

Before Satish Kumar Mittal & Inderjit Singh, J.J.

VIJAY KUMAR—Appellant

versus

STATE OF PUNJAB—Respondents

CRA No. D-141-DB of 2008

August 9, 2012

Indian Penal Code, 1860 - S. 302 - Code of Criminal Procedure, 1973 - Ss. 303 & 304 - Constitution of India, 1950 - Art. 21, 22 & 39A - Universal Declaration of Human Rights, 1948- Art. 11, 14(2) (3) - International Covenant on Civil and Political Rights, 1996 - Accused convicted and sentenced to life imprisonment and to pay a fine of Rs. 5,000/- u/s 302 - Accused convicted despite the fact that prosecution failed to prove recovery of the weapon but convicted him on basis of statement of two eye witnesses - Appeal against the order of conviction - whether fair trial conducted against accused - appeal disposed of with directions.

Held, that every accused has a fundamental right to be defended by a counsel and to have a fair and impartial trial. The right to be heard is fundamental and essential for every judicial system. The right to a fair trial has been internationally and nationally recognised by all the civilised countries. The concept of fair trial is based on the basic principles of natural justice

(Para 12 & 13)

Further held, that Article 14 (3) (d) entitles the person facing the criminal charge either to defend himself in person or through the assistance of a counsel of his choice and if he does not have legal assistance, to be informed of his right and provide him the legal assistance without payment in case he does not have sufficient means to pay for it. The aforesaid International Covenant on Civil and Political Rights guarantees to the indigent citizens of the member countries the right to be defended and right to have legal assistance without payment.

(Para 13)

Further held, that in a trial before the Court of Sessions, if the accused is not represented by a pleader and has not sufficient means, the court shall assign a pleader for his defence at the expense of the State.

(Para 17)

Further held, that a guiding hand of counsel at every step in the proceeding is needed for fair trial. If it is true of men of intelligence, how much true is it of the ignorant and the illiterate or those of lower intellect. An accused without the lawyer faces the danger of conviction because he does not know how to establish his innocence.

(Para 18)

Further held, that the prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result, the accused charged with a serious offence must not be stripped of his valuable right of a fair and impartial trial. To do that, would be negation of concept of due process of law, regardless of the merits of the appeal. Right of the accused to cross-examine the prosecution witnesses is also fundamental right and is part and parcel of the fair trial.

(Para 20 & 21)

Further held, that by not providing an opportunity to the accused to cross examine the material prosecution witnesses by his counsel, his fundamental right of getting free, fair, just and reasonable trial has been violated. One cannot lose sight of the fact that even an intelligent and educated man, not trained in law, and having no skill in the science of cross-examination of witness, is incapable to properly cross-examine the witnesses due to lack of skill and adequate knowledge to prepare his defence.

(Para 22)

Appeal disposed off

Necna Madan, Advocate, *for the appellant*.

Ritu Punj, Addl. A.G., Punjab.

SATISH KUMAR MITTAL, J.

(1) Appellant Vijay Kumar (hereinafter referred to as 'the accused') was sent to face trial for the offence punishable under Section 302 IPC for having caused the death of Sohan Lal, which was exclusively triable by the court of Sessions.

