

In Re: Gurumurthy and anr.

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Court : Chennai

Decided On : Mar-09-1972

Reported in : (1974)2MLJ466

Appellant : In Re: Gurumurthy and anr.

Judgement :

S. Ganesan, J.

1. The appellants, four in number, have been convicted by the learned Sessions Judge of West Thanjavur Division under various sections of the Indian Penal Code. The first appellant had been sentenced to imprisonment for life for offences Under Section 120-B, Indian Penal Code, and the third appelland has been sentenced to death and imprisonment for life respectively Under Sections 302 and 120-B, Indian Penal Code. It is unnecessary to refer to other convictions and sentences.

2. A preliminary objection is raised by Sri N. T. Vanamamalai, appearing on behalf of the appellants that the entire trial is vitiated in so far as the first three appellants are concerned, as the learned Sessions Judge had admittedly not appointed a State Counsel to defend the said appellants. It is pointed out that under Rule 166 of the Criminal Rules of Practice and Circular Orders, 1958, the Sessions Judge has an imperative duty to engage a pleader to defend an accused person in grave charges like murder and that the action of the Sessions Judge in not appointing a

State Counsel to defend the accused is violative of Article 21 of the Constitution of India which provides that no person shall be deprived of his life or personal liberty, except according to procedure established by law. It is, therefore, alleged that the trial is vitiated and totally void.

3. The material facts relevant to the decision are shortly these. The first three appellants claim to be Naxalites and refused to plead to the charges when read out by the Sub-Magistrate who held the preliminary enquiry; and when they were specifically asked at the end of the enquiry whether they had means to engage Advocates at the Sessions trial they uniformly refused to answer the question. At the Sessions, they refused to plead when the charges were read out to them individually; and it is seen from the order passed by the learned Sessions Judge on 15th November, 1971 that, before the commencement of the trial, the learned Sessions Judge questioned appellants 1 to 3 as to whether they have means to defend or whether they may be defended at the cost of the State and that the said appellants stated that they did not want to defend themselves as they had no faith in the Courts and in the law of the land as they are Naxalites. The fourth appellant who had told the Sub-Magistrate that he had no means to engage an Advocate at the Sessions was defended by a State Counsel at the Sessions.

4. Section 340 of the Criminal Procedure Code, provides that any person accused of an offence before a criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right, be defended by a pleader. Admittedly, appellants 1 to 3 cannot complain of any breach of this section as they have clearly expressed that they did not want to engage a Counsel for defending themselves; and it is not therefore suggested that the provisions of Section 340, Criminal Procedure Code, are in any way violated in this case.

5. The relevant provisions of the Criminal Rules of Practice and Circular Orders, 1958, are Rules 100 and 166. Rule 100 runs thus:

Committing Magistrates to report on means of accused. -- To enable the Court of Sessions to arrive at a decision as regards the second condition in Rule 166, the Committing Magistrate shall in such cases make enquiries and report in the preliminary register whether the accused has means to appoint a pleader, and if

not, whether he is, in the opinion of the Magistrate, possessed of sufficient means to do so. Each case must be decided on its merits, and no hard and fast rule as to insufficiency of means shall be applied.

6. Rule 166 is to the following effect:

In any case which comes before the High Court or a Court of Session, the Court shall engage a pleader to defend an accused person if: (1) the charge against him is such that a capital sentence is possible; and (2) it appears that he has not engaged a pleader and is not possessed of sufficient means to do so. The Court may, subject to condition (2) above, engage a pleader to defend an accused person against any other charge, if it considers it desirable to do so in the interests of justice.

7. We would like to point out at this stage that it is the imperative duty of a Magistrate who holds the preliminary enquiry to conform strictly to the provisions of Rule 100 while discharging his duty of reporting to the Sessions Judge about the necessity for appointing a Counsel at the Sessions. The Magistrate is bound to make enquiries before making a report and it is open to him to call for reports from the revenue and police officials, if necessity arises. The Magistrate can rest his conclusion on the answers elicited by him from the accused when examining him Under Section 342, Criminal Procedure Code. It must be remembered that he has to report on two specific points: (1) whether the accused intends to appoint a pleader to defend him at the Sessions; and (2) whether, in case he does not intend to appoint a pleader, is possessed of sufficient means to do so; and it necessarily follows that he must specifically put two independent questions to the accused on these two points. But we find from the records that the learned Magistrate who held the preliminary enquiry in this case has chosen to put only one question, namely, whether the appellants had means to engage a Counsel for defending themselves at the Sessions. In our view, the conditions of Rule 100 cannot be deemed to have been fully complied with in this case; it may be that no prejudice is likely to be caused in this case, because in all likelihood the appellants would have refused to answer, if asked, whether they meant to appoint a pleader to defend themselves at the Sessions. We are, however, clear that the Committing

Magistrate is bound to put the two specific questions referred to above to the accused in order to satisfy the provisions of Rule 100. We would, however, like to point out that the learned Counsel for the appellants has not made any grievance out of this lapse on the part of the Committing Magistrate.

