

Chhaja Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Jul-05-1988

Reported in : 1988WLN(UC)567

Judge : V.S. Dave, J.

Appeal No. : S.B. Cr. Misc. Petition No. 83 of 1988,

Appellant : Chhaja

Respondent : State of Rajasthan

Judgement :

V.S. Dave, J.

1. It is painful to decide an application for recalling the judgment delivered by a senior brother Judge and for that the proper course would have been to refer the matter to the Larger Bench and I expressed the same to the learned Counsel for the parties when the matter came up for hearing, but as the case is largely covered by the various decisions of their Lordships of the Supreme Court and a Full Bench decision of this court I have been persuaded to decide it sitting in Single Bench. The shprt question involved in this case is as to whether notice to amicus curiae appointed by the court in the court during the course of hearing is a Sufficient notice to the accused and whether such an appointment is an idle formality, i.e. to say whether without giving notice to the accused either by the

court or by the learned Counsel who has appeared as amicus curiae and without affording opportunity to the learned Counsel for constituting file and arguing the case, the same should be decided much less the sentence should be enhanced?

2. This case has a chequered history. The accused petitioner, Chhaja, filed an appeal through Shri I.C. Maloo and Shri R K. Thanvi Advocates on May 24, 1976 at Jodhpur against his conviction and sentence passed by Addl. Sessions Judge No. 2, Alwar. He was convicted for offence under Section 326 IPC and sentenced to two years' rigorous imprisonment and a fine of Rs. 500/-. In default of payment of fine he was further to undergo three months' rigorous imprisonment. This appeal was admitted on May 25, 1976 and order regarding suspension of sentence was also passed. At that time there was unified High Court in Rajasthan at Jodhpur and there was no Bench at Jaipur. The accused was directed to appear personally on July 12, 1976 but on that day he did not appear and therefore, Hon'ble DP. Gupta, J., as he then was, started proceedings Under/Section 446 Cr. PC. The accused in fact has sent a telegram to his counsel that his father expired and, therefore, he was unable to attend the date and asked for postponement, but this telegram was delivered one day late. Learned Counsel therefore, filed an application on the next day and, therefore, the learned Judge directed the proceedings to be dropped vide order, dated November 10, 1976 on which date the accused was also present in the court as is evident from the order sheet of that day. The learned Judge ordered that the appeal be listed for hearing in DUE COURSE. On 31-1-77 a Bench of the High Court was established under the orders of the President of India at Jaipur and the cases arising from the Eastern Districts of Rajasthan mentioned in the notification were transferred for hearing at Jaipur Bench. At that time certain lawyers shifted their offices to Jaipur, while most of them remained at Jodhpur and the learned Counsel for the accused petitioner Shri Maloo and Shri Thanvi stayed back at Jodhpur. Notice of transfer of the case from Jodhpur to Jaipur Bench was, it appears, not served upon the accused-petitioner, since there is neither mention in the order-sheet nor copy of the notice is in the file. The appeal was listed before me on May 24, 1985, but it did not reach. Similarly it was listed again on November 8, 1985, before my brother P.C. Jain, J. where also it could not reach and for the first time it came up for hearing before my brother Hon'ble CM. Lodha, J. as he then was, on January 2, 1986. On this date since no

one appeared for the accused he appointed Shri Sajjan Singh an amicus curiae and heard him on the same day. During the course of hearing it appears that learned Public Prosecutor orally asked for enhancing the sentence as according to him the sentence passed in the circumstance was grossly inadequate. Thereafter learned Judge observed as under:

Since there is no appeal from State, it would be in interest of justice first to give notice to accused's advocate amicus curiae, why the sentence should not be enhanced, if the appeal is dismissed. Mr. Sajjan Singh is allowed time to prepare the case against the notice for enhancement of sentence. Put up on 6-1-1986 as prayed.

On 6-1-1986 the learned Judge dismissed the appeal filed by the accused-appellant and exercising the powers suo moto revised the sentence awarded by the trial court, and it was enhanced, from two years to seven year's rigorous imprisonment and fine was increased from Rs 500/- to Rs. 1,000/-. The Hon'ble Lodha, J. after enhancing the sentence passed several remarks about the theory of punishment. It was also observed at the end of the order that the certified copy of this judgment and order-sheet should only be given to the appellant or his counsel or his representative when a certificate from the authority concerned is produced that the appellant has surrendered in jail.