(2) As per the prosecution version, the accused, who was resident of village Bath, was indulging in black magic and witch crafts and was being prevented from doing so by deceased Sohan Lal, his brothers Mohan Lal and Gurcharan Chand, and other villagers. On that account, he was nursing a grudge against them. On 31.3.2006, at about 9.30 PM, complainant Mohan Lal (PW.3) along with his brother Gurcharan Chand (PW.4) had gone to the house of their brother Sohan Lal and they were sitting inside the house. Suddenly, they heard the noise and hurling of abuses from inside, upon which all of them came out in the street. They found that the accused was present there, who was hurling abuses and noise by saying that he was a 'Baba', they were speaking against him, and today he would teach them a lesson. Thereupon, Sohan Lal went ahead in order to make the accused understand, upon which the accused gave a *Trishul* blow (which he was holding in his hand) on the left side of the chest of Sohan Lal. He fell down and profuse bleeding started from his body. The complainant and his brother raised alarm, upon which the accused ran away from the spot with his *Trishul*. Immediately thereafter, the complainant and his brother arranged a conveyance and took Sohan Lal to Civil Hospital, Nurmahal, where he was declared dead. The Doctor sent a report to the police. On receiving the same, Inspector Satinder Kumar, SHO Police Station Nurmahal (PW.7) came to the Hospital and recorded the statement (Ex.PE) of complainant Mohan Lal, on the basis of which formal FIR (Ex.PE/2) was registered against the accused under Section 302 IPC.

(3) On 1.4.2006, at about 11.30, Dr. Ashwani Kumar (PW.1) conducted the post mortem examination on the dead body of Sohan Lal and the following four injuries were found on the dead body :

1. Incised wound 3/4 inch x 1/2 inch on the front of the left side of chest, 5 inches above the left nipple, underneath the third rib. On exploration, the chest cavity was full of blood, left lung was punctured. Arch of Aorta was punctured. Heart was healthy and empty.
2. An abrasion 1 inch on the front of the left knee joint.
3. Lacerated wound 1-1/2 inches x 1 inch on the dorsum of the left big toe.
4. Lacerated wound 1/2 inch x 1/2 inch on the dorsum of the left second toe.

He opined that the death was caused due to shock and haemorrhage, which was sufficient to cause death in the ordinary course of nature. According to him, injury No.1 was sufficient to cause death.

(4) On 1.4.2006, Inspector Satinder Kumar arrested the accused and during interrogation, in the presence of ASI Raj Kumar and ASI Kuldip Kumar, he got recovered *Trishul*, which was kept concealed by him in the bushes inside the cremation ground of village Bath. The same was taken into possession vide memo Ex.PL.

(5) After completion of investigation, challan was presented before the Judicial Magistrate Ist Class, Phillaur, who committed the case to the court of Sessions Judge, Jalandhar, and it was received by the court of Sessions Judge on 24.7.2006. Thereafter, the case was adjourned to 4.8.2006 for consideration. On 4.8.2006, the Sessions Judge was on leave and the case was put up before Incharge, Sessions Judge, who adjourned the same for 12.8.2006 for consideration. But surprisingly, the case was taken up on 8.8.2006 and charge under Section 302 IPC was framed against the accused. A perusal of the zimni order passed on 8.8.2006 shows that the accused was present in the court with counsel and the arguments on charge were heard, but a perusal of the original record shows that on that day, the accused was not having any counsel. For the first time, the Vakalatnama of the accused was accepted by Shri S.K. Kapur and Shri Tejinder Singh, Advocates, on 19.1.2007. Even a perusal of the zimni order dated 19.1.2007 reveals that Shri S.K. Kapur, Advocate, had appeared on behalf of the accused and had prayed for adjournment on the ground that he was engaged by the accused only on that day.

(6) On 22.11.2006, Dr. Ashwani Kumar was examined as PW.1, who proved the Post Mortem Report of the deceased, request of the police for Post Mortem examination and the inquest report as Ex.PA, Ex.PB and Ex.PC, respectively. On that day also, the accused was having no counsel, as is evident from the zimni order of the said date. The statement of PW.1 Dr. Ashwani Kumar shows that an opportunity was given to the accused to cross-examine the witness, but he did not cross-examine him and the crossexamination of the witness was recorded as "Nil (opportunity given)". Thereafter, the case was adjourned to 19.1.2007. On that day, six prosecution witnesses were present, but on the request of counsel for the accused that

