

(2008) 12 MAD CK 0222

In the Madras High Court

Case No : Criminal Appeal No. 346 of 2007 and W.P. No's. 13919 and 13920 of 2005

Martin @ Tamilselvan and Others

APPELLANT

Vs

State
C. Vijayakumar and P. Pugalenthir Vs The
Member Secretary, Tamil Nadu State Legal Services
Authority, The Home Secretary, Government of Tamil Nadu
and The Deputy Superintendent of Police and Chief
Investigation Officer, Special Investigation Team, Crime
Branch - CID

RESPONDENT

Date of Decision : 10-12-2008

Acts Referred:

Arms Act, 1959 — Section 25(1B)
Constitution of India, 1950 — Article 21, 226, 227, 39A
Criminal Procedure Code, 1973 (CrPC) — Section 2, 303, 304, 304(1), 304(2)
Explosive Substances Act, 1908 — Section 3, 4, 5, 6
Explosives Act, 1884 — Section 9B(1)(B)
Explosives Rules, 1983 — Rule 141
Penal Code, 1860 (IPC) — Section 109, 120(B), 307, 34
Tamil Nadu Public Property (Prevention of Damages and Loss) Act, 1992 — Section 4

Citation : (2010) 1 Crimes 20

Hon'ble Judges : M. Sathyanarayanan, J; D. Murugesan, J

Bench : Division Bench

Advocate : R. Sankarasubbu, in CrI.A. No. 346 of 2007 and D. Hariparanthaman, in W.P. Nos. 13919 and 13920 of 2005, for the Appellant; P. Venkatasubramanian, Spl. Public Prosecutor for POTA cases in CrI.A. No. 346 of 2007, M. Babu Muthu Meeran, Assistant Public Prosecutor in CrI.A. No. 346 of 2007, A. Thiraviyanathan, for R1 in W.P. Nos. 13919 and 13920 of 2005 and R. Thirugnanam, Spl. Government Pleader for R2 and R3 in W.P. Nos. 13919 and 13920 of 2005, for the Respondent

Final Decision : Allowed

Judgement

D. Murugesan, J.—A short but important question that arises for our consideration in the criminal appeal and the writ petitions is whether the accused, in the facts and circumstances of the case, would be entitled to engage

the pleaders of their choice and such pleaders are entitled to the remuneration from the State and if so, what could be the quantum. The circumstances under which the criminal appeal and the writ petitions came to be filed would be dealt with in the later portion of the judgment. However, the appellants in the criminal appeal are facing trial before the Special Court for POTA offences, Poonamallee and the accused covered in the writ petitions are facing trial before the Special Court for Exclusive Trial of Bomb Blast Cases, Poonamallee for heinous crime and they have been defended by the pleaders appointed by them without reference to any orders passed by the Court of Session or this Court. In such circumstances, whether the pleaders who have represented the accused would be entitled to the remuneration from the State.

2. For deciding the above question, the entitlement of the accused to engage the pleaders of their choice and if the accused are able to satisfy this Court that they do not have sufficient means to pay the remuneration to the pleaders, the following legal right of the accused must be considered.

3. An accused is entitled to a fair trial in accordance with the principles of fundamental justice that requires funded pleader to be provided, if the accused wishes a pleader, but cannot pay a pleader. The object for a provision of a pleader to a disadvantaged accused is to minimise the imbalance in the adversarial system, where the accused is pitted against the awesome prosecutory machinery of the State. In our criminal jurisprudence, the presumption of innocence - being innocent until proven guilty - is a legal right that the accused in criminal trials is entitled to. This presumption is seen stem from the latin legal principle, namely, *ei incumbit probatio qui dicit non qui negat* - the burden of proof rests on the person who asserts, not on who denies. Free legal service to the poor and the needy is an essential element of "reasonable, fair and just" procedure. The right of such reasonable, fair and just procedure could be traced to the fundamental right guaranteed under Article 21 of the Constitution of India. Article 39A emphasises that the free legal service is an inalienable element of reasonable, fair and just procedure.

4. In this context, a reference could be made to Articles 21 and 39-A of the Constitution of India, which read as follows:

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.