3. On 16-8-1986 the accused-petitioner filed an application in, this court under Section 482, Cr.PC praying for re-calling of the judgment, dated 6-1-1986 and re-hearing the case. The case was registered on defective side and was placed before Hon'ble Lodha, J. who observed that the case should not have been listed before a certificate is given to the effect that the accused is in jail. He also called for the explanation of the clerk concerned. It took quite some time for getting information from jail about surrender of the accused and when the case came up again before him he directed the petitioner to be summoned from jail. The case thereafter was listed before him for several times but was adjourned from time to time till Hon'ble Lodha, J. was elevated as Chief Justice and thereafter orders were passed on March 11, 1988 that the matter be listed before the regular Bench and it came up for hearing before me on April 4, 1988. On this day since the

lawyers were on strike none appeared on behalf of the accused petitioner and I recorded the following order:

In this miscellaneous petition the petitioner has submitted that the appeal was filed by him at Jodhpur and notice of its being transferred to Jaipur Bench was not given to him. He has further submitted that this court appointed amicus curiae and enhanced the sentence. The amicus curiae had neither sought instructions from him nor had the material to argue the case. Thus, his grievance is that sentence has been enhanced without due and proper notice. Since the appeal is very old, it would be in the interest of justice if this miscellaneous petition is decided at admission stage.

Let notices be issued to the Public Prosecutor returnable within three weeks.

The accused was in jail since June, 1987 and he had made prayer for recalling of the judgment so I thought it proper to direct his release on bail, it is there after that now this case has come up for hearing before me.

4. I have heard the learned Counsel for the parties.

5. It is contended by Mr. Dhankar appeared on behalf of the accused petitioner that Hon'ble Lodha, J. has done only an idle formality in giving the notice of enhancement of sentence to the amicus curiae who was appointed on the same day and four day's time given to him was wholly inadequate to have contacted his client or prepare the case after studying the file. It is submitted that the petitioner had engaged the counsel at Jodhpur but unfortunately he heard nothing about hearing of the case from him. He was told as early as 1-9-1976 when he appeared in the court on 10-11-1976 that his case now shall be heard in due course and that when the case will be listed he will be informed. He submitted that in normal course the appeals are not heard for a decade in this court and accused have no opportunity of knowing it unless they are informed either by their counsel or by the court. His contention is that in the instant case his client even did not know that his case has been transferred from Jodhpur to Jaipur, since he is an illiterate person from village situated in remote area of Alwar District. It is submitted that he learnt it for the first time after five months of the judgment when the Police came and said

that his appeal has been dismissed and when he went to Jodhpur to find out the position he was informed that his case has been transferred to Jaipur. It was thereafter that he made enquiry at Jaipur and learnt about the fate of the case. It is submitted that he had no notice either of the hearing of the appeal or of intention of the learned Judge for treating the case as a revision-petition and enhance the sentence. It is submitted that the accused was not given an opportunity of hearing to show cause against the enhancement of sentence as contemplated by Section 386, Cr.PC. In support of his contentions he relied on *Radhey Shyam v. State of Rajasthan* 1987 (12) RCC 10 *Alla Nageswara Rao* petitioner. Reference Trial No. 67/54 dated 23-11-1954 [AIR 1957 AP 505], *Bashird v. State of UP* : [1969]1SCR32, *Ranchod Mathur Wasawa v. State of Gujarat* MR 1974 SC 1143, *Habu v. State of Rajasthan* 1987 RLR 1, *Suk Das and Anr. v. Union of Territory of Arunachal Pradesh* : 1986 CriLJ1084, *Khatri and Ors. v. State of Bihar and Ors.* 1981 Cr.LJ 470 and *Khaili and Ors. v. State of UP* 1981 (Supp.) SCC 75. He also submitted that according to Section 377(3) Cr.PC a right has been given to the accused by the Legislature that he has to be given notice of enhancement of sentence then a reasonable opportunity of showing cause against such enhancement and while doing so he has a right to plead for his acquittal or reduction of sentence even in an appeal which has been filed against adequacy of sentence. It is, therefore, prayed, that the order should be re-called and appeal should be listed for hearing again.

6. Learned Public Prosecutor though admitted that the period for which notice was issued to the amicus curiae was not enough and that notice should have also been sent to the accused, but his contention is that in revisional jurisdiction the High Court has a right to call for the record suo-moto and pass any order. He submitted that in the instant case no substantial injustice has been caused to the accused, since the act committed by him was quite heinous in as much as it was a case of nose cutting. Learned Public Prosecutor submitted that this court cannot review the judgment of Hon ble Lodha, J and re call the same as he himself would have done it when the case was listed before him and secondly the re-calling of the judgment would mean altering the same which is against the spirit of Section 362, Cr.PC.

