

(2011) 03 P&H CK 0815

In the Punjab And Haryana At Chandigarh

Case No : Criminal Writ Petition No. 395 of 2008

Karnail Chand

APPELLANT

Vs

State of Punjab

RESPONDENT

Date of Decision : 07-03-2011

Acts Referred:

Border Security Force (Amendment) Rules, 1969 — Rule 101(4), 123, 93(2)
Border Security Force Act, 1968 — Section 123
Constitution of India, 1950 — Article 14, 21, 22(1), 33, 39A
Criminal Procedure Code, 1973 (CrPC) — Section 303, 303
Penal Code, 1860 (IPC) — Section 302

Citation : (2011) 163 PLR 174 : (2011) 4 RCR(Criminal) 527

Hon'ble Judges : Ranjit Singh, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Ranjit Singh, J.—The petitioner-Karnail Chand, who has been convicted by General Security Force Court and presently undergoing life imprisonment, has mis-conceivedly filed an application u/s 374(2) of the Criminal Procedure Code to challenge his conviction by General Security Force Court (for short "GSFC"), which as per him, had held him guilty without appreciating evidence in its true perspective. His plea also is that Court failed to take note of the lacunas in the prosecution case and the evidence brought on file. Through this communication received through Superintendent Jail, which is termed as appeal, the petitioner has submitted that the Trial Court (meaning GSFC) erred in not appreciating the evidence. As per the petitioner, he was wrongly convicted and is pleading innocently that the prosecution version was false. This one page petition was sent to this Court through Jail, would not only be an indication of his poor state, but would show, how an absence of legal advice can deprive a person from raising even challenge to his conviction & sentence and thus deprive him of his right to life & liberty guaranteed under Constitution. This short, crisp misinformed communication was treated as petition and registered as Criminal

Writ Petition No.395 of 2008. This liberal legal approach has come to the rescue of the petitioner, who otherwise would have suffered this sentence & consequence of trial silently in jail without being aware of his right to challenge his conviction & sentence in proper legal manner and the grounds and basis on which this challenge could be made.

2. A petition submitted through Jail meant that no one was there to assist either the cause of the petitioner or to assist the court. Here again this Court came to his rescue and requested a counsel of this Court to assist as Amicus Curiae. The counsel due to some undisclosed reasons chose not to appear on some dates necessitating adjournment of this case on number of occasions. He had then appeared only to make a request for adjourning the case. The case was, thus, again adjourned on number of occasions. Courts could certainly expect better assistance from Amicus. Left with no option, the Court ultimately requested to Ms. Tanu Bedi, another counsel of this Court for assistance. The case has, thereafter, been heard.

3. Since there was total lack of pleadings in this case, the amicus did well to place on record written arguments to which the respondents responded with detailed submissions in writing. The plea is to challenge conviction & sentence and this would be a writ of record. Decision would not depend upon pleadings and it will be well within the domain of this Court to examine the record and the proceedings of GSFC to test the validity of the conviction & sentence. The technicalities regarding lack of pleadings should not come in the way of the petitioner nor this Court should feel any constraint by any such of lack of pleadings. The main ground of attack is inability of the petitioner to engage a counsel, which is rather apparent from the manner in which he has not been able to have any assistance even to challenge his conviction & sentence in a proper manner. After all, it is a case of life and liberty of an individual. He has approached this Court with a plea that conviction and the sentence is an outcome of a trial, where he was not given fair chance to defend. The petitioner is still undergoing the rigors of sentence and can simply plead that his continuous custody is based on a verdict where he suffered an unfair trial and thus, his continued detention is illegal. Respondents then can be called upon to show that the petitioner's conviction and sentence is legally valid and can not be faulted on the grounds as urged by the petitioner.

