

Modiya Vs. the State of Rajasthan

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Court : Rajasthan

Decided On : Dec-16-1983

Reported in : 1983WLN(UC)372

Judge : D.L. Mehta and; S.S. Vyas, JJ.

Appeal No. : D.B. Criminal (Jail) Appeal No. 208 of 1978

Appellant : Modiya

Respondent : The State of Rajasthan

Judgement :

1. This jail appeal by accused Modia is directed against the judgment of the learned Additional Sessions Judge, Sirohi dated May 8, 1978 convicting the appellant under Section 302 IPC and sentencing him to rigorous imprisonment for life with a fine of Rs. 200/-, in default of payment of fine to further undergo four months' rigorous imprisonment.

2. The charge framed by the learned Additional Sessions Judge against the accused was that he committed murder of Mota in village Korte on July 20, 1977 by inflicting injuries to him with Geti and an axe. The accused pleaded not guilty and faced the trial. Since the accused had no financial means to engage a defence counsel, the Court appointed amicus curiae for his defence in accordance with the provisions of Section 304 Cr. PC

3. The prosecution examined three eye witnesses and the Doctor, in addition to many other witnesses. On the conclusion of trial, the learned Sessions Judge held the charge proved against the accused-appellant. He was consequently convicted and sentenced.

4. In this Court also, the accused-appellant filed the appeal through jail. As such, the services of Shri J.M. Bhandari, Advocate were made available to the accused.

5. Launching an attack on the judgment of the court below. Shri J.M. Bhandari at the forefront of his arguments submitted that the trial stands vitiated because the learned amicus curiae who defended the accused in the Trial Court did not at all examine the prosecution witnesses. The appointment of the amicus curiae in the Trial Court was nominal without any material legal help to the accused. In these circumstances, the trial could not be said to be fair. It was also not carried out in a proper manner. In reply, Mr. R.P. Dave, learned Public Prosecutor submitted that since the service of amicus curiae were made available to the accused in the trial Court, he cannot now make any complaint that the Trial was not fair.

6. We have given our anxious consideration to the respective contentions urged before us.

7. Admittedly, the accused had no financial means to engage a lawyer for his defence. As such, the services of the amicus curiae were made available to him by the Trial Court. The need for free legal aid to an indigent person need not be stretched. It has been consistently held by their Lordships of the Supreme Court that in a case where the accused is unable to engage a counsel for his defence, it becomes the duty of the State to provide the services of a counsel for his defence at the State expenses. The modern thesis is that the criminal procedure providing trial should be reasonable, fair and just and unless it is reasonable, fair and just, it cannot be said to be a fair trial.

8. Article 21 of the Constitution provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. Article 21 would require the authority of law even if for the restriction of personal liberty. The Court is obliged to concede that in order to be a 'law' within the purview of this

Article, it must be a 'valid' law and that it is a valid law only if it is enacted by a competent Legislature and if does not violate any of the other fundamental right declared by the Constitution, i.e., Article 14 or Article 22. Under Article 21, it is open to challenge the constitutionality of a law which deprives a person of his life or personal liberty on the ground--(a) that it has not been enacted by a competent Legislature; (b) that the law suffers from the vice of excessive delegation; (c) that it constitutes a colourable exercise of the legislative powers; (d) that it contravenes any of the fundamental rights other than Article 21.

9. In *Maneka Gandhi v. Union of India* : [1978]2SCR621 , their Lordships of the Supreme Court observed:

that the requirement of compliance with natural justice was implicit in Article 21 and that if any penal law (e.g., the Passports Act) did not lay down the requirement of hearing before affecting him, that requirement would be implied by the Court, so that the procedure prescribed by law would be a reasonable and not arbitrary procedure.

It is difficult to hold that the substance of the doctrine of 'due process' has not still been infused into the conservative text of Article 21.