he was engaged by the accused only on that day, all the witnesses were bound down for 1.3.2007. On 1.3.2007, the Sessions Judge was on leave and the case was adjourned to 30.3.2007. On 30.3.2007, seven prosecution witnesses were present, but due to the non-appearance of the counsel for the accused on account of No Work Call given by the Advocates, those witnesses were bound down for 3.5.2007. On 3.5.2007, statements of four prosecution witnesses, namely HC Bhajan Lal Mohan Lal, Gurcharan Chand and HC Som Nath, were recorded as PW.2, PW.3, PW.4 and PW.5, respectively, whereas two witnesses were given up by the Public Prosecutor being unnecessary. PW.2 HC Bhajan Lal and PW.5 HC Som Nath are the formal witnesses, whereas PW.3 Mohan Lal and PW.4 Gurcharan Chand are the eye witnesses. Their statements show that opportunity was given to the accused to cross-examine them, but he did not cross-examine these material witnesses, therefore, cross-examination of these witness was again recorded as "Nil (opportunity given)". It is pertinent to mention here that on that day, no counsel was present on behalf of the accused and it was wrongly recorded in the zimni order that counsel for the accused was present. The statements of the prosecution witnesses, recorded on that day, clearly indicates that their cross-examination was conducted by the accused, but not by his counsel. Thereafter, the case was adjourned to 5.6.2007. In the meantime, the office of Assistant District Attorney (Legal Services) Jalandhar, vide its letter dated 21.5.2007 appointed Shri G.K. Agnihotri, Advocate, as Legal Aid Counsel, to defend the accused in the trial court. Accordingly, on 5.6.2007, he appeared on behalf of the accused before the trial court. On that day, two prosecution witnesses were given up being unnecessary, and the case was adjourned to 14.7.2007. On 14.7.2007, PW.6 Kirpal Singh (formal witness) and PW.7 Inspector Satinder Kumar (Investigating Officer) were examined by the prosecution and they were cross-examined by counsel for the accused. Thereafter, PW.8 Amritpreet Singh Bedi and PW.9 MHC Jaswinder Singh were examined on 21.9.2007.

(7) After the closure of the prosecution evidence, statement of the accused was recorded under Section 313 Cr.P.C., wherein he denied the incriminating evidence appearing against them. He pleaded innocence and false implication in the case. However, he did not lead any evidence in his defence.

(8) After hearing learned counsel for the parties, the trial court vide judgment and order dated 29.11.2007 convicted and sentenced the accused to undergo imprisonment for life and to pay a fine of ' 5,000/-, in default thereof to further undergo rigorous imprisonment for a period of two years, under Section 302 IPC for committing the murder of Sohan Lal, and sentenced him. Though the trial court held that the prosecution has failed to prove the recovery of *Trishul*, but convicted the accused on the basis of statements of two eye witnesses, namely PW.3 Mohan Lal and PW.4 Gurcharan Chand, which have been corroborated by the medical evidence, i.e Post Mortem Report (Ex.PA) proved by PW.1 Dr. Ashwani Kumar.

(9) Against the said judgment and order, the accused has filed the instant appeal.

(10) During the course of hearing, learned counsel for the accused pointed out that in the present case, a fair trial was not conducted against the accused, and he has been convicted primarily on the basis of statements of three prosecution witnesses, namely PW.1 Dr. Ashwani Kumar, PW.3 Mohan Lal and PW.4 Gurcharan Chand, who were examined in the absence of counsel for the accused, and therefore, could not be cross-examined at all by the counsel for the accused. Learned counsel argued that, as is clear from the record, the opportunity to cross-examine these three material prosecution witnesses was given to the accused, as on that day, he was having no counsel. Learned counsel further argued that when the accused being a poor person or otherwise had not engaged any counsel, it was the duty of the trial court to provide a suitable counsel to the accused, particularly in a murder case. According to him, on the basis of the statements of eye witnesses, who were not subjected to any crossexamination by counsel for the accused, conviction of the accused is wholly unsustainable and unjust and is in violation of the fundamental right of the accused to defend himself in the criminal case, by taking competent legal advise.