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.

5. The Supreme Court, while considering the right of free legal service to an accused in the judgment in *Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna*, has authoritatively declared that the right to free legal

service 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 pleader to an accused person, if the circumstances of the case and the needs of justice so require. This law declared by the Supreme Court is quoted with approval in the subsequent judgment in *Khatris and Others Vs. State of Bihar and Others*, . In *Suk Das Vs. Union Territory of Arunachal Pradesh*, , the Supreme Court observed in paragraph-5 as follows:

5. It is now well established as a result of the decision of this Court in *Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna*, that "the right to free legal service is ... clearly an essential ingredient of "reasonable, fair and just" procedure for a person accused of an offence and it must be held to be implicit in the guarantee of Article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and 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, provided of course the accused person does not object to the provision of such lawyer.? This Court pointed out that 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 service available to him. The same view was taken by a Bench of this Court earlier in *Madhav Hayawadanrao Hoskot Vs. State of Maharashtra*, . It may therefore now be taken as 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 course, it must be recognised 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 service may not be provided by the State. There can in the circumstances be no doubt that the appellants were entitled to free legal assistance at State cost when he was placed in peril of his personal liberty by reason of being accused of an offence which if proved would clearly entail imprisonment for a term of two years.

6. Section 303 of the Code of Criminal Procedure, 1973 contemplates a statutory right on the person accused of an offence before a criminal Court, or against whom proceedings are instituted under the Code, may of right be defended by a pleader of his choice. Section 2(q) of the Code of Criminal Procedure defines the word "pleader" meaning, when used with reference to any proceeding in any Court, a person authorised by or under any law for the time being in force to practise in such Court, and includes any other person appointed with the permission of the Court to act in such proceeding. Hence the right to be defended by a pleader of his choice shall also include the pleader appointed with the permission of the Court to act in criminal trial. In the event the accused

chooses a pleader and appoints him to defend his case, the question as to who should pay the remuneration of the pleader. When the accused expresses his inability to engage a pleader of his choice and in such case the Court appoints a pleader, then it is the duty of the State to pay the fee. When such request is made to the Court by proper application u/s 304, the Court may appoint directly a pleader of competence to defend the accused or may refer to the Legal Services Authority for making such appointment. In case the reference is made to the Legal Services Authority, the accused is entitled to legal assistance at the cost of the State. In order to provide such legal assistance, the State has established the Tamil Nadu State Legal Services Authority in which advocates are empanelled to provide legal assistance to the needy accused. Such advocates are paid the remuneration prescribed by the authority and they are not entitled to the amount more than what is prescribed by the authority. The question would arise that when an accused who is not satisfied with the pleader nominated by the Legal Services Authority, as he may not be expertise in defending the case the accused is facing, or the pleader nominated by the Legal Services Authority may not be willing to defend the accused for a reason whatsoever, what would be the right of an accused to effectively defend the case.

7. The provisions of Section 304 of the Code of Criminal Procedure read as under:

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 rule providing for-

- (a) the mode of selecting pleaders for defence under Sub-section (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 Sub-section (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.

8. A careful reading of the provisions of Section 304 of the Code of Criminal Procedure shows that each Sub-section operates distinctly and it is not as if one Sub-section would depend upon the compliance of the other. A careful reading of Sub-section (1) of Section 304 shows that it is the duty of the Court of Session to assign a pleader for the defence of the accused at the expense of the State when the accused is not represented by a pleader, and where it appears to the Court that the accused has no sufficient means to engage a pleader. The power

of the Court of Session to assign a pleader may be at the instance of the accused himself by filing an application or by the exercise of power suo motu even in case where there is no application for such request, as the Court is concerned with the question as to whether the accused was represented by a pleader or not and such accused did or did not have sufficient means to engage a pleader.