4. Let us first get the hang of the issues agitated as can be noticed from the proceedings of GSFC.

5. The petitioner was enrolled as a constable in the BSF on 1.4.1988. After completing his basic training, he was posted to 100 Bn BSF on 2.2.1989. The petitioner was detailed on naka duty on the intervening night of 30th September/1st October, 1996 along with LNK VS Saraf and Constable BP Roy. It is stated that both petitioners and LNK V.S. Saraf had consumed liquor at the naka point. Thereafter, the petitioner allegedly entered into heated argument with Constable BP Roy, which led to exchange of abuses between them. At about

2250 hrs. on 30.9.1996, the petitioner is alleged to have fired three consecutive shots from his 7.62mm self loading rifle at Constable BP Roy and caused his death. FIR No.231/96 dated 1.10.1996 u/s 302 IPC was lodged at Police Station Fazilka, Punjab. This case was later on transferred to General Security Force Court by Judicial Magistrate, (First Class) Fazilka. The petitioner, thereafter, was put to trial before GSFC from 6.4.1998 to 28.4.1998. The petitioner was held guilty of the charge and sentenced to suffer imprisonment for life and to be dismissed from service. Upon confirmation of the sentence, as required by law, the petitioner was committed to Superintendent Jail at Fazilka and presently is undergoing life imprisonment at Central Jail, Ludhiana. It may be a bit unfortunate to observe that by now the petitioner has undergone custody of over 14 years actual. The petitioner has delayed in making the approach. For this, his ignorance and lack of legal assistance is an apparent cause. The petitioner has challenged the proceedings through this brief communication through Jail in the year 2008. Either he did not received proper advise or perhaps his poverty was the cause for which he could not make an approach in an appropriate manner to raise the challenge.

6. In the reply filed, the respondents of course would raise the preliminary objection regarding the delay and laches. As per the respondents, the petitioner has made this approach with delay of 10 years. Normally this delay would have been reason enough to decline consideration any further, but in my considered view doing that would lead to perpetuating injustice to the petitioner. The manner, in which the case of the petitioner has been handled, would show that he has suffered seriously on account of lack of proper advice during the trial and subsequently. The petitioner could not defend himself properly and the consequence thereof is directly staring at him. One may have taken this delay into consideration to defeat his challenge to the proceedings of the Security Force Court, had the petitioner not been still facing the consequence of the sentence awarded to him. Unfortunate, would it be to notice that the petitioner is still undergoing custody without his case being heard. The rigors of law are having effect on the petitioner, who is subjected to the trial under the BSF Act, which even may have lead to denial of certain human right considerations. The result is that the petitioner has undergone more than actual sentence of over 14 years and is still in custody. As per Ms. Tanu Bedi till November, the petitioner was in incarceration though as on date she does not have any instructions in this regard.

7. Be that as it may, I am not inclined to negate the challenge of the petitioner only on the ground that he has delayed much in making the approach. Seeing the manner of his approach, one can understand the difficulty which confronted the petitioner. He has challenged the order of his conviction & life sentence by writing one page letter. It would reveal his plight, his ignorance and lack of advice, which still continues to elude him. The petitioner apparently has not received any assistance from his family or assistance from so called legal aid forums on the basis of legal provision legislated in this regard. I wonder what is

the use of Article 39-A of the Constitution, if the plight of some person, who is illiterate, is as is that of the petitioner. Article 39-A of the Constitution has made a very salutary provision in the Constitution since 1977. This Article makes a provision for equal justice and free legal aid. The State is, thus, put under an obligation to secure that the operation of legal system promotes justice on the basis of equal opportunity and is in particular required to provide free legal aid by suitable legislation or schemes or any other way, to ensure that opportunities to secure justice are not denied to any citizen by reasons of economic or other disabilities. Certainly, the petitioner in this case has suffered either because of reason of economic or some other disability due to his incarceration. Otherwise I do not find any justification as to why despite liberal provisions having been made in regard to the legal aid, nobody came forward to help the petitioner to file or to draft a petition in proper manner so that his challenge in law could be considered in an appropriate manner. Denying him the right of consideration at this stage on the ground that he has delayed in filing the petition (if it could be so termed), would amount to adding insult to injuries. At least, I am not inclined to adopt that course. The preliminary submission and objection raised by the respondent-State on the ground of delay, thus, can not stand in my way to consider the pleas raised by Amicus Curiae to see if the petitioner has suffered on account of any unfair approach or whether there was any denial of opportunity to him to properly defend himself.

8. Though this writ petition does not contain any grounds of challenge because of the reason as already noticed, but amicus has taken some action to place on record the grounds of challenge in the form of his written submissions. After going through the proceedings of GSFC, counsel has placed on record the written submissions containing grounds of challenge as well. Mainly, the counsel would raise the following points for consideration of this Court to challenge the findings and the sentence of Court Martial awarded by the GSFC:-

(A) The scope of Article 33 vis-a-vis trial and conviction of a person enrolled under BSF Act and accused of a civilian offence.