(11) We have heard learned counsel for the parties on the issue whether in the facts and circumstances of the present case, as indicated above, a fair trial was conducted against the accused.

(12) Every accused has a fundamental right to be defended by a counsel and to have a fair and impartial trial. The right to be heard is fundamental and essential for every judicial system. If the person is charged

with a criminal offence and he is incapable, generally of determining for himself whether the indictment is good or bad and when he is unfamiliar with the rules of evidence, then the aid of a competent counsel is must for a fair trial. Normally, an accused lacks both the skill and knowledge adequately to prepare his defence, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. Therefore, the competent legal assistance to the accused is mandatory for a fair trial.

(13) The right to a fair trial has been internationally and nationally recognised by all the civilised countries. The concept of fair trial is based on the basic principles of natural justice. It has been accepted as one of the human rights in the Universal Declaration of Human Rights, 1948 (hereinafter referred to as 'the UDHR') and also in the International Covenant on Civil and Political Rights. Articles 14 (2) and (3) of the International Covenant on Civil and Political Rights read as under :

“Article 14.

xxx xxx xxx

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality :

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed,

if he does not have legal assistance, of his right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.”

Thus, Article 14 (3) (d) entitles the person facing the criminal charge either to defend himself in person or through the assistance of a counsel of his choice and if he does not have legal assistance, to be informed of his right and provide him the legal assistance without payment in case he does not have sufficient means to pay for it. It is accepted in the civilised world without exception that the poor and ignorant man is equal to a strong and mighty opponent before the law. But it is of no value for a poor and ignorant man if there is none to inform him what the law is. In the absence of such information that courts are open to him on the same terms as to all other persons the guarantee of equality is illusory. The aforesaid International Covenant on Civil and Political Rights guarantees to the indigent citizens of the member countries the right to be defended and right to have legal assistance without payment.

(14) Not only this, the UDHR ensures due process, and Article 10 thereof provides that :

‘10. Everyone is entitled in full equality to a fair hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charges against him.’

(15) Article 11 of the UDHR guarantees everyone charged with a penal offence all the guarantees necessary for the defence. The same reads as under :

“11. (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”

(16) These salutary features forming part of the International Covenants and UDHR are deep rooted in our constitutional scheme. Article 21 of the Constitution of India commands in emphatic terms that no person shall be deprived of his life or personal liberty except according to the procedure established by law and Article 22 (1) thereof confers on the person charged to be defended by a legal practitioner of his choice. Article 39 A of the Constitution of India casts duty on the State to ensure that justice is not denied by reason of economic or other disabilities in the legal system and to provide free legal aid to every citizen with economic or other disabilities.

(17) Besides the International Covenants and Declarations and the constitutional guarantees referred to above, Section 303 of the Code of Criminal Procedure, 1973 gives right to any person accused of an offence before a criminal court to be defended by a pleader of his choice. Section 304 of the Code of Criminal Procedure contemplates legal aid to accused facing charge in a case triable by Court of Sessions at State expense and the same 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 subsection (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 subsection (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.”

From a plain reading of the aforesaid provision, it is evident that in a trial before the Court of Sessions, if the accused is not represented by a pleader and has not sufficient means, the court shall assign a pleader for his defence at the expense of the State. The entitlement to free legal aid is not dependent on the accused making an application to that effect, in fact, the court is obliged to inform the accused of his right to obtain free legal aid and provide him with the same.

