

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 140 OF 2008

RAJOO @ RAMAKANT

....Appellant

Versus

THE STATE OF MADHYA PRADESH

....Respondent

J U D G M E N T

Madan B. Lokur, J.

After hearing arguments in this appeal, we had reserved judgment. While preparing the judgment, it was noticed that the appellant (Rajoo) was not represented in the High Court.

The issue that arises, therefore, is whether Rajoo was entitled, as a matter of right, to legal representation in the High Court. Our answer is in the affirmative.

The facts:

On 06.12.1998, seven persons including Rajoo are alleged to have gang-raped 'G'. The Trial Court convicted all of them for the offence and sentenced each of them to 10 years rigorous imprisonment and a fine of Rs. 500/-. In default thereof they were required to undergo rigorous imprisonment for a further period of 3 months.

Appeals were filed by all the convicted persons before the High Court. By its judgment and order dated 05.09.2006, the High Court set aside the conviction in respect of five of the convicts, but upheld the conviction in respect of Rajoo and Vijay. We have been

informed that Vijay has accepted the judgment of the High Court. Only Rajoo has appealed against his conviction and sentence. Before us Rajoo was represented by learned counsel who took us through the material on record and made his submissions.

Constitutional and statutory provisions :

By the 42nd Amendment to the Constitution, effected in 1977, Article 39-A was inserted. This Article provides for free legal aid by suitable legislation or schemes or in any other manner, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Article 39-A of the Constitution reads as follows:-

39A. Equal justice and free legal aid. - The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

Subsequently, with the intention of providing free legal aid, the Central Government resolved (on 26th September, 1980) and appointed the "Committee for Implementing the Legal Aid Schemes". This committee was to monitor and implement legal aid programs on a uniform basis throughout the country in fulfillment of the constitutional mandate.

Experience gained from a review of the working of the committee eventually led to the enactment of the Legal Services Authorities Act, 1987 (for short, the Act).

The Act provides, inter alia for the constitution of a National Legal Services Authority, a Supreme Court Legal Services Committee, State Legal Services Authorities as well as Taluk Legal Services Committees. Section 12 of the Act lays down the criteria for providing legal services. It provides, inter alia, that every person who has to file or defend a case shall be entitled to legal services, if he or she is in custody. Section 13 of the Act provides that persons meeting the criteria laid down in Section 12 of the Act will be entitled to legal services provided the concerned authority is satisfied that such person has a prima facie case to prosecute or defend.

It is important to note in this context that Sections 12 and 13 of the Act do not make any distinction between the trial stage and the appellate stage for providing legal services. In other words, an eligible person is entitled to legal services at any stage of the proceedings which he or she is prosecuting or defending. In fact the Supreme Court Legal Services Committee provides legal assistance to eligible persons in this Court. This makes it abundantly clear that legal services shall be provided to an eligible person at all stages of the proceedings, trial as well as appellate. It is also important to note that in view of the constitutional mandate of Article 39-A, legal services or legal aid is provided to an eligible person free of cost.

Decisions of this Court :

Pending the enactment of the Legal Services Authorities Act, the issue of providing free legal services or free legal aid or free legal representation (all terms being understood as synonymous) came up for consideration before this Court.

Among the first few decisions in this regard is ***Hussainara Khatoon (IV) v. Home Secretary, State of Bihar, (1980) 1 SCC 98***. In that case, reference was made to Article 39-A of the Constitution and it was held that free legal service is an inalienable element 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 [of the Constitution]." It was noted that this is "a constitutional right of every accused person who is unable to engage a lawyer and secure free legal services on account of reasons such as poverty, indigence or incommunicado situation." It was held that the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, subject of course to the accused person not objecting to the providing of a lawyer.

The essence of this decision was followed in ***Khatri (II) v. State of Bihar, (1981) 1 SCC 627***. In that case, it was noted that the Judicial Magistrate did not provide legal representation to the accused persons because they did not ask for it. This was found to be unacceptable. This Court went further and held that it was the obligation of the Judicial Magistrate before whom the accused were

produced to inform them of their entitlement to legal representation at State cost. In this context, it was observed that the right to free legal services would be illusory unless the Magistrate or the Sessions Judge before whom the accused is produced informs him of this right. It would also 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 thereby rendering the constitutional mandate a mere paper promise.