(i) Exposing a person enrolled under BSF Act to procedure not in consonance with the one followed in the criminal Court would be violative of Article 14.

(ii) Right to counsel at the expense of State.

(iii) Right to have at least one appeal.

(B) Principle of natural justice.

(i) No one should be judge in its own cause

(ii) Law Officer's failure to do its duly properly has vitiated the trial.

(iii) The culpable homicide not amounting to murder not explained,

(iv) Reasons for decisions.

(D) The judgment so far on the applicability of the provisions of Armed Forces Act and inapplicability of the same to the issues raised in the writ petition."

9. Elaborating the grounds, the counsel would plead that a person ACCUSED OF AN OFFENCE, WHICH IS PUNISHABLE WITH DEATH, would have various rights including right to engage a counsel of his choice, which was denied to him and has resulted in a serious prejudice, rendering the trial to be unfair. As per the counsel, Article 21 of the Constitution would come to the rescue of the petitioner, which is a guarantee of his life and liberty. The petitioner has a right to have a counsel at the State expense in view of the nature of offence for which he was put to trial. The counsel would also plead violation of principle of natural justice in conducting the trial and in this regard, with special emphasis, make reference to the duty of law officer. As per the counsel, the law officer attending the trial did not perform his sacrosanct duty in accordance with Law. Inasmuch as he failed to give appropriate direction in regard to the offence and the right of the Court to arrive at a special finding. The counsel contends that this non-direction would amount to misdirection vitiating entire trial and finding. Further plea is that confirming and convening authority in this case was the same and thus, the same authority became a judge of his own cause, which will be in violation of basic spirit of human law. As per the counsel, absence of appeal would be another lacuna, which would directly stare in this case and except for filing the present petition, the petitioner is left with no remedy. Counsel would emphasize this aspect of the issue by making reference to the amendment made in the provisions of the Army Act and other Acts, whereby Armed Forces Tribunal has been constituted to hear appeal against the verdict of Courts Martial.

10. Counsel for Union of India would not only refer to the reply filed, but has also placed on record the written submissions to respond to the challenge raised on behalf of the petitioner through the Amicus Curiae. As per the response, the petitioner was at liberty to engage a counsel to defend his case i.e. on his own costs, but he did not engage any counsel. Reference is made to the provisions of Section 123 of the Border Security Force Act, 1968, which makes a provision for an accused person to be represented by a counsel. The counsel would also dispute the proposition of law as canvassed by the counsel for the petitioner that providing a counsel at the State expense would be a limb of right of life and liberty enshrined in the Constitution of India. Government counsel submits that even if there be some provision or a right to have a counsel at State expense, the same would stand eclipsed because of the Article 33 of the Constitution of India. Any of the fundamental right, which was otherwise available would stand abrogated in terms of Article 33 of the Constitution of India so far their applicability to armed forces is concerned. Counsel would also dispute the proposition of law that confirming and convening authority being same would lead to a position, where authority has become Judge on its own cause. As per the counsel this is what is permissible under the Rules and hence, could not lead to any infirmity. Counsel would join issues with regard to the right of appeal by saying that no provision has been made for providing of an appeal in ease of

person subjected to the para military forces and this provision has earlier been upheld through various authoritative pronouncements while dealing with similar provision under the cognate Acts like Army and Air Force Act. In this context only, counsel would say, that there is no requirement to record reasons in support of a finding as recorded and the same could be simply recorded as guilty or not guilty as per the provisions under the BSF Act. Accordingly, the counsel prays that there is no merit in the writ petition and the same be dismissed.

11. Though challenge to the Court Martial through writ petition has a limited scope to interfere on well laid down parameter, but the counsel appearing for the respondent-UOI has chosen to highlight the facts in this case to say that right to have a counsel at State expense would be immaterial and would not have made any substantial difference in the outcome in view of the confession made by the petitioner. The counsel has pointed out that the petitioner has made extrajudicial confession before the officer making record of evidence a pre-trial stage, who appeared as a witness to prove the said extra judicial confession made before him during the course of trial. Submission is that this witness was not cross-examined on this aspect would show that finding was correctly recorded.