(18) The right of a person charged with crime to have the services of a lawyer is fundamental and essential for fair trial. The trial to be defended by a legal practitioner, flowing from Article 22 (1) of the Constitution has further been fortified by the introduction of the Directive Principles of State Policy embodied in Article 39A of the Constitution by the 42nd Amendment Act of 1976 and enactment of sub-section 1 of Section 304 of the Code of Criminal Procedure. Legal assistance to a poor person facing trial whose life and personal liberty is in jeopardy is mandated not only by the Constitution and the Code of Criminal Procedure but also by International Covenants and Human Rights Declarations. If an accused too poor to afford a lawyer is to go through the trial without legal assistance, such a trial cannot be regarded as reasonable, fair and just. The right to be heard in criminal trial would be inconsequential and of no avail if within itself it does not include right to be heard through counsel. One cannot lose sight of the fact that even intelligent and educated men, not trained in law, have more than often no skill in the science of law if charged with crime. Such an accused not only lacks both the skill and knowledge adequately to prepare his defence but many a time loses his equilibrium in face of the charge. A guiding hand of counsel at every step in the proceeding is needed for fair trial. If it is true of men of intelligence, how much true is it of the ignorant and the illiterate or those of lower intellect. An accused without the lawyer faces the danger of conviction because he does not know how to establish his innocence.

(19) The Hon'ble Supreme Court in the case of *Zahira Habibullah Sheikh (5) and another* versus *State of Gujarat and others (1)*, has explained the concept of fair trial to an accused and it was central to the administration of justice and the cardinality of protection of human rights. It is stated :

“35..... If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere

recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. The courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.

36. The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning a Nelson's eye to the needs of society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial."

In *M.H. Hoskot versus State of Maharashtra (2)*, the Hon'ble Supreme Court has held as under :

14. The other ingredient of fair procedure to a prisoner, who has to seek his liberation through the court process is lawyer's services.

Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise; and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side. Our judiciary, moulded by Anglo-American models and our juridical process, engineered by kindred legal technology, compel the collaboration of lawyer-power for steering the wheels of equal justice under the law. Free legal services to be needy is part of the English criminal justice system. And the American jurist, Prof. Vance of Yale, sounded sense for India too when he said :

“What does it profit a poor and ignorant man that he is equal to his strong antagonist before the law if there is no one to inform him what the law is? Or that the courts are open to him on the same terms as to all other persons when he has not the wherewithal to pay the admission fee?”

In *Mohd. Sukur Ali* versus *State of Assam* (3), it is observed by the Hon'ble Supreme Court as under :

“9. In *Maneka Gandhi v. Union of India*, it has been held by a Constitution Bench of this Court that the procedure for depriving a person of his life or liberty should be fair, reasonable and just. We are of the opinion that it is not fair or just that a criminal case should be decided against an accused in the absence of a counsel. It is only a lawyer who is conversant with law who can properly defend an accused in a criminal case. Hence, in our opinion, if a criminal case (whether a trial or appeal/revision) is decided against an accused in the absence of a counsel, there will be violation of Article 21 of the Constitution.

10. The right to appear through counsel has existed in England for over three centuries. In ancient Rome there were great lawyers e.g. Cicero, Scaevola, Crassus, etc. who defended the accused. In fact the higher the human race has progressed in civilisation, the clearer and stronger has that right appeared, and the more firmly it has been held and asserted. Even in the Nuremberg trials the Nazi war criminals,

responsible for killing millions of persons, were yet provided counsel. Therefore when we say that the accused should be provided counsel we are not bringing into existence a new principle but simply recognising what already existed and which civilised people have long enjoyed.”

In the case of *Hussainara Khatoon and others versus Home Secy., State of Bihar (4)*, it is held as under :