8. The main contention of the learned Counsel is based upon the provision of Rule 166; and emphasis is laid on the use in that rule of the words 'shall engage a pleader'. It is pointed out by him that, the words used were 'the Court may engage a pleader' and that the word "shall" had been deliberately substituted by the High Court in P. Dis. No. 431 of 1948. According to the learned Counsel, it is the imperative duty of the learned Sessions Judge to have appointed a State Counsel, when the Sub-Magistrate who held the enquiry had stated on the committal order that they had no means to defend themselves at the Sessions even though they did not want to defend themselves when the learned Sessions Judge questioned them at the commencement of the trial whether they have means to defend or whether they may be defended at the cost of the State.

9. Reliance is placed by the learned Counsel on the decision of the Supreme Court in *Bashira v. State of Uttar Pradesh* : [1969]1SCR32 . In that case a State Counsel was admittedly engaged to defend the accused at the Court of Sessions but the Counsel was appointed only on the date fixed for the trial and records were given to him only then; but, admittedly, the Counsel did not ask for more time to prepare the defence and he did his level best to cross-examine the witnesses to the extent it was possible for him to do in the very short time available to him. The grievance was that the provisions of Rule 37 of the Allahabad High Court General Rules (Criminal) (1957) have not been complied with.

10. Rule 37 of the Allahabad High Court General Rules (Criminal) (1957) runs as follows:

In any case which comes before a Court of Session, the Court may engage Counsel to defend the accused person if

(a) the charge against him is such that a capital sentence is possible, and

(b) it appears that he has not engaged Counsel and is not possessed of sufficient means to do so.

To enable the Sessions Court to arrive at a decision, as regards the second condition in the preceding paragraph, the committing Magistrate shall in such cases make enquiries from the accused at the time of commitment and after making such other enquiries as may be necessary, report within a month of the commitment order to the Court to which the commitment is made whether the accused is possessed of sufficient means to engage Counsel. Each case must be decided on its merits and no hard and fast rule as to sufficiency of means should be applied. The Sessions Court in making its decision shall not be bound by the report of the committing Magistrate.

Counsel appointed under this rule shall be furnished with the necessary papers free of cost and allowed sufficient time to prepare for the defence.

11. It was contended by the learned Counsel for the State that the rule should not be held to be mandatory, but was only enacted to enable a Court to engage a Counsel to defend a person accused of an offence punishable with capital sentence, but the contention was rejected by the Supreme Court; and their Lordships have observed that, though the word used in the rule was ' may ', in their opinion, the purpose of the rule would be completely defeated, if they had to accept this submission, that the intention of the rule was perfectly clear that no accused person should remain totally unrepresented by a lawyer, if he was tried on a charge for which capital sentence can be awarded and that considering the purpose of the rule, the word 'may' in the rule must be interpreted as laying down a mandatory direction to the Courts to engage a Counsel, if the conditions laid down in the rule are otherwise satisfied.

12. Their Lordships upheld the contention of the accused in that case that, though the record did not contain any note that the Counsel asked for more time to prepare the defence, there was no compliance with the requirements of Rule 37 and have observed that the rule cast a duty on the Court itself to grant sufficient time to the Counsel for preparing the defence and that, as the trial was proceeded with immediately after the appointment of the amicus curiae Counsel, the time

given was nominal.

13. On behalf of the State strong reliance is placed on the English case *Reg. v. Yacuada Cox's Crl. Law Case*, Vol. VI, p. 386. A Spaniard was tried before Hertford Assizes and evidence was given to the effect that, though he had talked in Spanish with a person sent from the Spanish Embassy to assist him in his defence, he had later declared that he would never speak again and from that time he had never uttered a word. When the evidence was read over through an interpreter by the Judge, he remained silent. Mr. Rodwell who appeared for the prosecution then suggested to the Court that, under the peculiar circumstances of the case, Counsel should be assigned to the foreigner and Mr. Parry volunteered to defend him; and Erle, J., asked the foreigner whether he wished to have the services of Counsel to defend him, but no reply was given. It was suggested by Mr. Parry, that the foreigner must be presumed to have understood all that was interpreted to him and that if on being told that a certain Counsel had been assigned by the Court to conduct his defence, he did not repudiate him, it might be taken that he assented to such a course. The learned Judge observed that the foreigner was not bound to give any assent to the proposition and that he did not see how he could infer an assent from his silence. The learned Judge has further observed that, even in the case of treason where the Court may, by a special Act of Parliament, assign Counsel to a prisoner, it can be only done at his request and held, that, under the circumstances, he had no authority to assign Counsel to a prisoner without his consent, as in such an event he would be authorizing a defence which the prisoner himself would never have made, and yet for which he must be held responsible.