12. The submissions on the lines as aforementioned rather would show the prejudice that the petitioner had suffered because of absence of counsel to defend him. It is fairly well settled position of law that a confession can not be used against an accused person unless the court is satisfied that it was voluntary and at that stage the question whether it is true or false does not arise. It has been observed that it is abhorrent to our notions of justice and fair play, and is also dangerous to allow a man to be convicted on the strength of a confession unless it is made voluntarily and unless he realizes that anything he says may be used against him. Thus, it must be established that a confession is voluntary and also is true. For placing reliance on confession, it is also required to be shown that the same was voluntary in nature. Any confession howsoever truthful, it may be, cannot be relied upon to make a conviction, if it is not voluntary. The petitioner obviously did not know anything about this legal position. Had the petitioner been assisted by counsel, the counsel would have appreciated this position of law to challenge the confession and to defend the petitioner on the basis of this legal position and to make an attempt to show that this confession suffered from any infirmity of the nature as noticed. Mere fact that there is no cross-examination of the witnesses concerned on the voluntary nature of the confession or about the truthfulness thereof in itself would show that the petitioner has suffered a prejudice on account of absence of counsel. The plea raised by the counsel for the petitioner about the requirement of providing legal assistance to a person, who is charged with and accused of an offence, punishable with capital sentence, would need appreciation in this background.

13. It can also be noticed that the officer, who was detailed to prepare a record of evidence in this case, was a witness to the facts of the case. This officer (Harbhajan Singh), was examined as Prosecution Witness No.5 at the trial.

Before the GSFC, this witness has clearly stated that he had visited the scene immediately after the incident and had spoken to the petitioner. The petitioner statedly was in-coherent in his reaction and did not give any satisfactory reply and told that "SAHIB USNE FIRE KIYA FIR MAINE FIRE KIYA OR WHOW MAR GAYA ". The officer preparing the record of evidence, thus, gave evidence of the circumstances which were immediately connected with the fact in issue and were relevant being part *res gestae*. He thus, was a material witness for the prosecution, but was detailed to prepare a record of evidence, which has to be by an officer, who is an independent or not a witness to the facts of the case. The prosecution witness thus, was detailed to prepare a record of evidence which ultimately was the basis of putting the petitioner to trial by GSFC. This aspect appears to have escaped notice of the authorities and may lead to a serious prejudice to the petitioner. As the maxim goes Justice should not be done, but it must appear to be done. This aspect certainly is found wanting in this case.

14. Leaving this aspect here, let's now see the main submissions advanced by the counsel in this case. Though counsel for the petitioner has very genuinely pressed more than one ground to challenge the award of the GSFC, but what would directly stare at the validity of the procedure adopted, would be the submission that the petitioner was denied fair opportunity to defend himself before the GSFC as already noticed. Nothing much would depend on the pleadings in this regard. Even otherwise, *certiorari* being a writ of record, the submissions made by the counsel for the petitioner can be appreciated by making reference to the record of the trial proceedings. Perusal of the record shows that the petitioner was produced before the GSFC on 6.4.1998. The charge sheet and "record of evidence" were laid before the Court. This is the same record of evidence, which was prepared by PW-5. After satisfying itself as required by BSF Rules, 1965, the Court recorded the presence of prosecutor and the defending officer. It is then recorded by the Court that the petitioner accused was informed that he was at liberty to engage the counsel during the trial at his own cost. The exact record as made by the GSFC is as under:-

"Irrespective of the fact that defending officer .is a legally qualified one, the accused is informed that he is at liberty to engage a counsel to defend his case during the trial at his own cost."

15. The petitioner thereafter, informed the Court the he did not wish to engage any counsel. The plea of the petitioner for providing a counsel at the State expense in the light of what is recorded above would need to be appreciated. Having made substantive provision under the BSF Act, 1968, the procedure is provided in the BSF Rules, 1969. Rule 123 of the Rules is relevant in this regard. So far as appearance of a counsel before the GSFC is concerned, this Rule provides that accused person intending to be represented by a counsel shall give to his own commandant or the convening officer the earliest practicable notice of such intention and if no sufficient notice has been given the Court may, if thinks fit, on the application of the prosecutor, adjourn to enable him to obtain a

counsel on behalf of the prosecutor at the trial. Similarly, where the convening officer so directs, the counsel may appear on behalf of the prosecutor or accused, and the prosecutor then is under a corresponding obligation to give advance notice to the accused person intending to engage a counsel to represent the prosecution at the trial. Then the Rule also makes a provision in regard to the right of the counsel, who appears on behalf of the prosecutor or the accused. The provisions of Rule 123 are as under:

"123. Requirements for appearance of counsel.