7. I have given my thoughtful consideration to the rival contentions

8. Several questions emerge out in this appeal and the first is whether this court has power to re-call the judgment and re-calling would amount to altering or reviewing the judgment? I think this contention has been made by the learned Counsel for the State only to be rejected. This court in *Habu v. State of Rajasthan* (supra) in a Full Bench reference to which I was a member after reviewing the entire case law and discussing as many as 58 judgments of various courts answered the reference made by the learned Single Judge and categorically held that power of re-call is different than the power of altering or reviewing the judgment and the powers under Section 482 Cr.PC can be and should be exercised by this court for re-calling the judgment in case the hearing is not given to the accused and the case falls within one of the three conditions laid down Section 482 Cr.PC. The aforesaid judgment of this court is based on several authorities of their Lordships of the Supreme Court and, therefore, I will not discuss in detail this point again in this case and suffice it to say that power of re-call vests in this court.

9. Coming to second question, whether in the revisional jurisdiction a notice to the accused is not necessary and this court can suo moto pass any order as it deems proper and as has been observed by Hon'ble Lodha, J. in his own judgment, I will like to refer to Sub-Sections (2), (3) and (4) of Section 401, Cr.PC which read as under:

Section 401(1) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence;

[2] Nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction.

[3] Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.

Therefore, in Sub-section

(2) Legislature has made it mandatory that notice is condition precedent if prejudicial order is passed In Sub-section

(3) of Section 401 Cr.PC the legislature has put a restraint on the power of the High Court in converting the finding of acquittal into one of conviction. In Sub-section

(4) of Section 401, Cr.PC it has been mentioned that where under this code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed. A careful study of the aforesaid three Sub-Sections of Section 401, Cr. PC makes it patently clear that the legislature did not leave it to the wisdom of the court, that a notice be issued to the accused before passing any order detrimental to his interest But enshrined the same in the statute itself. Thus all the safe-guards have been provided to see that accused does not suffer in any manner what so ever regarding giving him an opportunity to be heard. It is true that the High Court has power to suo moto enhance the sentence of accused and it is now settled as per law laid down in *Nadir Khan v. State (Delhi Administration)* : 1976 CriLJ1721 that the High Court's jurisdiction to act suo moto for enhancement of sentence in appropriate cases is not excluded even though the new Code has given powers to the State to file appeal under Section 377, IPC. I could lay my hands on several decisions of their Lordships of the Supreme Court on the aforesaid point, but at no stage their Lordships gave unfettered discretion to the High Court to enhance the sentence in a case where either notice is not given or accused is not represented as such an occasion did not come on the facts in any of the cases. It is in this respect that the word 'prejudice' used in Sub-section

(2) of Section 401, Cr. PC has to be given proper meaning in conformity with the spirit of the legislation. The word 'prejudice' connotes damnification when used in criminal law. However, to say that one was prejudiced because he was convicted and sentenced, it is a mis-use of the word 'prejudice'. However, when it is said that the person has been convicted and sentenced without trial, the use of the word 'prejudice' in that case would be relevant. In such case where the accused is damnified the normal meaning of the word 'prejudice' i.e. detrimental to or causing

injury or prejudice due to some judgment or action of another would be appropriate meaning, therefore, it will be reasonable to conclude that some intimation or notice must be given to the accused if any order prejudicial to his interest is to be passed. Seeing from another angle it is true that under Sub-section

(6) of Section 439 Cr.PC 1898 there was a provision wherein it was mentioned that notwithstanding anything contained in this section any convicted person to whom an opportunity has been given under Sub-section

(2) of showing cause why the sentence should not be enhanced, shall in showing cause be entitled to show cause against such conviction and since the legislature has omitted nothing like Sub-section

(6) from Section 401 Cr.PC no notice is essential to be given in revisional jurisdiction as contemplated either by Sub-section

(2) or Sub-section

(6) of Section 439 Cr PC 1898, But in my humble opinion this would mean an erroneous construction in the scheme in which Section 401, Cr.Ft 1973 has been incorporated. In fact the Law Commission in its Forty-eighth Report dealt with this aspect of the matter and observed as under;

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.