14. The second case relied upon by the learned Public Prosecutor is *Emperor v. Sukh Dev A.I.R. 1939 Lah. 705* and a Division Bench of the Lahore High Court has relied on *Reg. v. Yacuada Cox'S, Crl. Law Cases*, Vol. VI, p. 386, referred to above and has made the following observations:

Where the accused is not represented by a pleader and is unable to attend personally because of illness, the Court cannot proceed with the case by assigning him a pleader, for such a Counsel is neither chosen by him nor given to him with

his express or implied consent and in fact does not really represent him; and no Court has any authority to force upon a prisoner the services of a Counsel if he is unwilling to accept them. The employment of a Counsel places him in a confidential position which, of course, will not exist in the case of a pleader, assigned without the accused's consent. Moreover, the pleader might advance a defence which the accused will never have made and yet for which he must be responsible.

15. The last case cited is the decision of a Division Bench of this Court in *In re, Palaniappan*. Anantanarayanan, J. (as he then was), observed that the right of the Counsel appointed at Government cost under Rule 166 of the Madras Criminal Rules of Practice to put questions to the witnesses on behalf of the accused depends entirely upon the continuance of the representation, which, in its turn, depends upon the express or implied consent of the accused; and where the consent has been expressly repudiated by the accused, the interests of justice require that the accused should be permitted to put questions himself, supplemented if necessary, by exertions of the Counsel. Veeraswami, J. (as he then was), has observed that it is hardly necessary to mention that one who is represented by another has always got the right to terminate the authority; but where the authority is not terminated by the accused, the fact that he is represented by a Counsel does not in any way stand in the way of the accused to cross-examine the witnesses.

16. It must, however, be noted that the Division Bench of this Court has also made the following observations:

Rule 166 of the Madras Criminal Rules of Practice, under which a Counsel is appointed at Government cost to take instructions from the accused and to defend him, is mandatory in its terms; it should be complied with in all cases to which that rule refers.

17. Construing the provisions of Rule 166 of the Criminal Rules of Practice and Circular Orders as they stand and taking into account the fact that the words used are 'shall engage a pleader', we agree with the observations made by a Division Bench of this Court in *In re, Palaniappan* : AIR1961 Mad417 , cited above that it is

the imperative duty on the part of the Sessions Judge to appoint a State Counsel in a case where the conditions imposed by Rule 166 are complied with. In arriving at this conclusion, we have also taken note of the fact that the old rule containing the word 'may' had been amended by this Court by substituting the word 'shall' for 'may' and that the Supreme Court had construed Rule 37 of the Allahabad High Court Rules as casting an imperative duty on the Sessions Judge to appoint a State Counsel. We have also taken note that the consent of the accused is not made a condition precedent for such appointment.

18. The conditions imposed by Rule 166 are: (1) that the charge against the accused must be such that he is liable to be sentenced to death; (2) that he has not engaged a pleader; and (3) is not possessed of sufficient means to do so. Admittedly, conditions 1 and 2 are complied with in this case and in view of the report made by the committing Magistrate that appellants 1 to 3 have no means to engage advocates at the Sessions in spite of the fact that the appellants have refused to answer that question, condition 3 may also be taken to have been complied with. Under these circumstances, this would normally be a fit case in which the learned Sessions Judge should have engaged a Counsel at the cost of the State to defend the appellants.

19. The only point which requires consideration is whether an appointment of a State Counsel by the learned Sessions Judge in this case was unnecessary, because appellants 1 to 3 have distinctly stated in answer to a question by the learned Sessions Judge whether they have means to defend or whether they may be defended at the cost of the State, that they did not want to defend themselves at all.