(1) An accused person intending to be represented by a counsel shall give to his Commandant or to the Convening Officer the earliest applicable notice of such intention, and, if no sufficient notice has been given the court may, if it thinks fit, on the application of the prosecutor, adjourn to enable him to obtain a counsel on behalf of the prosecutor at the trial.

(2) Where the convening Officer so directs, counsel may appear alongwith the prosecutor, but in that case, unless the notice referred to in sub-rule (1) has been given by the accused, notice of the direction for counsel to appear shall be given to the accused at such time (not in any case less than seven days) before the trial as would, in the opinion of the Court, have enabled the accused to obtain counsel to assist him at the trial.

(3) The counsel, who appears, before a Court on behalf of the prosecutor or accused, shall have the same rights as the prosecutor or accused for whom he appears to call, and orally examine, cross-examine, and re-examine witnesses, to put in any plea, and to inspect the proceedings and shall have the right otherwise to act in the course of the trial in place of the person on whose behalf he appears, and he shall comply with these rules as if he were that person and in such a case that person shall have no right himself to do any of the aforesaid matters except as regards the statement allowed by sub-rule (2) of rule 93 and sub-rule (4) of Rule 101 or except so far as the court permits him so to do.

(4) When counsel appears on behalf of the prosecutor, the prosecutor if called as witness, may be examined and re-examined as any other witness."

16. This regulates the general provision for requirement of appearance of a counsel before the GSFC. This Rule would not directly attend to the submission as has been advanced by the counsel for the petitioner. A similar provision exists under the Rules of procedure applicable to Army, Air Force etc. Rather the provisions of BSF Act have almost been borrowed from the similar provision of the Army Act. The provisions under the Army Rules are little elaborate as compared to those contained in the BSF Rules. The similar rule is made under the Army Rules 1957, Besides Army Rules 1957 makes a provision for allowing counsel to appear before the General and District Court Martial. Then there is specific provision made for counsel for the prosecution and counsel for the accused and so also in regard to the general rules as to the counsel unlike Border Security Force Rules. There is a specific Section under the Army Act, 1950

empowering the authority to make rules in addition powers to make regulation. Pursuant to this enabling provision, regulations known as Regulations for the Army have been framed by the Central Government and para 479 of the Regulation for Army, 1987 (Revised edition), makes a provision of defence counsel for an accused of an offence, charged which is punishable with death. The provision has now been made even in terms of policy issued by the Army Headquarters that a person, who is accused of an offence punishable with death can be provided a counsel at the State expense. In this background, requirement has to be seen, if the petitioner suffered any prejudice on account of a clear flat issued to him that if he wishes to engage a counsel, he has to do so at his own cost. In other words it is required to be seen that if there was any legal obligation on the part of the respondent-UOI to make a provision of the counsel at the State expense for the petitioner, who was accused of an offence for which he could be awarded a death penalty. In this context, only the right to fair trial, part of which would be a legal assistance to an accused, who is indignant or who cannot afford a counsel, would arise.

17. Let us see if the State i.e. UOI has any obligation to provide a counsel at the State expense. The submission by the counsel for the petitioner is. that not only a counsel was required to be provided at the State expenses, but keeping in view the gravity of the offence such a counsel had to be a competent counsel and the counsel, who would be in a position to communicate with the accused and take instructions from him. The counsel has placed before me a decision of a Division Bench of Delhi High Court in C.W.P. No. 2937 of 1995 (Ranjit Singh, Ex. Sepoy v. Union of India,,), decided on 18.5.2002. It was a case where the counsel was provided to the accused of an offence u/s 302 IPC at the State expense. The accused therein had made a request for engaging the counsel, which was engaged by his father and was to be brought. His request was declined and counsel assigned at the State expense allowing to appear before the court to defend the accused person. The submissions were made before the Court on the ground that the accused therein suffered prejudice as he did not know Hindi, English or Assamees, the language which was known to and was used by the counsel. The accused person knew only the Punjabi language and thus, he could not communicate with his counsel. In this context, the submission was that the petitioner was not provided with a counsel of his own choice, which violated his fundamental right under Article 21 of the Constitution of India. In this case, also, initially the accused person was asked to engage the counsel and he had declined to bear the expenses, but at later stage, the accused person was informed that counsel shall be provided to him where the fee of the counsel will be Rs.250/- per day for the days counsel appeared before the General court Martial. The submission was that the defence counsel with requisite competence was not engaged to appear on behalf of the accused person. Reliance was placed on number of decisions of the Supreme Court like Ranchod Mathur Wasawa Vs. State of Gujarat, , Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna, , and Suk Das Vs. Union Territory of Arunachal Pradesh, in support.

