

Abdul Razack Vs. State of Kerala

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Court : Kerala

Decided On : Aug-27-2009

Reported in : 2009CriLJ4705; 2009(3)KLJ343

Judge : K. Balakrishnan Nair and; P.S. Gopinathan, JJ.

Acts : Indian Penal Code (IPC) - Sections 302; [Constitution of India](#) - Articles 3, 14, 19, 21 and 39A; Legal Aid to Accused Rules, 1992 - Rules 3, 3(6) and 4; Code of Criminal Procedure (CrPC) - Sections 304 and 304(2)

Appeal No. : CrI. A. No. 1771 of 2005

Appellant : Abdul Razack

Respondent : State of Kerala

Advocate for Def. : Noble Mathew, (P.P.)

Advocate for Pet/Ap. : P. Samsudin, Adv.

Disposition : Appeal allowed

Judgement :

Balakrishnan Nair, J.

1. The appellant, feeling aggrieved by his conviction and the sentence imposed on him in Sessions Case No. 262/01 on the files of the Court of Sessions, Manjeri,

has preferred this Criminal Appeal. The case against the appellant was as follows:

The appellant was residing with his wife Rasiya and two children in a rented building bearing Door No. 7/87 of Edakara Grama Panchayat. On the fateful day, there was a quarrel between the husband and wife and this led to the appellant pouring kerosene over Rasiya and setting fire to her at about 10 p.m. She Was taken to the nearby hospital at Nilambur and from there to the Medical College Hospital, Kozhikode. While undergoing treatment, she breathed her last on 2.9.1997. Based on the F.I. Statement given by the deceased and the dying declaration made before the learned Magistrate, the police charge-sheeted the appellant for the offence punishable under Section 302 of the Indian Penal Code (for short IPC). The Judicial First Class Magistrate, before whom the charge-sheet was filed, committed the case for trial by the Sessions Court.

2. Before the trial court, the appellant pleaded not guilty to the charge. The prosecution, to prove its case, examined PWs 1 to 15 and marked Exts. P1 to P16, Material objects MO 1 to MO6 were also produced. The trial court found the appellant guilty of the offence under Section 302 of the IPC, sentenced him to undergo imprisonment for life and also to . pay a fine of Rs. 10,000/-. In default, it was ordered that he should undergo rigorous imprisonment for a further period of one year.

3. The aggrieved appellant attacks the judgment of the court below on various grounds. One of the contentions raised before us was that the defence counsel arranged by the Sessions Court, in terms of Section 304 of the Cr.P.C. read with Rules 3 and 4 of the Legal Aid to Accused Rules, 1992 was a raw junior. The examination of the witnesses in this case started on 7.2,2005. Going by Annexure-A1 produced along with Cri.MA No. 8247/09, it is pointed out that the lawyer, who defended the appellant, was enrolled only on 20.10.2002. That means, he has less than three years' practice and so, the engagement of such a lawyer was contrary to the aforementioned provision of the Cr.P.C. and the Rules of the Legal Aid to Accused Rules, 1992, it is submitted. The defence arranged by the State for the appellant, who cannot afford to engage a lawyer by himself, was so poor that he did not get a fair trial. So, the conviction and sentence imposed on him is

unsustainable in law, it is submitted. In support of the above submission, reliance was placed on the decision of the Apex Court in *Kishore Chand v. State of Himachal Pradesh* : 1991 (1) SCC 286. The appellant, apart from attacking the conviction and sentence, on other grounds, highlighted the above vitiating circumstance affecting the trial and prayed for remand of the matter, so that he can get the service of an experienced lawyer for cross-examination of the witnesses.

4. We heard the learned Public Prosecutor on the above point. The learned Public Prosecutor submitted that going by the facts of the case, no prejudice has been caused to the appellant and even if there is violation of Section 304 of the Cr.P.C. or of the aforementioned Rules, unless prejudice is established, it is not necessary for this Court to remand the matter.