9. Sub-section (2) of Section 304, on the other hand, empowers the High Court, with the previous approval of the State Government, to make rules providing for the mode of selecting pleaders for defence under Sub-section (1), the facilities to be allowed to such pleaders by the Courts and the fee payable to such pleaders by the Government, and generally, for carrying out the purpose of Sub-section (1). In the event the High Court makes the rules, the Sessions Court may adopt the mode of selecting the pleaders as contained in the rules and the Government may adopt the payment of fee in terms of the rule to such pleaders. Nevertheless, in our considered view, even in the absence of any rules framed by the High Court, the power of the Court of Session to assign a pleader to defend the accused is not affected, as any such construction would defeat the very object as to the entitlement of an accused to defend his case effectively through the pleader of his choice and in the event he is able to satisfy the Court that he does not have sufficient means to engage a pleader. Sub-section (3) relates to the power of the State Government to direct the provisions of Sub-sections (1) and (2) to 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 and by the said sub-section, again the power of the Court of Session to assign a pleader in terms of Sub-section (1) of Section 304 would not be affected.

10. Keeping the above in mind, the claim in the writ petitions and in the criminal appeal should be considered. Both the writ petitioners have not approached the Court of Session by filing any application invoking Sub-section (1) of Section 304 of the Code of Criminal Procedure. It is argued by the learned Additional Public Prosecutor that in view of Sub-section (1) of Section 304, an application for assignment of a pleader should be filed only by the accused concerned and in both the writ petitions none of the accused have approached the Court of Session seeking for assignment of pleaders. On the other hand, the two advocates, namely, the petitioners in both the writ petitions, have directly approached this Court for fixation of fee by the State on the ground that they have defended some of the accused. Hence the writ petitions are not maintainable. Mr. R. Thirugnanam, learned Special Govt. Pleader has also argued extensively on the same line by referring to the counter affidavit.

11. We are not inclined to accept the said submission. In matters like this, the Court cannot adopt a narrow approach as to the entitlement of the pleader for reasonable fees for defending the accused, who was not represented by any pleader and who did not have sufficient means to engage a pleader. Sub-section (1) of Section 304 should be read along with the provisions of Section 303, which contemplates a right on the accused to have a pleader of his choice. Of course,

when the accused chooses a pleader to defend his case, the remuneration should be borne by the State in the event the accused is able to satisfy the Court that he did not have sufficient means to pay the pleader. This right of an accused stem from the right to fair trial which includes the right to defend effectively through a pleader who is competent in the subject. Such right could be traced to Article 21 as well to Article 39A of the Constitution of India. Therefore, the prime consideration and the decisive factor would be the right of the accused for a just and fair trial and to defend the case effectively and in that context, the payment of remuneration to the pleaders shall incidentally assume importance. It is true that except the appellants in the criminal appeal, the other accused have not approached the Court of Session for payment of remuneration to the pleaders they had engaged in terms of Sub-section (1) of Section 304 of the Code of Criminal Procedure nor invoking the inherent power of this Court under Article 226/227 of the Constitution of India. As we have held that the prime consideration would be the right of the accused, the relief of payment of remuneration on the basis that the pleaders have defended the accused cannot be rejected on technical grounds and in the peculiar facts and circumstances of the case, namely, that when the trial itself had already been completed and the pleaders have already defended the accused by effectively cross examining the accused, it would not be proper for this Court to reject the claim on the ground that the accused had not approached the Court of Session under Sub-section (1) of Section 304 of the Code of Criminal Procedure for appointment of pleaders and for payment of remuneration.

12. We could see from the typed set of papers that the Accused Nos. 1, 2, 3, 5, 10 & 11 have in fact filed applications u/s 304 before the Special Court for Exclusive Trial of Bomb Blast Cases at Poonamallee as early as on 5.1.2004 and 3.2.2004. Considering the applications, the learned District & Sessions Judge for Exclusive trial of Bomb Blast Cases, in his proceedings dated 10.2.2004, informed the Member Secretary, State Legal Services Authority, Chennai to appoint the respective pleaders from the State Legal Services Authority to defend the respective accused and the fee may be paid. From the said proceedings, the following recommendations are made:

Name with rank Counsels name and address chosen by the accused	Accused
-----	Zakir Hussain
(A1) C. Vijayakumar 134, Thambu Chetty Street, & Chennai-1 P. Pugalendhi M. Mohammed Moosa (A2) -do- -do- D. Sultan @ Siddiq Ali (A3) -do- -do- J. Rahamathullah Khan (A5) -do- -do- A. Kaleel @ Kaleel Rahman (A10) -do- -do- A. Jaleel @ Abdul Jaleel (A11) -do- -do- Ummar Farook (A4) Xavier Felix 10, Dhimmasami Dharga St., Ammani (A6) -do- (Near Venus Theatre) Sathakathullah (A7) -do- Agaram, Perambur, Ch-82 Sheik Moideen (A8) -do- -do- Darwesh Moideen (A9) -do- -do- Nazeer (A12) -do- -do- Hakkim (A13) -do- -do- Scientist Zakir Hussain (A14) -do- -do- Mohammed Kamil @ Kamil (A15) -do- -do- -----	

13. Thereafter, both the petitioners were appointed and later on, both the petitioners have expressed their unwillingness to continue, as the fee paid by the State Legal Services Authority was not commensurate to the work. In the meantime, it is not in dispute that both the petitioners had been attending the trial defending the accused. We are informed that the trial is completed. Out of 380 witnesses cited, 224 witnesses were examined in 129 hearings. Thiru. C. Vijayakumar, the learned Counsel, out of 49 hearings, had attended more than 45 hearings and had effectively participated in the trial for more than 4 hours in 40 hearings. Similarly, Thiru. P. Pugalendhi, the learned Counsel, out of 129 hearings, had attended 108 hearings for more than 4 hours. As we have observed that the power under Sub-section (1) of Section 304 could be also suo motu exercised by the Court of Session, an application by the accused concerned is not necessary. Equally, the assignment of a pleader cannot be made by the Court without satisfying itself as to the inability of the accused to pay the fee to the pleader. The Court must be cautious and is entitled to know that the request is not a veiling attempt to circumvent the publicly funded legal aid system. In view of the facts which we have stated, it cannot be said that the accused have chosen the above advocate-pleaders only to veil away the legal service and has made the State to bear the expenditure more than what is prescribed for the empanelled pleaders in the Legal Services Authority. The choice of the accused to engage the pleader must not be also allowed for mere asking. The Court must also see the heinous of the crime, complicity of facts and evidence involved, number of witnesses to be examined, number of documents to be referred and the question of law involved. When an accused is disabled from engaging a pleader on reasonable grounds such as, indigence or incommunicado situation, the Court shall, if the circumstances of the case, the gravity of the offence and the needs of justice so require, should assign a competent pleader for his defence. The more serious the likely consequence, the greater is the probability that a pleader should be appointed. The Court should also consider the individual factors peculiar to each case, as the right to defence includes the right to effective and meaningful defence at the trial and the poor accused cannot defend effectively and adequately.

14. The accused are facing trial under Sections 120(B), 307, 109, 34 of Indian Penal Code read with Sections 3, 4(a), 4(b), 5 and 6 of the Explosive Substances Act, 1908, Section 25(1-B)(a) of Arms Act, 1959, Section 4 of Tamil Nadu Property (Prevention of Damage and Loss) Act, 1992 and Section 9-B(1)(B) of the Explosives Act, 1884 read with Rule 141 of the Explosive Rules, 1983. The charges were framed as early as on 23.12.2003 and the trial commenced from 5.1.2004 onwards till its completion in the year 2008. In the above backdrop, we are of the considered view that the choice of the two pleaders by the accused is justified, as both the pleaders are more familiar in the conduct of trials in such cases. Hence, we are of the considered view that even in the absence of any specific averments made in terms of Sub-section (1) of Section 304, by virtue of the inherent powers of this Court, a direction can be issued to the State for

payment of fee to the pleaders.