The writ petition filed by the said petitioner, was allowed by accepting this contention of the petitioner accused therein that he suffered a prejudice on account of not being given opportunity to engage the counsel of his own choice, which in a way violated his fundamental right as granted under Article 21 of the Constitution of India.

18. Question in regard to providing of counsel came up for consideration before this Court in Criminal Revision No. 1273 of 2007 (Boota Ram and another v. State of Punjab,). This was a case where the appeal filed by an accused person was decided in the absence of counsel engaged, who could not appear when the appeal was heard. The submission was that the decision of the appellate court while deciding the appeal only after hearing the public prosecutor in absence of the counsel representing the appellants or the appellants therein was illegal procedure.

19. In Ram Naresh Yadav and others v. State of Bihar, AIR 1987 SC 1500 and Banchhanidhi Singh alias Nani Singh v. State of Orissa, Criminal Law Journal 397, it is held that in criminal cases the convicts must be heard before their cases are decided on merits. This was a case where the Court had dismissed an appeal without hearing the appellant or his counsel. Despite having noticed the fact that waiting for appearance by a counsel, when the criminal appeals are called, may hamper the working of the Court and creates a serious problem for it, the Hon"ble Supreme Court went on to hold that the convicts or accused must be heard before cases are decided. The Supreme Court has observed that the case can be disposed of on merits only after hearing the appellant or his counsel. In case no one came present, then the Court might appoint a counsel at the State cost to argue on behalf of the appellant. The order convicting the appellants therein was accordingly, set aside and the case was remitted back to the High Court to pass an appropriate order.

20. It will be important here to notice the observation made by the Apex Court in Khaili and others v. State of Uttar Pardesh, 1982 S.C.C. (Cri.) 143. It is observed that "howsoever diligent the learned Judge might have been and however careful and anxious to protect the interests of the appellants in the absence of their counsel, his effort cannot take the place of an argument by an Advocate appearing on behalf of the appellants".

21. Reference here can also be made to the case of S. Mohan Rao v. Bhubaneswar Rath, 1985 Cri.LJ. 228. The importance of a counsel in a criminal proceeding or a trial, thus, can very well be appreciated from the law laid down in the above noted cases.

22. This issue need to be looked and judged having regard to the constitutional protection given to an accused under Article 21 of the Constitution of India. An accused has right to be defended by a counsel of his choice in terms of provisions of Section 303 of Criminal Procedure Code. As per Article 21, no person is to be deprived of his life or personal liberty except according to the

procedure established by law. This Article, which was narrowly construed earlier, has in the recent past been given altogether new dimensions. In *Ranchod Mathur's case* (supra), the trial was held to be vitiated when the counsel for the accused was not given sufficient time and facilities for preparing the defence. The relevant observations are:-

".... Sufficient time and complete papers should also be made available to the advocate chosen so that he may serve the cause of justice with all the ability at his command."

23. In *Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna*, , the trial and the conviction was set aside on the ground that the accused was not offered as free legal aid where he was unable to engage a lawyer. It is held in this case that the procedure, which does not make available legal services for the accused cannot possibly be regarded as reasonable, fair and just. Reference can also be made to *Madhav Hayawadanrao Hoskot Vs. State of Maharashtra*, . Similarly, in *Suk Das Vs. Union Territory of Arunachal Pradesh*, and *Khatri and Others Vs. State of Bihar and Others*, , the trial without offering legal aid to an indigent accused at State cost was held to be vitiated and conviction set-aside.