5. We considered the rival submissions made at the Bar. We have gone through the entire evidence on record, including the deposition of the witnesses and the Exhibits produced by the prosecution. Before dealing with the contentions of the parties, we will presently refer to the relevant statutory provisions. Section 304 Cr.P.C. reads as follows:

304. Legal aid to accused at State expense in certain cases - (1) 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,

(2) The High Court may, with the previous approval of the State Government, make rules providing for:

(a) the mode of selecting pleaders for defence under Sub-section (1);

(b) the facilities to be allowed to such pleaders by the Courts;

(c) the fee payable to such pleaders by the Government, and generally, for carrying out the purposes of Sub-section (1).

(3) The State Government may, by notification, direct that, as from such date as may be specified in the notification, the provisions of Sub-sections (1) and (2) shall apply in relation to any class of trials before other Courts in the State as they apply in relation to trials before the Courts of Session.

The Kerala High Court has framed Rules under Sub-section 2 of Section 304 of the Cr.P.C. as Legal Aid to Accused Rules, 1992. Rules 3 and 4 of the aforementioned Rules read as follows:

3. Panel of Pleaders - (1) Every Criminal Court shall maintain a panel of pleaders consisting of not less than five, for the purpose of these Rules.

(2) All Magistrate Courts of coordinate jurisdiction functioning at a place shall be treated as one Court for the purpose of this Rule and the number of pleaders in the panel shall not be less than five times the number of such courts of co-ordinate jurisdiction and the seniormost among the Magistrates shall prepare the panel.

(3) All benches of the Sessions Court(including Additional Sessions and Assistant Sessions) functioning at a place shall be treated as one court for the purpose of this Rule and the number of pleaders in the panel shall not be less than five times the number of such benches and the Sessions Judge shall prepare the panel.

(4) Additional Sessions Courts and Assistant Sessions Courts functioning at a place different from the seat of the Sessions Judge of a particular Sessions Division shall have a separate panel in accordance with these Rules and the Additional or Assistant Sessions Judge shall prepare the panel.

(5) The panels to be prepared under Sub-rules (3) and (4) shall consist of two panels of Advocates, a senior panel and a junior panel and the number of Advocates to be included in each panel shall be the same.

(6) (a) No Advocate who has put in less than 5 years of actual practice shall be eligible for inclusion in the senior panel.

(b) No Advocate who has put in less than 2 years of actual practice shall be eligible for inclusion in the junior panel.

4. Appointment of Pleaders: Advocates in the senior panel alone shall, ordinarily, be appointed in sessions case and in other cases where the offence is punishable with imprisonment for more than 10 years. In all other cases, including criminal appeals and revisions, Advocates in the Junior panel shall, as far as possible, be appointed unless the Court is of the opinion that an Advocate from the senior panel is necessary in view of the complexity of the case.

6. Going by Rule 4 of the above quoted Rules, for, sessions trials, where the offence is punishable with imprisonment for more than ten years, ordinarily a member of the senior panel shall be engaged to render legal aid to the accused. Sub-rule 6 of Rule 3 provides that only the persons having five years' actual practice shall be eligible for inclusion in the senior panel. So, the defence lawyer was engaged in this case in violation of Rules 3 and 4 quoted above, During the trial, even if any statutory provision is violated, ordinarily, the same will not by itself vitiate the trial or the resultant conviction. The point to be considered is whether any prejudice has been caused. When we went through the evidence, we noticed that on many material points no effective cross-examination was made by the defence lawyer. The contradictions in the deposition of the witnesses with reference to their earlier statements before the police were not put to them or marked. The omissions in the earlier statements with reference to the statements made in the box were also not brought to the notice of the witnesses concerned. Further, concerning many' material witnesses, we find practically there was no cross-examination. So, we are of the view that the engagement of a junior lawyer to defend the accused has seriously prejudiced the appellant. He did not get a fair trial. Article 39A of the [Constitution of India](#) proclaims 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. In discharge of the above obligation, Parliament has framed Section 304 of the Cr.P.C. In obedience to the mandate of Sub-section 2 of Section 304, the High Court has framed Legal Aid to Accused Rules, 1992. Article 21 proclaims that no person shall be deprived of his life or personal liberty except according to procedure established by law. The view that any law is sufficient to deprive the life or