20. Normally, it is the accused who engages an Advocate to defend him and the Advocate therefore becomes an agent of the latter. Consequently the Advocate is entitled to represent and act on behalf of the accused, but only so long as his authority is not revoked by the latter. As the position is one of mutual trust and confidence, no such relationship can be created by any external agency, much less by a Court; and the Court will not therefore normally be entitled as observed by Erle, J., in *Reg v. Yacuado* 6 C.C.C. 386, cited above, to assign a Counsel to

the accused, as in such a case, it cannot be said that the Counsel (assigned by the Court) is one engaged by or is acting with express or implied consent of the accused.

21. The position has, however, been materially altered in Tamil Nadu by the introduction of Rules 100 and 166 of the Criminal Rules of Practice; and the latter rule not only enables, but makes it obligatory on the Court to appoint a Counsel to defend the accused in certain grave cases. The legality of these rules is not challenged. All these rules were admittedly framed by this High Court in exercise of the powers conferred on it by the Constitution or by the Code of Criminal Procedure; and the Supreme Court has in *Bashir v. State of Uttar Pradesh* : [1969]1SCR32 , cited above, affirmed that Rule 37 of the Allahabad High Court, which substantially corresponds to Rule 166 of the Madras Criminal Rules of Practice, has statutory force. It is therefore clear that these rules form part of the procedure for trial of the criminal cases by Courts subordinate to High Court, in addition to the procedure laid down by the Code of Criminal Procedure. The observations of Erle, J., reflect the law of England and cannot apply to Tamil Nadu where a significant change has been effected by Rules 100 and 166 of the Criminal Rules of Practice.

22. It is pointed out by the learned Public Prosecutor that appellants 1 to 3 have categorically stated that they did not want to defend themselves; and it is therefore urged that no useful purpose would be served by the appointment of a State Counsel, specially when it is perfectly clear from their attitude as Naxalites that they were sure to refuse to be defended by the State Counsel even if one had been appointed in spite of their clear and positive stand that they would not like to be defended. The argument sounds attractive at the outset, but cannot be upheld on a closer examination of the object and purpose for which the Rules 100 and 166 have been introduced.

23. It is, no doubt, seen from the provisions of Rule 166 that a Counsel has to be appointed for the purpose of defending an accused who has not engaged a pleader and is not possessed of sufficient means to be defended: but then the significance of the further condition that 'the charge against him must be such that

a capital sentence is possible' should not be lost sight of. It appears to us clear that the object underlying the rule is twofold, namely: (1) to make provision for the defence of the accused; and (2) also to provide legal assistance to Courts in grave cases of crime like murder and treason where facts and law are likely to be intricate and complicated. It must be remembered that the State Counsel appointed under Rule 166 is generally known as 'amicus curiae'. The term 'amicus curiae' literally means a friend of the Court. (We Pueblods Taos v. Archultta C.C.A.N.M. 64-F2 (d), 801-810. The Corpus Juris Secundum Vol. 3, page 104.) In that book, 'amicus curiae' is defined as one who is not a party to the proceedings, but who advises or informs the Court or one who is allowed to appear to protect an interest he represents. The term is defined in Ramanatha Iyer, (i) Law Lexicon, Vol. 1 (at page 62) as a member of the bar or other standards who helps the Court in removing the doubtful or mistaken view of any fact or decided case.

24. A State Counsel is admittedly appointed by the State for the purpose of defending the accused; and it is therefore open to the accused to say that he does not desire to be defended by that State Counsel, in which case the Counsel cannot obviously continue to represent the accused any more and cannot cross-examine the witnesses on his behalf and cannot make any submissions on his behalf; but his appointment is not thereby terminated and he does not cease to function any more. He has still the duty, as *amicus curiae*, to assist the Court on difficult points of fact or law in the case and must play that role to the best of his ability.

25. It may be that appellants 1 to 3 would have refused to be defended by any State Counsel appointed by the Sessions Judge, but that contingency would have arisen only after the appointment had been made. In any event, it must be remembered that the State Counsel has to play his role as *amicus curiae* and help the Court by his submissions on intricate questions of fact and law.

26. For the foregoing reasons we are satisfied that the learned Sessions Judge in this case had the imperative duty to appoint a State Counsel to defend appellants 1 to 3 in pursuance of the provisions of Rule 166 of the Criminal Rules of Practice, though the said appellants did not want to defend themselves and did not seek the

assistance of a State Counsel for that purpose.

