

MD. SUKUR ALI
v.
STATE OF ASSAM
(Criminal Appeal No.546 of 2011)

FEBRUARY 24, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Administration of criminal justice: Right to be defended by counsel – Held: A criminal case should not be decided against the accused in the absence of a counsel – It is only a counsel who is conversant with law who can properly defend an accused in a criminal case – Adjudication of a criminal case (whether a trial or appeal/revision) against an accused in the absence of a counsel would be violative of Article 21 of the Constitution – In the absence of a counsel, for whatever reasons, the case should not be decided forthwith against the accused but in such a situation, the court should appoint a counsel who is practicing on the criminal side as amicus curiae and decide the case after fixing another date and after hearing him – Constitution of India, 1950 – Article 21.

A.S. Mohammed Rafi vs. State of Tamil Nadu & Ors. AIR 2011 SC 308; Man Singh & Anr. vs. State of Madhya Pradesh (2008) 9 SCC 542; Bapu Limbaji Kamble vs. State of Maharashtra (2005) 11 SC 412; Maneka Gandhi vs. Union of India AIR 1978 SC 597 – Relied on

Powell vs. Alabama, 287 US 45 (1932); Gideon vs. Wainwright 372 US 335 (1963); Brewer vs. William 430 US 387 (1977) – Referred to

Constitutional Law of India, Third Edition by Jurist Seervai – Referred to

A Case Law Reference:

	AIR 2011 SC 308	Relied on	Para 9
	(2008) 9 SCC 542	Relied on	Para 10
B	(2005) 11 SC 412	Relied on	Para 10
	AIR 1978 SC 597	Relied on	Para 12
	287 US 45 (1932)	Referred to	Para 8
	372 US 335 (1963)	Referred to	Para 17
C	430 US 387 (1977)	Referred to	Para 18

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 546 of 2011.

D From the Judgment & Order dated 01.06.2010 of the High Court of Guwahati, Assam in Criminal Appeal No. 137 of 2003.

Fail S. Nariman, Azim H. Laskar, Bekash Kar Gupta, Abhijit Sengupta, Avijit Roy, Vartika Sahay (for Corporate Law Group) for the appearing parties.

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The following order of the Court was delivered

ORDER

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1. Leave granted.

2. Heard learned counsel for the parties.

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3. We have also heard Mr. Fali S. Nariman, learned senior counsel, who very kindly consented to assist us as Amicus Curiae in this case in which an important constitutional and legal question is involved.

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4. That question is whether in a criminal case if the counsel for the accused does not appear, for whatever reasons, should the case be decided in the absence of the counsel against the

accused, or the Court should appoint an amicus curiae to defend the accused ?

5. In the present case, it appears that Criminal Appeal 137 of 2003 was decided by the Gauhati High Court on 01.06.2010 in the absence of the counsel for the appellant- accused and the conviction was upheld.

6. Mr. Nariman, learned senior counsel, pointed out that earlier the counsel for the appellant-accused was Mr. A.S. Choudhury but the appellant changed his counsel and appointed Mr. B. Sinha in the year 2007 as his new counsel, and this fact is corroborated by affidavit. Unfortunately, the name of Mr. Sinha as counsel for the appellant was not shown in the cause list when the case was listed and the name of the former counsel Mr. Choudhury was shown. In these circumstances, Mr. Sinha who was engaged by the appellant as his new counsel did not appear.

7. We are of the opinion that even assuming that the counsel for the accused does not appear because of the counsel's negligence or deliberately, even then the Court should not decide a criminal case against the accused in the absence of his counsel since an accused in a criminal case should not suffer for the fault of his counsel and in such a situation the Court should appoint another counsel as amicus curiae to defend the accused. This is because liberty of a person is the most important feature of our Constitution. Article 21 which guarantees protection of life and personal liberty is the most important fundamental right of the fundamental rights guaranteed by the Constitution. Article 21 can be said to be the 'heart and soul' of the fundamental rights.

8. In our opinion, a criminal case should not be decided against the accused in the absence of a counsel. We are fortified in the view we are taking by a decision of the US Supreme Court in *Powell Vs. Alabama*, 287 US 45 (1932), in which it was observed :-

A "What, then, does a hearing include? Historically and in
 practice, in our own country at least, it has always included
 the right to the aid of counsel when desired and provided
 by the party asserting the right. The right to be heard would
 be, in many cases, of little avail if it did not comprehend
 B the right to be heard by counsel. Even the intelligent and
 educated layman has small and sometimes no skill in the
 science of law. If charged with crime, he is incapable,
 generally, of determining for himself whether the indictment
 is good or bad. He is unfamiliar with the rules of evidence.
 C Left without the aid of counsel he may be put on trial without
 a proper charge, and convicted upon incompetent
 evidence, or evidence irrelevant to the issue or otherwise
 inadmissible. He lacks both the skill and knowledge
 adequately to prepare his defense, even though he have
 a perfect one. He requires the guiding hand of counsel at
 D 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.
 If that be true of men of intelligence, how much more true
 is it of the ignorant and illiterate, or those of feeble intellect.
 E If in any case, civil or criminal, a State or federal court were
 arbitrarily to refuse to hear a party by counsel, employed
 by and appearing for him, it reasonably may not be
 doubted that such a refusal would be a denial of a hearing,
 and, therefore, of due process in the constitutional sense".