personal liberty, taken in *A.K. Gopalan v. State of Madras* : AIR 1950 SC 27 has been buried deep and now it is well settled that the procedure contemplated under Article 21 should be a just, fair and reasonable procedure. See the leading decision on this point *Maneka Gandhi v. Union of India* : AIR 1978 SC 597. The same principle has been dealt with by the Apex Court in the decision in *Suk Das v. Union Territory of Arunachal Pradesh* : 1986 (2) SCC 401. It is equally well-settled now that if fair trial is denied to an accused and as a result, his life or liberty is deprived, the same will amount to violation of Article 21 of the [Constitution of India](#). In *Kishore Chand (Supra)*, the decision cited by the learned Counsel for the appellant, it was held as follows:

12. ...Undoubtedly, heinous crimes are committed under great secrecy and that investigation of a crime is a difficult and tedious task. At the same time the liberty of a citizen is a precious one guaranteed by Article 3 of Universal Declaration of Human Rights and also Article 21 of the [Constitution of India](#) and its deprivation shall be only in accordance with law. The accused has the fundamental right to defend himself under Article 10 of Universal Declaration of Human Rights. The right to defence includes right to effective and meaningful defence at the trial. The poor accused cannot defend effectively and adequately. Assigning an experienced defence counsel to an indigent accused is a facet of fair procedure and an in built right to liberty and life envisaged under Articles 14, 19 and 21 of the Constitution....

13. Though Article 39A of the Constitution provides fundamental rights to equal justice and free legal aid and though the State provides amicus curiae to defend the indigent accused, he would be meted out with unequal defence if, as is common knowledge the youngster from the bar who has either a little experience or no experience is assigned to defend him.

7. Though the learned Public Prosecutor tried to distinguish the decision on facts, we think the principle laid down therein is a sound principle which binds us also. We also notice that poor lawyering of the defence lawyer is taken as a ground, vitiating the trial, in all civilised countries. The U.S. Supreme Court in *Strickland v. Washington* 80 Lawyers' Edition 2d 674 has held that ineffective assistance of defence counsel in criminal trial will violate the 'due process' clause. Similarly, the

Court of Appeal in Regina v. Ensor 1989 (1) WLR 497 observed that 'If the court had any lurking doubt that the appellant might have suffered some injustice as a result of fragrantly incompetent advocacy by his advocate, the court would quash the conviction'.

8. Keeping the above principles in mind, when the facts of this case are considered, we feel that the defence counsel has failed to properly conduct the case. The statements of the witnesses have become evidence without subjecting the same to proper cross-examination. The defence of the accused was not effectively projected. As suggested by the learned Counsel for the appellant, if the case was properly defended, the appellant might have been acquitted on the ground of benefit of doubt. Without meaning any disrespect to the counsel, who defended the accused, we are constrained to say that there was incompetent advocacy attributable to lack of experience and the same resulted in vitiating the trial of the appellant. On this ground alone, we are of the view that the conviction of the appellant is liable to be set aside. Therefore, it is unnecessary to go into other grounds raised by the appellant.

9. In the result, the Criminal Appeal is allowed. The conviction and sentence imposed on the appellant is set aside. Hereafter, he shall be treated as an under trial prisoner. The trial court shall issue warrant for production of the appellant before it. Upon his production, if bail application is moved, the trial court shall deal with the same in accordance with law. If bail is not granted, he shall be kept in judicial custody in the jail, where remand prisoners from the trial court are lodged, ordinarily.

10. The trial court shall arrange a competent lawyer to defend the appellant. The witnesses examined shall be recalled and the said counsel shall be given an opportunity to cross-examine them. Needless to say, the prosecution will be given a chance to re-examine them. Thereafter, the trial court shall proceed with the case in accordance with law.

The Criminal Appeal is allowed as above.