27. It is obvious that the learned Sessions Judge could have avoided all this controversy, if he had within a few days after receiving the committal order, appointed a State Counsel to defend all the appellants and did not wait until the commencement of the trial for that purpose. Admittedly, the committing Magistrate had in his committal report clearly stated that all the four appellants had no means to defend them at the Sessions trial, in spite of the fact that appellants 1 to 3 refused to answer the question whether they had means to defend themselves at the Sessions. We are clear that under the circumstances it was not open to the learned Sessions Judge to have waited till the commencement of the trial for making arrangements for the defence of the appellants. It is obvious that such a belated arrangement would not satisfy the requirements of Rule 166 of the Criminal Rules of Practice and would be open to the just attack that no real opportunity was under the circumstances, given to the appellants to defend themselves. This practice has been strongly deprecated by the Andhra Pradesh High Court in Nageswara Rao, In re A.I.R. 1957 A.P. 505, by the Kerala High Court in Mathai Thoman v. State : AIR1959 Ker241 and by the Supreme Court in Bashira v. State of Uttar Pradesh : [1969]1SCR32 . In the cases before the Andhra Pradesh and Kerala High Courts, only about 2 days were available for the State Counsel to prepare the defence; and the learned Judges of the Kerala High Court have pungently observed that practices like this would reduce to a farce the engagement of a Counsel under Rule 21 (of the Criminal Rules of Practice of the Kerala High Court) which had been made for the purpose of effectively carrying out the duty cast on the Court to see that no one is deprived of life and liberty without a fair and reasonable opportunity being afforded to him to prove his innocence. Their observation that, at least 10 or 15 days before the trial should be allowed for the Court to prepare the defence have, no doubt, not met with the full approval of the Supreme Court in the case referred to above; but their Lordships are clear that the Court of Session must ensure that the time granted to the Counsel is sufficient to prepare for the defence. We do hope that, in future at least, the Sessions Judges would avoid such serious lapses.

28. In the view we have taken that Rule 166 is mandatory in terms, it necessarily follows that the learned Sessions Judge was in error in not appointing a State Counsel to defend appellants 1 to 3 at the Sessions trial and that the trial is accordingly vitiated as having been held in violation of a statutory rule. The convictions and sentences of appellants 1 to 3 are accordingly set aside; but we are, however, satisfied that appellants 1 to 3 must stand their trial once again before the learned Sessions Judge on the same charges, after a State Counsel had been appointed under the provisions of Rule 166 of the Criminal Rules of Practice.

29. The learned Counsel urges that the case against the fourth appellant should be disposed of now itself, particularly when he had been fully defended by the State Counsel engaged by the learned Sessions Judge and also points out that no useful purpose would be served by a retrial. According to him, considerable prejudice may, on the other hand, result to the appellant in the case of retrial. We are, however, satisfied that, in the interests of justice, the same 'procedure must be followed in the case of the fourth appellant as in the case of appellants 1 to 3-

30. The case against the appellants is inter-connected and the fourth appellant has been charged along with the other appellants Under Section 120-B, Section 147 and also Under Section 307 read with Section 149 of the Indian Penal Code. A decision of the case against the fourth appellant alone is bound to cause considerable embarrassment to the learned Sessions Judge who will have to deal with the case against the other appellants after remand; and we would also like to avoid the possibility of conflicting judgments in this case. Further, in our opinion, there will be no prejudice at all to the fourth appellant as a result of the retrial.

31. In the result, the convictions and sentences passed by the learned Sessions Judge, West Thanjavur, on all the appellants are hereby set aside; and, in view of the fact that the learned Sessions Judge, Thiru C. M. Kuppannan, who conducted the trial in the case continues to preside over the Sessions at West Thanjavur, it is but proper that the case should be tried by another Judge; and accordingly the sessions case is remanded to the Court of Session, East Thanjavur, for fresh trial.

32. Before the trial is commenced, the learned Sessions Judge will first appoint a State Counsel for all the appellants under Rule 166 of the Criminal Rules of Practice sufficiently in advance in order to enable the Counsel to prepare the defence and then proceed with the trial. If the learned Sessions Judge finds that there is conflict of interest between the appellants, he will have to appoint more than one Counsel according to the necessities of the case. If any of the appellants does not, however, desire to have the services of the Counsel appointed by the Court to defend him, the Judge will permit him to cross-examine the witnesses by himself, if he so desires. Even then it will be the duty of the Counsel appointed by the Court to act as *amicus curiae* and assist the Court on points of fact and law in particular. He will endeavour to bring out all the relevant omissions, contradictions and improvements as can be gathered from the prior statements Under Sections 161 and 164, Criminal Procedure Code, and the evidence in the committal Court.

33. We would also like to emphasize that, in such cases, the Sessions Judge has a greater obligation to peruse the case diary and prior statements of the witnesses with more care than usual and elicit in favour of the appellants contradictions and embellishments over prior statements.