In *M.H. Hoskot v. State of Maharashtra* : 1978 CriLJ1678 , the provisions of Articles 21, 22, 39A and 142 of the Constitution were examined. It was observed by their Lordships:

It is integral to fair procedure, natural justice and normative universality save in special cases like the original tribunal being a high bench sitting on a collegiate basis. It short, a first appeal from the Sessions Court to the High Court as provided in the Criminal Procedure Code, manifests this value upheld in Article 21. Every step that makes the right of appeal fruitful is obligatory and every action or inaction which stultifies it is unfair and, argo, unconstitutional In a sense, even Article 19 may join hands with Article 21). Pertinent to the point are two requirements: (i) service of a copy of the judgment to the prisoner intine to file an appeal and (ii) provision of free legal services to a prisoner who is indigent or otherwise disabled from securing legal assistance where the ends of justice call for such service Both

these are State responsibilities Under Article 21. Where the procedural law provides for further appeals, these requirements will similarly apply.

The same principles were followed by their Lordships of the Supreme Court in *Hussainara Khatoon v. State of Bihar* : 1979 CriLJ1045 . Their Lordship of the Supreme Court observed as under:

When Article 21 provides that no person shall be deprived of his life or liberty except in accordance with the procedure established by law, it is not enough that there should be some semblance of procedure provided by law, but the procedure under which a person may be deprived of his life or liberty should be 'reasonable, fair and just'. Now, a procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as 'reasonable, fair and just'. It is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the court's process that he should have legal services available to him.

Article 39A of the Constitution, also emphasises that free legal service is an unalienable element of 'reasonable, fair and just' procedure for without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. 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 guarantees 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 required, provided of course the accused person does not object to the provision of such lawyer.

In *Hussainara Khatoon v. State of Bihar* : 1979 CriLJ1052 , it was observed by their Lordships of the Supreme Court as under:

It is the 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, to have free legal services provided to him by the State and the State is under a constitutional mandate to provide a lawyer to such accused person if the needs of justice so require. If free legal services are not provided to such an accused, the trial itself may run the risk of being vitiated as contravening Article 21 and every State Government should try to avoid such a possible eventuality.

We are fortified with our views by the observations made by their Lordships of the Supreme Court, in the above referred authorities.

10. Realising the necessity to provide free legal aid to an indigent accused in trial before the Court of Sessions, the Legislature inserted Section 304 in the Code of Criminal Procedure. The necessity to provide legal aid was felt by even the Law Commission. The Law Commission in its 48th Report observed:

We are of the view that defence of indigent accused by a pleader assigned by the State should be made available to every person accused of an offence, i.e., in all criminal trials so that mere poverty may not stand in the way of adequate defence in a proceeding which may result in the deprivation of liberty or property or loss of reputation.

In our view representation by a counsel is so basic an ingredient of a criminal trial, that the law should go as far as possible in seeking that this requirement is not absent-In making this recommendation, we do not pause to consider the technical question whether a literal interpretation of the language of Articles 14 and 22(1) of the Constitution requires that the State should arrange for counsel in particular classes of cases. The philosophy underlying the Constitution, reflected in the provisions for equal protection of laws and in the chapter on directive principles shows that the Constitution is imbued with respect for human rights. That philosophy is sufficient to furnish inspiration for a provision that will put an end to the invidious discrimination that otherwise arises between person and person because of poverty. Where a poor man has to defend himself without counsel, there is lacking that equality which is demanded by the spirit of the onstitution.

Denial to the indigent of the benefit of counsel's examination of the record, and marshalling of arguments on his behalf, is nothing less than denial of justice. 'The indigent where the record is unclear or the errors are hidden, has only the right to a meaningless ritual?'

It is in this spirit that we are recommending a wide provision. We hope that legal practitioners will also appreciate the spirit in which we are making this recommendation and will readily come forward to defend poor persons who cannot afford to pay. The scheme can be worked successfully if the members of the Bar, including senior members, co-operate in its working.