“6. Then there are several under trial prisoners who are charged with offences which are bailable but who are still in jail presumably because no application for bail has been made on their behalf or being too poor they are unable to furnish bail. It is not uncommon to find that under trial prisoners who are produced before the Magistrates are unaware of their right to obtain release on bail and on account of their poverty, they are unable to engage a lawyer who would apprise them of their right to apply for bail and help them to secure release on bail by making a proper application to the Magistrate in that behalf. Sometimes the Magistrates also refuse to release the under trial prisoners produced before them on their personal bond but insist on monetary bail with sureties, which by reason of their poverty the under trial prisoners are unable to furnish and which, therefore, effectively shuts out for them any possibility of release from pre-trial detention. This unfortunate situation cries aloud for introduction of an adequate and comprehensive legal service programme, but so far, these cries do not seem to have evoked any response. We do not think it is possible to reach the benefits of the legal process to the poor, to protect them against injustice and to secure to them their constitutional and statutory rights unless there is a nation-wide legal service programme to provide free legal services to them. It is now well settled, as a result of the decision of this Court in *Maneka Gandhi v. Union of India* that 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." This Court pointed out in *M.H. Hoskot v. State of Maharashtra* : "Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise; and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side. Our judicature, moulded by Anglo-American models and our juridical process, engineered by kindred legal technology, compel the collaboration of lawyer-power for steering the wheels of equal justice under the law". Free legal services to the poor and the needy is an essential element of any 'reasonable, fair and just' procedure. It is not necessary to quote authoritative pronouncements by Judges and Jurists in support of the view that without the service of a lawyer an accused person would be denied 'reasonable, fair and just' procedure. Black, J., observed in *Gideon v. Wainwright* :

Not only those precedents but also reason and reflection require us to recognise that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both State and Federal quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime who fail to hire the best lawyers they can get to prepare and present their defences. That Government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and

essential to fair trials in some countries, but is in ours. From the very beginning, our State and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realised if the poor man charged with crime has to face his accusers without a lawyer to assist him."

In the case of *Khatri versus State of Bihar (5)*, the Supreme Court has held as under :-

"5. That takes us to one other important issue which arises in this case. It is clear from the particulars supplied by the State from the records of the various Judicial Magistrates dealing with the blinded prisoners from time to time that, neither at the time when the blinded prisoners were produced for the first time before the Judicial Magistrate nor at the time when the remand orders were passed, was any legal representation available to most of the blinded prisoners. The records of the Judicial Magistrates show that no legal representation was provided to the blinded prisoners, because none of them asked for it nor did the Judicial Magistrates enquire from the blinded prisoners produced before them either initially or at the time of remand whether they wanted any legal representation at State cost. The only excuse for not providing legal representation to the blinded prisoners at the cost of the State was that none of the blinded prisoners asked for it. The result was that barring two or three blinded prisoners who managed to get a lawyer to represent them at the later stages of remand, most of the blinded prisoners were not represented by any lawyers and save a few who were released on bail, and that too after being in jail for quite some time, the rest of them continued to languish in jail. It is difficult to understand how this state of affairs could be permitted to continue despite the decision of this Court in *Hussainara Khatoon (IV)* case. This Court has pointed out in *Hussainara Khatoon (IV)* case which was decided as far back as March 9, 1979 that the right to free legal services is 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 guarantee of

Article 21 and the State is under a constitutional mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer. It is unfortunate that though this Court declared the right to legal aid as a fundamental right of an accused person by a process of judicial construction of Article 21, most of the States in the country have not taken note of this decision and provided free legal services to a person accused of an offence. We regret this disregard of the decision of the highest court in the land by many of the States despite the constitutional declaration in Article 141 that the law declared by this Court shall be binding throughout the territory of India. Mr. M.G Bhagat on behalf of the State agreed that in view of the decision of this Court the State was bound to provide free legal services to an indigent accused but he suggested that the State might find it difficult to do so owing to financial constraints. We may point out to the State of Bihar that it cannot avoid its constitutional obligation to provide free legal services to a poor accused by pleading financial or administrative inability. The State is under a constitutional mandate to provide free legal aid to an accused person who is unable to secure legal services on account of indigence and whatever is necessary for this purpose has to be done by the State. The State may have its financial constraints and its priorities in expenditure but, as pointed out by the court in *Rhem v. Malcolm* 'the law does not permit any Government to deprive its citizens of constitutional rights on a plea of poverty' and to quote the words of Justice Blackmun in *Jackson v. Bishop* 'humane considerations and constitutional requirements are not in this day to be measured by dollar considerations'. Moreover, this constitutional obligation to provide free legal services to an indigent accused does not arise only when the trial commences but also attaches when the accused is for the first time produced before the Magistrate. 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 the first opportunity to apply for bail and obtain his release as also to resist remand to 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 when he is first produced before the Magistrate as also when he is remanded from time to time.