F 9. The above decision of the US Supreme Court was cited
 with approval by this Court in *A.S. Mohammed Rafi Vs. State
 of Tamil Nadu & Ors.*, AIR 2011 Supreme Court 308, vide para
 24.

G 10. A similar view which we are taking here was also taken
 by this Court in *Man Singh & Anr. Vs. State of Madhya
 Pradesh* (2008) 9 SCC 542, and in *Bapu Limbaji Kamble Vs.
 State of Maharashtra*, (2005) 11 SC 412.

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11. In this connection we may also refer to Articles 21 and 22(1) of the Constitution. Articles 21 and Articles 22(1) are as under :

“Article 21. Protection of life and personal liberty. - No person shall be deprived of his life or personal liberty except according to procedure established by law”.

Article 22(1). Protection against arrest and detention in certain cases. - (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.”

12. In *Maneka Gandhi vs. Union of India* AIR 1978 SC 597, 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.

13. 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 civilization, the clearer and stronger has that right appeared, and the more firmly has it 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 recognizing what already existed and which

A civilized people have long enjoyed.

14. Apart from the above, we agree with the eminent jurist Seervai who has said in his "Constitutional Law of India", Third Edition, Vol. I, Pg. 857:-

B "The right to be defended by counsel does not
 appear to have been stressed, and was clearly not
 considered in any detail in Ajaib Singh's case (1953) SCR
 254. But the right of a person accused of an offence, or
 C against whom any proceedings were taken under the
 Cr.P.C. is a valuable right which was recognized by
 Section 340 Cr.P.C. Article 22 (1) on its language makes
 that right a constitutional right, and unless there are
 compelling reasons, Article 22 (1) ought not to be cut down
 by judicial construction..... It is submitted that Article 22
 D (1) makes the statutory right under Section 340 Cr.P.C. a
 Constitutional right in respect of criminal or quasi-criminal
 proceedings."

15. We are fully in agreement with Mr. Seervai regarding
 E his above observations. The Founding Fathers of our
 Constitution were themselves freedom fighters who had seen
 civil liberties of our people trampled under foreign rule, and who
 had themselves been incarcerated for long period under the
 formula 'Na vakeel, na daleel, na appeal' (No lawyer, no
 F hearing, no appeal). Many of them were lawyers by profession,
 and knew the importance of counsel, particularly in criminal
 cases. It was for this reason that they provided for assistance
 by counsel under Article 22 (1), and that provision must be
 given the widest construction to effectuate the intention of the
 Founding Fathers.

G 16. In this connection, we may also refer to the ringing
 speech of Rt. Hon. Srinivasa Sastri, speaking in the Imperial
 Legislative Council, at the introduction of the Rowlatt Bill, Feb
 7, 1919 (the Rowlatt Act prohibited counsels to appear for the
 H accused in cases under the Act):-

"When Government undertakes a repressive policy, the innocent are not safe. Men like me would not be considered innocent. The innocent then is he who forswears politics, who takes no part in the public movements of the times, who retires into his house, mumbles his prayers, pays his taxes, and salaams all the government officials all round. The man who interferes in politics, the man who goes about collecting money for any public purpose, the man who addresses a public meeting, then becomes a suspect. I am always on the borderland and I, therefore, for personal reasons, if for nothing else, undertake to say that the possession, in the hands of the Executive, of powers of this drastic nature will not hurt only the wicked. It will hurt the good as well as the bad, and there will be such a lowering of public spirit, there will be such a lowering of the political tone in the country, that all your talk of responsible government will be mere mockery...

"Much better that a few rascals should walk abroad than that the honest man should be obliged for fear of the law of the land to remain shut up in his house, to refrain from the activities which it is in his nature to indulge in, to abstain from all political and public work merely because there is a dreadful law in the land."

17. In *Gideon vs Wainwright*, 372 US 335 (1963) Mr. Justice Hugo Black of the US Supreme Court delivering the unanimous judgment of the Court observed:-

"Lawyers in criminal courts are necessities, not luxuries"

18. In *Brewer vs William*, 430 US 387 (1977) Mr Justice Stewart delivering the opinion of the US Supreme Court observed:-

"The pressures on state executive and judicial officers charged with the administration of the criminal law are great. But it is precisely the predictability of those

A pressures that makes imperative a resolute loyalty to the guarantees that the Constitution extends to us all.”

B 19. For the reasons stated above, we allow this Appeal, set aside the impugned judgment of the High Court and remand the matter to the High Court for a fresh decision after hearing Mr. Sinha, the new learned counsel for the appellant in the High Court, or any other counsel which has been engaged by the appellant, or in the absence of these, an amicus curiae being a lawyer practising on the criminal side.

C 20. The case shall be heard by a Bench of Judges other than those who passed the impugned judgment.

D 21. The Order dated 24.01.2011 passed by this Court granting bail to the appellant shall continue till the appeal is decided by the High Court.

E 22. We reiterate that in the absence of a counsel, for whatever reasons, the case should not be decided forthwith against the accused but in such a situation the Court should appoint a counsel who is practising on the criminal side as amicus curiae and decide the case after fixing another date and hearing him.

F 23. If on the next date of hearing the counsel, who ought to have appeared on the previous date but did not appear, now appears, but cannot show sufficient cause for his non-appearance on the earlier date, then he will be precluded from appearing and arguing the case on behalf of the accused. But, in such a situation, it is open to the accused to either engage another counsel or the Court may proceed with the hearing of the case by the counsel appointed as amicus curiae.

G D.G. Appeal allowed.