Sub-section (6) of Section '439 Cr.PC 1898 says:

That a person required to show cause Why sentence should not be enhanced, is entitled to say that his conviction is unsustainable although he may not have appealed against his conviction. The principle underlying this rule is sound but as we are separately providing 'enhancement of sentence' through an appeal this sub-section would be redundant and we, therefore, propose to omit it.

In this view of the matter the powers of revisional jurisdiction for enhancement shall have to be read along with Section 377 Cr.PC as the intention of the legislature in enacting Section 377 was to give on one hand the powers to the State Government for filing an appeal challenging the adequacy of the sentence and also giving sufficient safe-guards to the accused that he has a reasonable opportunity of being heard. Therefore, by giving harmonious construction to Sub-Sections (2), (3) and (4) of Section 401, Cr.PC and Section 377 Cr.PC, it will be reasonable to conclude that while exercising the powers of revision also it is essential to give notice to the accused as the order enhancing the sentence will be prejudicial to his rights, secondly if an appeal against acquittal cannot be converted into an order of conviction, then it will be unreasonable to conclude that enhancement can be done without notice to the accused and lastly, since a right has been given to the State for filing an appeal against inadequacy of sentence atleast the State Government cannot file a revision petition under Sub-section (4) of Section 401, Cr. PC. If such an an appeal would have been file by the State the following words used by the Legislature in Sub-section (3) of Section 377, Cr.PC would have provided all safe-guards to the accused, namely-

[a] A reasonable opportunity of showing cause against the enhancement, and

[b] While showing cause the accused could plead for acquittal or for reduction of sentence.

Thus, a reasonable opportunity is a condition precedent for passing any order about the inadequacy of sentence and enhancing the same. It is also pertinent to mention that it is a fundamental principle that nobody should be condemned unheard. The principle audi alteram partem would be violated in case reasonable notice is not given to the accused even when revisional powers are suo moto being exercised for enhancement of sentence. I would, therefore, also reject this contention of the learned Public Prosecutor.

10. His third contention that it could only be Hon'ble Mr. Justice G.M. Lodha, who could re-call his judgment is also devoid of any force. A perusal of the record shows that the case has been listed before him time and again but it was postponed till he was elevated as Chief Justice of the Gauhati High Court and no

more remained a Judge of this Court, therefore, it was ordered by the present Chief Justice that it should be heard by the Tegral Bench as per roster. In fact non hearing of this petition from August, 1986 to March, 1988 by Hon'ble Lodha, J. has virtually resulted in compelling the accused to serve out a good part of the sentence imposed on him without adjudicating whether he had a right to challenge his conviction or not. After his leaving as a Judge of this court obviously some other Judge had to dispose of the application which remained undisposed of for more than six years and half, has to be disposed of expeditiously and once it came before me in the regular roster I have no option but to decide the same.

11. Now remains the question whether the appointment of the amicus curiae in the manner done, was proper and whether the accused had sufficient opportunity as contemplated by law and for doing so I will here in after deal with the cases cited before me. In Radhey Shyam v. State of Rajasthan (supra) I had an opportunity to deal with Section 304, Cr.PC and Article 39A of the Constitution of India. I had held in the aforesaid case as under:

It is the fundamental duty of the State now recognized by Section 304, Cr.FC as well as Article 39A of the Constitution of India to provide legal assistance and this legal assistance should not be only a ritual while making the panel of amicus curiaes or making the appointment of Public defenders. It must be ensured that the persons so appointed are willing, diligent and intelligent. Providing legal assistance has not to be considered as a charitable cause but has to be taken as public duty which must be discharged with all humbleness, sincerity and integrity at one's command. The right of a citizen muchless one who cannot defend himself is the State's responsibility and this right of the accused has been recognized in all civilized and democratic societies.

I have also held that amicus curiae is a word which connotes a friend and a person who assists the court in giving justice and, therefore, appointment of the public defenders or the amicus curiae must be such that they do not belie the hopes In State of Uttar Pradesh and Ors. v. Mokhtar Singh and Ors. (supra); Hon'ble Subba Rao, J. as then he was, held as under:

After we heard this appeal for some time it was brought to our notice that the accused, who is a poor man, was not given a real opportunity to defend the charge against him for murder. The accused was defended by an Advocate in the Committing Magistrates court. But, before the Sessions Judge, it is represented by the learned Counsel for the accused and it is not denied by the learned Public Prosecutor that an Advocate was engaged for the accused two hours prior to the trial. However, eminent and intelligent an Advocate might be, we are not satisfied that he could have done any justice to the case in such a short time.