Suk Das v. Union Territory of Arunachal Pradesh, (1986) 2 SCC 401 reiterated the requirement of providing free and adequate legal representation to an indigent person and a person accused of an offence. In that case, it was reiterated that an accused need not ask for legal assistance - the Court dealing with the case is obliged to inform him or her of the entitlement to free legal aid. This Court observed that it was now "settled law that free legal assistance at State cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty and this fundamental right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21 [of the Constitution]."

Since the requirements of law were not met in that case, and in the absence of the accused person being provided with legal representation at State cost, it was held that there was a violation of the fundamental right of the accused under Article 21 of the Constitution. The trial was held to be vitiated on account of a

fatal constitutional infirmity and the conviction and sentence were set aside.

We propose to briefly digress and advert to certain observations made, both in ***Khatiri (II)*** and ***Suk Das***. In both cases, this Court carved out some exceptions in respect of grant of free legal aid to an accused person. It was observed that 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.” We have some reservations whether such exceptions can be carved out particularly keeping in mind the constitutional mandate and the universally accepted principle that a person is presumed innocent until proven guilty. If such exceptions are accepted, there may be a tendency to add some more, such as in cases of terrorism thereby diluting the constitutional mandate and the fundamental right guaranteed under Article 21 of the Constitution. However, we need not say anything more on this subject since the issue is not before us.

The above discussion conclusively shows that this Court has taken a rather pro-active role in the matter of providing free legal assistance to persons accused of an offence or convicted of an offence.

Another view:

A slightly different issue had recently arisen in ***Clark v. Registrar of the Manukau District Court, (2012) NZCA 193***. The issue

before the Court of Appeal in New Zealand was whether legally aided defendants in criminal proceedings are entitled to choose or prefer the counsel assigned to represent them. The discussion in that case centered round the New Zealand Bill of Rights Act, 1990 and the issue was answered in the negative.

However, in the course of discussion, the Court observed that the right of a fair trial is guaranteed by the Bill of Rights Act and it is an absolute right. A fundamental feature of a fair trial is a right to legal representation under the Bill of Rights Act. Reference was made to the decision of the Supreme Court of New Zealand in **Condon v. R, (2006) NZSC 62** wherein it was concluded that representation by a lawyer is nearly always necessary for a trial for a serious offence to be fair. An accused person must have legal representation or at least should have been afforded a reasonable opportunity of attaining it when charged with a serious offence. But, the Supreme Court held that:

"An accused has the right to employ a lawyer, but the state does not guarantee to provide the lawyer's services - in this respect its role is passive, in the sense that it must not impede the exercise of the right by the accused. The exception is under s 24(f) [of the Bill of Rights Act], when the accused does not have sufficient means to provide for legal assistance. Even in such a case, however, it is the accused who must take the necessary steps to obtain assistance under the Legal Services Act."

It was noted that the Supreme Court agreed with the High Court of Australia in **Dietrich v. R, 1992 HCA 57** that, other than in

exceptional circumstances, "an accused who conducts his or her own defence to a serious charge, without having declined or failed to exercise the right to legal representation, would not have had a fair trial." A conviction obtained in such circumstances would be quashed unless the prosecution is able to satisfy the appellate Court that the trial was actually fair.

That there is a right of legal representation available to an accused is undoubted, even in New Zealand and Australia. The only point of disagreement appearing from **Condon**, as far as we are concerned, is whether the accused should be asked whether he or she requires legal assistance or not. The Supreme Court in New Zealand appears to have taken the view that the role of the State (and indeed of the Court) in this regard is passive. The view taken by this Court on issues of legal representation, on the other hand, is pro-active and an obligation is cast on the Court to enquire of the accused or convict whether he or she requires legal representation at State expense.

JUDGMENT

Conclusion:

Under the circumstances, we are of the opinion that neither the Constitution nor the Legal Services Authorities Act makes any distinction between a trial and an appeal for the purposes of providing free legal aid to an accused or a person in custody. We

are also of the view that the High Court was under an obligation to enquire from Rajoo whether he required legal assistance and if he did, it should have been provided to him at State expense. However, since the record of the case does not indicate any such endeavour having been made by the High Court, this case ought to be re-heard by the High Court after providing Rajoo an opportunity of obtaining legal representation.

We dispose of this appeal by setting aside the judgment and order dated 05.09.2006 passed by the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No.3 of 1991 and remit the case records back to the High Court for a fresh hearing. We request the High Court to expedite hearing the appeal.

.....J.
(A.K. Patnaik)

.....J.
(Madan B. Lokur)

New Delhi;
August 9, 2012

JUDGMENT