6. But even this right to free legal services would be illusory for an indigent accused unless the Magistrate or the Sessions Judge before whom he is produced informs him of such right. It is common knowledge that about 70 per cent of the people in the rural areas are illiterate and even more than that percentage of people are not aware of the rights conferred upon them by law. There is no much lack of legal awareness that it has always been recognised as one of the principal items of the programme of the legal aid movement in this country to promote legal literacy. It would make a mockery of legal aid if it were to be left to a poor ignorant and illiterate accused to ask for free legal services. Legal aid would become merely a paper promise and it would fail of its purpose. The Magistrate or the Sessions Judge before whom the accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. Unfortunately, the Judicial Magistrates failed to discharge this obligation in the case of the blinded prisoners and they merely stated that no legal representation was asked for by the blinded prisoners and hence none was provided. We would, therefore, direct the Magistrates and Sessions Judges in the country to inform every accused who appears before them and who is not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal services at the cost of the State. Unless he is not willing to take advantage of the free legal services provided by the State, he must be provided legal representation at the cost of the State. We would also direct the State of Bihar and require every other State in the country to make provision for grant of free legal services to an accused who is unable to engage a lawyer on account of reasons such as poverty, indigence or incummunicado situation. The only

qualification would be that the offence charged against the accused is such that, on conviction, it would result in a sentence of imprisonment and is of such a nature that the circumstances of the case and the needs of social justice require that he should be given free legal representation. There may be cases involving offences such as economic offences or offences against law prohibiting prostitution or child abuse and the like, where social justice may require that free legal services need not be provided by the State.”

In *Ram Awadh* versus *State of U.P.* (6), the Allahabad High Court held as under :

“14. The requirement of providing counsel to an accused at the State expense is not an empty formality which may be not (met) by merely appointing a counsel whatever his caliber may be. When the law enjoins appointing a counsel to defend an accused, it means an effective counsel, a counsel in real sense, who can safeguard the interest of the accused in best possible manner, which is permissible under law. An accused facing charge of murder may be sentenced to death or imprisonment for life and consequently his case should be handled by a competent person and not by a novice or one who has no professional expertise. A duty is cast upon the Judges before whom such indigent accused are facing trial for serious offence and who are not able to engage a counsel, to appoint competent persons for their defence. It is needless to emphasize that a Judge is not prosecutor and his duty is to discern the truth so that he is able to arrive at a correct conclusion. A defence lawyer plays an important role in bringing out the truth before the Court by cross-examining the witnesses and placing relevant materials or evidence. The absence of proper cross-examination may at times result in miscarriage of justice and the Court has to guard against such an eventuality.”

(20) The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result, the accused charged with a serious offence must not be stripped of his valuable right of a fair and impartial trial. To do that, would be negation of concept of due process of law, regardless of the merits of the appeal.

(21) Right of the accused to cross-examine the prosecution witnesses is also fundamental right and is part and parcel of the fair trial. The purpose of cross-examination of witness has been explained by the Constitution Bench of the Apex Court in *Kartar Singh versus State of Punjab* (7), as under :

“278. Section 137 of the Evidence Act defines what cross-examination means and Sections 139 and 145 speak of the mode of cross-examination with reference to the documents as well as oral evidence. It is the jurisprudence of law that cross-examination is an acid-test of the truthfulness of the statement made by a witness on oath in examination-in-chief, the objects of which are :

- (1) to destroy or weaken the evidentiary value of the witness of his adversary;
- (2) to elicit facts in favour of the cross-examining lawyer's client from the mouth of the witness of the adversary party;
- (3) to show that the witness is unworthy of belief by impeaching the credit of the said witness; and the questions to be addressed in the course of cross-examination are to test his veracity; to discover who he is and what is his position in life; and to shake his credit by injuring his character.”