In the instant case applying the principles, it can be said that the trial Court has technically followed the provision of Section 304 Cr. P.C. while appointing the amicus curiae. We are unhappy to note that the learned amicus curiae failed to discharge his duties properly. A perusal of the case file of the court below reveals that there are three eye witnesses in the case but none of them has been properly cross-examined by the learned amicus curiae. So much so, that the testimony of the Doctor who conducted the post-mortem examination was left completely uncross-examined. We are further unhappy to note that on March 28, 1978 when some witnesses were examined, the learned amicus curiae was not present. The order sheet of the date does not show the presence of the learned amicus curiae. From the perusal of the statements of PW 2. Kapoora and PW 3 Ota it is clear that both these witnesses are eye witnesses and no effective cross-examination was made to them. Only few questions were put to them and those questions were also of the formal nature. PW 6 Dr. S P. Purohit has not all been cross-examined. From the perusal of the statements of PW 7 Amar Singh, PW 8 Hari Singh and PW 9 Nabukhan, it reveals that they have also not been cross-examined effectively. We are satisfied that the amicus curiae appointed by the Court has not performed his duties in the right earnest and he has not taken the steps to defend the accused. Thus, the accused has been deprived of his judicial rights, it was the obligatory duty of the Court also to see whether the amicus curiae so appointed is working effectively or not? If the Court comes to the conclusion that the amicus curiae so appointed is not performing his duties effectively, another person should be appointed as amicus curiae and the person so appointed earlier should be

removed.

11. Learned Counsel for the appellant has invited my attention to the number of cases and has submitted that on his ground alone, the accused should be acquitted. We agree with the proposition that the Court has a power to acquit the accused looking to the delay and other alike factors, if the accused has not properly been represented and the Court has committed an illegality. It is the duty of the Court that the persons who are guilty should be convicted and sentenced. It is also the duty of the Court to see that the innocent persons should not be punished. Unfortunately, in the instant case, the Court as well as the amicus curiae have not cared to look into the matter properly. The Presiding Officer has not discharged his duties faithfully in proceeding with the case specially when it was patent on the record that the amicus curiae is not discharging his duties and if he is not pleading the case of the accused effectively, the learned Presiding Officer should have taken a note of it and should have proceeded in a way by which it can be said that the accused is having a fair, reasonable and just opportunity to defend his case. It is more surprising why the proceedings have taken place in the absence of the amicus curiae when on 28-3-1978, counsel for the accused was not present at the initial stage. From the perusal of the order sheet dated 28-3-1978, it is clear that the presence of the counsel for the accused (amicus curiae) has not been recorded. Any proceeding taken in the absence of the learned counsel for the accused (amicus curiae) is vitiated. It was the obligatory duty of the Presiding Officer to appoint amicus curiae afresh even on 28-3-1987. In the interest of justice, we consider it proper not to acquit the accused only on the ground that the amicus curiae so appointed by the court has not defended the accused effectively. The Court has also committed an error in not considering this fact.

12. Now the question remains about the powers of the appellate court Under Section 386 Cr.P J. It is an admitted position that the appellate court has power to reverse the finding and sentence and acquit or discharge the accused or to alter the finding, maintaining the sentence or with or without altering the finding, alter the nature or the extent of the sentence but not so as to enhance the same Section 386(e) Cr. PC reads as under:

386. Powers 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 appeal, or may--

(e) make any amendment or any consequential or incidental order that may be just or proper.

Section 391 Cr. PC lays down that in dealing with any appeal the Appellate Court if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Sessions or a Magistrate. A careful reading of Section 386 read with Section 391 Cr. PC shows that the appellate Court has a power to make any amendment or any consequential or incidental order that may be just or proper. Having regard to the facts and circumstances of the case, we consider it proper that the statements of PW 1 Dharma, PW 3 Kapoora, PW 3 Ota Ram, PW 6 Dr. S.P. Purohit and PW 7 Amar Singh should be recalled and an opportunity should be given to the accused to cross-examine them afresh.

13. We, therefore, direct the learned Additional Sessions Judge, Sirohi to appoint afresh amicus curiae in this case and to allow him to cross-examine the witnesses referred above viz., PW 1 Dharma, PW 2 Kapoora, PW 3 Ota Ram, PW 6 Dr. S.P. Purohit and PW 7 Amar Singh. We further direct that the accused should be examined under Section 313 Cr. PC and an opportunity should be given to him to produce the defence evidence, if he so desires. The record of this case may be sent to the Additional Sessions Judge, Sirohi immediately, He shall examine all the witnesses as directed within a period of two months and shall submit the record and the statements so recorded within a period of three months to this Court.

14. With these directions, the application filed by the learned Counsel for the accused-appellant is disposed of. The case may be listed for hearing in the month of April, 1984.