A mere formal compliance with this rule will not carry out the object underlying the rule. A sufficient time should be given to the Advocate engaged on behalf of the accused to prepare his case and conduct it on behalf of his client. We are satisfied that the time given was insufficient and, in the circumstances, no real opportunity was given to the accused to defend himself.

In *Bashira v. State of UP.* (supra) it has been held as under:

In this case, the principle ground urged on behalf of the appellant raises an important question of law. Learned Counsel appearing for, the appellant emphasized the circumstance that the amicus curiae counsel to represent the appellant was appointed by the Sessions Judge on 28th February, 1967 just when the trial was about to begin and this belated appointment of the counsel deprived the appellant of adequate legal aid, so that he was unable to defend himself properly. It was urged that the procedure adopted by the court was not in accordance with law, so that, if the sentence of death is carried out, the appellant will be deprived of his life in breach of his fundamental right under Article 21 of the Constitution which lays down that no person shall be deprived of his life or personal liberty, except according to procedure established by law.

It is true that the record also does not contain any note that the counsel asked for more time to prepare the defence, but that, in our opinion, is immaterial. The Rule casts a duty on the court itself to grant sufficient time to the counsel for this purpose and the record should show that the Rule was complied with by granting him time which the court considered sufficient in the particular circumstances of the case.

It is obvious that in rejecting the application the Sessions Judge failed to notice that the counsel had been appointed on the very day when the witness was examined and sufficient time had not been granted to him to prepare the defence. In fact we feel that in such cases, if sufficient time is not granted to the counsel to prepare defence, prejudice must necessarily be inferred and the trial will be vitiated.

In *Ranchod Mathur Vasawa v. State of Gujarat* (supra) it has been held as under:

In the present case the accused had made a grievance that *amicus curiae* came into the picture only on the day when the trial commenced. This is an unfortunate feature. Nevertheless we are satisfied that the postponing the examination of the important witnesses to the next day the learned Judge helped counsel to assist himself fully. We would, however, emphasize that in all these cases there should be sensitive approach made by the court to see that the accused felt confident that his counsel chosen by the court has had adequate time and material to defend him properly.

12. A perusal of the aforesaid cases leads to an irresistible conclusion that the accused has a right to be heard and this right is a very valuable right which is not taken away by either any express provision of law or by implication of the same that before appointing *amicus curiae* it must be ensured that he is a proper and competent person who can assist the court and protect the interest of his client. In words of the Lordships of the Supreme Court, in *Khaili and Ors. v. State of U.P.* (supra): 'Now one thing is clear that howsoever diligent the learned Judge might have been and how ever careful and anxious to protect the interests of the appellants, his effort could not take the place of an argument by an advocate appearing on behalf of the appellants'. Arguments on merits of appeal could only be made when sufficient proper and reasonable opportunity has been provided to the *amicus curiae*, that is a case which was initially filed at Jodhpur, that no notice of transfer of the case has been given to the accused which was obligatory on the court to have first issued notice to the accused of even the hearing of his represented appeal much less the notice of enhancement. In *Anwar Hussain v. The State of U.P. and Anr.* (supra) it has been held as under:

It is admitted that in the appeal against acquittal of present appellant, Anwar Hussain filed by the State of U.P. no notice was served upon him and his acquittal was set aside by the High Court at his back and without hearing him. This is clearly impermissible.

In *Khatri and Ors. v. State of Bihar* (supra) it has been held as under:

It is elementary that the jeopardy to his personal liberty arises as soon as a person is arrested and produced before a Magistrate, for it is at that stage that he gets first opportunity to apply for bail and obtain his release also to resist remand to the Police or jail custody. That is the stage at which an accused person needs competent legal advice and representation and no procedure can be said to be reasonable, fair and just which denies legal advice and representation to him at this stage. We must therefore hold that the State is under a constitutional obligation to provide free legal services to an indigent accused not only at the stage of trial but also at the stage of when he is first produced before the Magistrate as also when he is remanded from time to time.

In *Sukhdas and Anr. v. Union Territory of A.P.* (supra) it has been held as under:

It may therefore now be taken as settled law that free legal assistance at the State's cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life or his personal liberty and this fundamental right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21.

In AIR Commentaries on Cr.PC (Manohar and Chitaley) on Section 304 at page 161 it has been laid down as under:

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 as so basic ingredient of a criminal trial, that the law should go as far as possible in seeking that this requirement is not absent.

According to Section 385 Cr. PC, if the appellate court does not dismiss the appeal summarily it has to give a notice of time and place at which such appeal will be heard to the appellant or his pleader inter alia others mentioned in Sub-section (1).