15. In Criminal Appeal No. 346 of 2007, the appellants, 27 in number, have approached the Special Court u/s 304 of the Code of Criminal Procedure in CrI.M.P. No. 102 of 2007 for appointment of pleaders through legal aid to defend them in their case and the said petition was dismissed by order dated 24.3.2007. As we have found that irrespective of whether an application is filed or not, in the event the Court is satisfied that the accused is entitled to defend the case through the pleader of his choice and at the expense of the State in the event he is able to satisfy the Court that in the circumstances of the case a pleader of special expertise is required and he has no means to pay him, the Court in exercise of suo motu power u/s 304 could appoint such pleader by fixing the fee at the cost of the State. In the event the Court had not done so, this Court would certainly be competent, both to make such appointment and to direct the payment of fee from the State fund. Hence for the above reasons, both the writ petitions and the criminal appeal should succeed.

16. This leads us to the next question as to the quantum of fee to which each of the pleaders are entitled to. The Government in G.O.(D) No. 480, Home (Courts-VI) Department dated 19.4.2007 issued directions fixing the following fee to the State Brief Advocates and to the Junior Advocate/Associate Advocate/Advocate appearing on behalf of State Brief Advocates:

Fees to State Brief Advocates

----- Bar
experience of the Fees for effective hearing Fees for less than 3 hours Advocate
(above 3 hours) (50% of the amount indicated in Col.1 & 2)

Outstation Local Outstation Local Advocate Advocate Advocate Advocate (3/5 of
the (3/5 of the amount amount indicated in indicated in Col.1) Col.3) (1) (2)
(3) (4) -----
Advocate with 20 years Rs. 2,500/- Rs. 1,500/- Rs. 1,250/- Rs. 750/- or more
experience

Advocate with over 10 Rs. 1,875/- Rs. 1,125/- Rs. 940/- Rs. 564/- years or more
experience but less than 20 years experience

Advocate with over 5 years Rs. 1,250/- Rs. 750/- Rs. 625/- Rs. 375/- experience
or more but less than 10 years experience

Advocate with less than 5 Rs. 625/- Rs. 375/- Rs. 315/- Rs. 200/- years
experience

----- Junior
Advocate/Associate Advocate/Advocate appearing on behalf of State Brief
Advocates

-----						Fees
for effective hearing (above 3 hours	Fees for less than 3 hours (50% of the					
amount	indicated	in	Col.1	&	2)	

Outstation Advocate	Local Advocate (3/5 of Outstation	Local Advocate (3/5 the				
amount indicated in Advocate of the amount Col.1)	indicated in Col.3)	(1)	(2)			
(3)			(4)			

Rs.	600/-	Rs.	500/-	Rs.	300/-	
1,000/-						

17. The above fee is directed to be paid to the State Brief Advocates and to the Junior Advocate/Associate Advocate/Advocate appearing on behalf of State Brief Advocates who defended the accused in the bomb blast cases at Coimbatore. The said fee was fixed on the basis of the recommendation of the High Court in the absence of any rules framed for that purpose in terms of Sub-section (2) of Section 304. The above fee includes the transport, accommodation, etc. However, the trial in question was conducted only in Poonamallee and therefore, the pleaders who defended the accused need not spend much on transport and accommodation for that matter, as they could come back after the completion of the trial. Therefore, in our opinion, the two writ petitioners and the Counsel for the accused in the criminal appeal are entitled to Rs. 1,750/- for each day's of their effective participation, excluding adjournments, in the trial. The above fee is irrespective of the number of accused they represent. The second respondent, the Secretary to Government, Home Department, is directed to calculate the actual amount to be paid to each of the above pleaders based upon the number of days of their effective participation in the trial, excluding adjournments, and pay the same within a period of two months from the date of receipt of a copy of this judgment. It is seen from the records that this Court by order dated 29.4.2005 had directed the respondents to pay an interim payment of Rs. 25,000/- and Rs. 30,000/- respectively. Any amount of remuneration paid to the pleaders pursuant to the interim directions of this Court shall be adjusted in the actual quantum of amount arrived by the respondent in terms of this judgment. Accordingly, the writ petitions are allowed. Consequently, W.P.M.P. No. 15231 & 15232 of 2005 are closed. No costs. Likewise, the judgment and order in Crl.M.P. No. 102 of 2007 passed by the learned Special Judge for POTA offences, Poonamallee is set aside and the criminal appeal is also allowed.