The aforesaid view was again reiterated by the Hon'ble Supreme Court in *Jayendra Vishnu Thakur versus State of Maharashtra* (8), wherein it is observed as under :

“24. A right to cross-examine a witness, apart from being a natural right is a statutory right. Section 137 of the Evidence Act provides for examination-in-chief, cross-examination and re-examination. Section 138 of the Evidence Act confers a right on the adverse party to cross-examine a witness who had been examined in chief, subject of course to expression of his desire to the said effect. But indisputably such an opportunity is to be granted. An accused has not only a valuable right to represent himself, he has also the right to be informed thereabout. If an exception is to be carved out, the statute must say

(7) (1994) 3 SCC 569

(8) (2009) 7 SCC 104

so expressly or the same must be capable or being inferred by necessary implication. There are statutes like the Extradition Act, 1962 which excludes taking of evidence vis-a-vis opinion.”

Recently, the Hon’ble Supreme Court in *Mohd. Hussain @ Zulfikar Ali* versus *State (9)*, has observed that it cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case, to confront the witnesses against him not only on facts but also to discredit the witness by showing that his testimony-in-chief was untrue and unbiased. Therefore, every accused has a right to cross-examine a prosecution witness and the said right is a part of fair trial. The object and purpose of providing competent legal aid to undefended and unrepresented accused persons are to see that the accused gets free and fair, just and reasonable trial of charge in a criminal case.

(22) In the light of the aforesaid principles, if we examine the facts of the present case, then we come to inevitable conclusion that in the present case, by not providing an opportunity to the accused to cross-examine the material prosecution witnesses by his counsel, his fundamental right of getting free, fair, just and reasonable trial has been violated. On the first day, when the charge was framed, the accused was not given the assistance of an Advocate. On that day, the accused neither engaged any counsel nor the trial court provided him a counsel to defend himself during the trial. On the subsequent date, when four prosecution witnesses were examined, the accused was again not having any counsel. Though the opportunity to cross-examine the witnesses was given to the accused, but in our opinion being illiterate and poor person, the accused was not in a position to cross-examine the prosecution witnesses. We are surprised to note that the Sessions Judge, who conducted the trial in the murder case, even did not notice that the accused was not competent enough to cross-examine the prosecution witnesses. In our opinion, the Sessions judge failed to discharge his duty while not providing legal assistance to the accused before examining the material witnesses of the prosecution. One cannot lose sight of the fact that even an intelligent and educated man, not trained in law, and having no skill in the science of cross-examination of witness, is incapable to properly cross-examine the witnesses due to lack of skill and adequate knowledge to prepare his defence. In our opinion, assistance of counsel at every stage in the trial is necessary for a fair trial.

(23) Unfortunately, in the present case, the learned Sessions Judge has convicted the accused solely on the basis of the statements of two eye witnesses and one Medical Officer, who conducted the post mortem of the deceased, and all these three witnesses were not cross-examined, because the accused was having no counsel at that time. Therefore, conviction of the accused under Section 302 IPC, without providing him sufficient opportunity to defend his case, is not sustainable. Accordingly, the impugned judgment of conviction and the order of sentence are set aside and the matter is remitted to the trial court to decide the case afresh, after providing the accused with competent legal assistance of an Advocate having more than ten years standing on the criminal side, and after providing opportunity to cross-examine the prosecution witnesses, whose cross-examination has been recorded as “Nil (opportunity given)”, and thereafter, statement of the accused under Section 313 Cr.P.C. be recorded afresh. In the meanwhile, during the pendency of the trial, the accused be released on bail to the satisfaction of the trial court. The trial court is further directed to conclude the trial within a period of six months.

(24) Appeal stands disposed of, accordingly.