13. In the instant case it is borne out from the record that the appeal was admitted on 25-5-1976 and, therefore, it was not dismissed summarily, hence it was obligatory on the court to have given the notice of time and place of hearing either to the accused or to his counsel. As mentioned above the appeal was filed at Jodhpur and the counsel stay at Jodhpur, therefore, appearance of the case in the cause-list at Jaipur has no meaning either for the accused or for his counsel who does not stay here at Jaipur. In fact as back as 1977 when the Bench was established, as was done in several other cases notice ought to have been given to the accused appellant that his case has been transferred to Jaipur and he can engage a counsel of his own choice there. If the accused even thereafter did not choose to engage a counsel, then it was again obligatory on the court as per the ratio of decisions quoted above that the court should have appointed amicus curiae and to the amicus curiae, as mentioned above, reasonable and proper opportunity should have been given.

14. In the instant case the Registry did not appoint amicus curiae. It was the court which called a counsel sitting in the court to get up and argue the case and it was on the same day that my learned brother heard it. On the request of learned Public Prosecutor issued notice of enhancement to him I am unable to conceive of that a lawyer who had no record and no file on the day he had been appointed as amicus curiae and, incidently called upon to do so, could least justify his existence in the court. It is again important to note that my learned brother has issued notice on asking of the learned Public Prosecutor as per the order sheet, which he could not have done as per mandate of Section 401 Cr PC because the State had a right to file an appeal under Section 377 Cr. PC and that not having been done could not

circumvent the provisions of law by making a prayer like the one in the instant case. I will also like to add here that in my opinion notice to the amicus curiae is never a notice to the accused. In fact the procedure of appointing amicus curiae in the court during hearing the case on the same day by itself is faulty and is only an idle formality to show that the compliance of Section 304 Cr. PC has been done. In fact when ever an amicus curiae should be appointed it should be done well in advance or if on the same day he must be provided reasonable opportunity which means that he should have time to have an access to his client. It is imperative on the amicus curiae to send an intimation to the accused, by an ordinary letter or by registered post and seek instructions from him. There may be several things which his client may tell him regarding the merits of the case as well as regarding quantum of punishment. It may also happen in some cases that the person might have died and his legal representatives may not even be knowing that the deceased had filed an appeal. In that eventuality on the notice from the amicus curiae they can approach him and contest the appeal because Under Section 394 Cr PC in all appeals against conviction any of his near relative has a right to continue the appeal or representative in which the accused has no faith. In that eventuality if he knows that who has been appointed amicus curiae he can always ask for changing the same. When a public defender or amicus curiae is appointed it is for the purpose that case of the accused is properly canvassed and placed before the court, hence it was essential even in this case that this much opportunity should have been provided by my learned brother, Hon'ble G M. Lodha, J. to Mr. Sajjan Singh, amicus curiae, appointed by him on January 2, 1986, that he could contact his client who was living in a remote area and seek instructions from him.

15. There is yet another aspect of the matter whether accused himself also should be intimated of the appointment of the amicus curiae by the court, in my opinion that is also necessary. It is the practice of this court that while initially the Registry appoints an amicus curiae for the persons who are in jail, an intimation is sent by the Registry, but the problem only comes when the court calls upon any lawyer to get up and work as an amicus curiae on the spot, in my humble opinion, it is not a very healthy practice unless the court gives a reasonable and proper opportunity to the person to prepare the case and argue the same, else it would be negating

the spirit of appointment of amicus curiae. Asking a counsel present in the court to assist the court on a question of law is a different thing than asking a lawyer to argue an appeal on facts where he is not possessed with file or the documents, enough guidelines have been provided by their Lordships of the Supreme Court in cases cited above and I bow to these valuable observations and only wish that the courts follow them in letter and spirit. Their Lordships of the Supreme Court in one of the cases observed that at times repeated observations made by them in several cases are not followed by the subordinate courts either because they are not being brought to the notice of the court or that the Judges themselves are unmindful of the same. I can only hopefully wish that the observations would be borne in mind as and when question of appointment of amicus curiae comes. Looking from any angle in this case I am satisfied and firmly of the opinion that the sentence of the accused could not be enhanced as he had no reasonable opportunity of being heard, the judgment therefore, deserves to be re-called. I hereby re-call the order, dated Jan. 6, 1986 passed by Hon'ble G.M. Lodha, J, and direct that the main application be listed for hearing forthwith.