24. Article 39-A can also not be ignored, which is as under:

"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."

25. Apart from the right to counsel being part of right of life and liberty, the State is under obligation to provide equal justice and free legal aid. This Article in this regard clearly provides that the State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity and shall, in a 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. The manner in which Article 21 has received wide and extended interpretation would have extended scope in the light of the provisions made in Article 39A of the Constitution of India. It would be safe to say that by now it would be difficult to hold that the substance of doctrine of due process as well is not infused into the context of this Article, though it may otherwise appear conservative in nature.

26. In fact, the requirement of a counsel at a criminal trial can not be demonstrated in better manner than by making reference to the case of *Clarence Earl Clarence v. Louie L. Wainwright, Director, Division of Corrections*, (1963) 372 U.S. 335 : 9L Ed 2d 799. Mr. Gideon was charged with an offence of felony under Florida law and while appearing before the Court, he asked for appointment of a counsel at State expense as he was without funds. This was denied to him, on

the ground that it could be done only when offence involves capital punishment. He was put to trial without counsel. Mr. Gideon conducted his defence but was found guilty and sentenced to suffer 5 years imprisonment. He attacked his conviction by filing a writ of Habeas Corpus before Florida Supreme Court on the ground that Court's refusal to appoint counsel for him denied him rights guaranteed by the Constitution and the Bill of Rights by the United States Government. The relief, however, was denied to him by referring to a case of *Betts v Brady*, 15 316 US 55, 86 Led. 595, 62 S Ct 1252. Gideon challenged the same before US Supreme Court. The issue basically was for review of *Betts*" case (supra) if any relief was to be granted to Mr. Gideon. The court ultimately reconsidered the ratio in *Betts*" case (supra), which was almost identical to the case of Mr. Gideon. In *Betts*" case (supra), it was held that refusal to appoint a counsel for an indigent defendant charged with felony did not necessarily violate the Due Process Clause of the Fourteenth amendment, which for reasons given by the Court deemed to be only applicable to federal, Constitutional provisions. It was farther held in *Betts*" case (supra) that asserted denial of due process is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may in other circumstances, and in the light of other considerations, fall short of such denial. It was observed that a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the BUI of Rights, refusal to appoint counsel under the particular facts and circumstances in *Betts* case was not so offensive to the common and fundamental ideas of fairness as to amount to a denial of due process. While reviewing and over-ruling *Beit*"s case (supra), reference was made to the case of *Powell v. Alabama*, 287 US 45, 68, 77 Led 158, 170, 53 S Ct 55, 84 ALR 357(1932), where the need for a lawyer has been stated in the following moving words of Mr. Justice Sutherland:-

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."

27. Emphasising the need of a counsel in criminal trial, the Court eloquently said:-

".....even the intelligent and an 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. 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 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."

28. The requirement of being represented by a counsel can not be more

eloquently put than the afore-mentioned observations made. It is in this context the judgment in Betts case (supra) was over-ruled. The ratio that can clearly be culled out is that a person can not be assured a fair trial unless he is represented by a counsel and unless counsel is not provided to him if he is poor to have one. To further emphasis this requirement, a reference may be made to following telling reasoning by the U.S. Court in Powell's case (supra):-

"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, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money to hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries."

29. The fact that the presence of counsel is a necessity can well be highlighted by making reference to the aftermath of Mr. Gideon Case. It is understood that Gideon was put to retrial upon setting-aside of his conviction and acquitted after retrial, when defended by a counsel provided to him at State expense.

30. From the above, right of a person charged with crime to be represented by a counsel appears to be fundamental and essential to fair trial in our country as well. This requirement has been emphasized by invoking the life and liberty clause guaranteed under Article 21 of the Constitution of India. The emphasis upon procedural safeguard designed to assure fair trials and equality before law can be read through various provisions of our Constitution. The noble ideal of a fair trial and equal opportunity can not perhaps be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. Keeping this aspect in view, the provision has been made in the Constitution as a directive principle in the form of Article 39-A, which provides that the State shall secure that the operation of the legal system promotes justice on the basis of equal opportunity, and shall in particular provide free legal aid by a suitable legislature 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. This Article, when read with Article 21 of the Constitution, has led the Courts to hold that when an accused is unable to engage a lawyer owing to poverty or similar circumstances, the trial would be vitiated unless the State offers free legal aid by engaging a lawyer to whose engagement the accused does not object. This right arises, the moment the accused is produced before a Court and does not require any application for it. Thus, the right to have a counsel is a constitution guarantee and such right is constitutionally recognized.

