was prejudiced; the trial of the three cases against the appellant was vitiated and the orders of conviction and sentence were rendered invalid. The Court, accordingly, set aside the orders of conviction and sentence. While dealing with the question as to what final order should be passed in the appeals, the Constitution Bench held as under: 29. ..The offences with which the appellant stands charged are of a very serious nature; and though it is true that he has had to undergo the ordeal of a trial and has suffered rigorous imprisonment for Crl. Appeals 207/2016, 208/2016, 345/2016, 467/2016 &530/2016 Page 18 of 20 some time that would not justify his prayer that we should not order his retrial. In our opinion, having regard to the gravity of the offences charged against the appellant, the ends of justice require that we should direct that he should be tried for the said offences de novo according to law. We also direct that the proceedings to be taken against the appellant hereafter should be commenced without delay and should be

disposed as expeditiously as possible. 32. In view of the above discussion, the learned ASJ or the successor ASJ shall proceed with the trial of the appellants in Session Case No.158/2011 vide FIR No.253/2008, Police Station Kashmere Gate, under Section 394/397/120-B/4
IPC, from the stage of the prosecution evidence and shall ensure that the trial is concluded as expeditiously as may be possible and in no case later than three months from the date of communication of this order.

33. Since the accused/appellants were on bail at the time of announcement of the impugned order dated 23rd January, 2016 of conviction, they be set free from the custody provided they are not required in any other case. The appellants are directed to appear before the trial court on 25.09.2017 at 10:00 AM to face the re-trial. The trial court shall direct the appellants to furnish fresh bail and surety bonds with such terms and conditions as it deems fit in the facts and circumstances of the case. Crl. Appeals 207/2016, 208/2016, 345/2016, 467/2016 &530/2016 Page 19 of 20 34. This court expects that the ld. defence counsels engaged by the appellants shall cooperate with the learned Addition Sessions Judge and they shall remain available to cross-examine witnesses. In case, the appellants are not able to engage the counsels the Ld.ASJ shall provide them Amicus Curiae or Legal Aid counsel.

35. Copy of this order be circulated to all the Judicial Officers for their guidance. SEPTEMBER14, 2017/jitender (VINOD GOEL) JUDGE Crl. Appeals 207/2016, 208/2016, 345/2016, 467/2016 &530/2016 Page 20 of 20