31. To be fair to Mr. Gurpreet Singh, he has placed before me two judgments in the case of Ram Sarup Vs. The Union of India (UOI) and Another, , and Union of India (UOI) and Others Vs. Ex. Flt. Lt. G.S. Bajwa, . The Constitutional bench in

Ram Samp's case (supra) has considered a somewhat similar submission made on behalf of the petitioner therein and has expressed a view that it cannot be said that the petitioner was denied his fundamental right to have been defended by the counsel of his own choice. The petitioner therein had expressed a desire on many occasions for permission to engage a counsel to represent him at the trial, but the authorities turned down those requests and told him that it was not permissible to allow him the services of a civilian lawyer and that he would have to defend his case with the counsel, which is provided by the Military authorities.

32. In my view, the Hon'ble Supreme Court had taken this view primarily on the ground that the petitioner had made no request for being represented by the counsel of his own choice. It was a case of fundamental right of being represented by a counsel. This was so expressed in para 9 of the judgment, where it is held that there has been no violation of the fundamental right of the petitioner to be defended by a counsel of his choice conferred under Article 22(1) of the Constitution. In G.S. Bajwa's case (supra) the Hon'ble Supreme Court has observed that it was not disputed before the Court that the Acts and Rule; framed there under do not apply to the Union of India to engage a counsel for the officer, who faces his trial before the Court Martial. This may be issue in that case as the petitioner therein was not accused of an offence, for which he could be imposed death penalty. As already noticed, a provision has already been made under the regulations in the Army for providing a counsel at the State expense where the accused person is charged with an offence, where death penalty could be imposed. In this regard, reference can be made to para 479 of the Regulations for the Army, 1987 (Revised edition) which may need a notice here:-

"479:- Provision of Defence Counsel for accused at Court Martial Trials for Offences Punishable with Death - (a) When a person subject to the Army Act is to be tried by court-martial for an offence punishable with death and such person is unable to engage a counsel for his defence at the trial owing to lack of pecuniary resources and the convening officer is satisfied about his inability, a counsel for the defence of the accused at the trial may be employed by the convening officer at Government expense in consultation with the DJAG concerned."

33. Counsel for the petitioner has placed before me a communication issued by Army Headquarter to the effect that fee of the counsel would be provided at the State expense shall stand enhanced from Rs.250/- per day to Rs.2000/- per day. This in itself be an indication of change in trends. To my mind the Constitutional Bench while deciding the case of Ram Sarup (supra) was not apprised of the provisions of the Regulation and went by a basic provision made in the Act initially legislated in the year 1950, where a provision was made for allowing the defence counsel on a permission being granted by convening authority. This rule position has undergone a change. Change would have necessitated on coming into force the provisions of Article 39-A introduced in the year 1977. This

provision was obviously not before the Hon''ble Supreme Court while deciding the Ram Sarup's case (supra) in 1963. The law is not and can not be static. It must change with the changing needs. The requirement of a counsel would now need no emphasis and its requirement has been so well recognized and can be exemplified by making reference to Clarence Earl Gideon's case (supra). There was no provision made for counsel at State expense for which he made a request. His request was declined. The Supreme Court of America, thereafter, allowed his plea and ordered retrial by directing the Court to provide him a counsel at the State expense.

34. The submission at this stage now to say that there was no requirement for providing counsel to the petitioner and that he did not suffer any prejudice on this account, can not be accepted. I am, therefore, of the considered view that the petitioner had suffered prejudice during his trial because of not being provided with assistance of a counsel. He was unable to defend himself. The absence of counsel would have led to a situation as was well observed in Powell's case and it would not be out of place to reemphasis the same at this stage. The petitioner, thus, in my view, suffered a trial which was not fair. The finding and conviction of the petitioner, thus, cannot be sustained. The same is set aside. The petitioner would stand relieved of his consequential trial. In view of the prayer of the petitioner having been allowed on this ground, I am not going into remaining grounds advanced by the counsel for the petitioner. The writ petition is, accordingly, allowed.