
(1954) 08 RAJ CK 0013
In the Rajasthan High Court
Case No : Criminal Reference No. 39 of 1954

Moti Bai	Vs	APPELLANT
The State		RESPONDENT

Date of Decision : 04-08-1954

Acts Referred:

Constitution of India, 1950 — Article 22(1)
Criminal Procedure Code, 1898 (CrPC) — Section 340, 561A
Evidence Act, 1872 — Section 126

Citation : AIR 1954 Raj 241 : (1954) RLW 611

Hon'ble Judges : Modi, J

Bench : Single Bench

Advocate : Mahaveer Singh, for the Appellant; Kansingh, Dy. G.A., for the Respondent

Judgement

Modi, J.—This is a reference by the learned Sessions Judge, Jodhpur, and raises an important point as to the right of a counsel for an accused who is in police custody to interview the accused out of the hearing of the police though in their presence.

2. The facts leading up to this reference may shortly be stated as follows: Mt. Moti Bai was arrested by the police on 15-6-1954, as she was suspected of being involved in an offence u/s 6, Indian Wireless Telegraphy Act and u/s 439A, Penal Code. While she was in police custody, learned counsel for the accused wanted to interview her. It appears that this interview was not granted although he was able to obtain one at the house of the Second Additional Extra Magistrate, First Class, Jodhpur City, when the accused was taken to him for a remand u/s 167, Criminal P. C. Learned counsel had earlier submitted an application on 16-6-1954, to the said Magistrate in which he had complained of his having not been allowed to interview the accused and sought for such permission.

It appears that the accused's counsel further wanted to interview the accused on the 17th and he made a request to the Station House Officer, Division B, in the

first instance, and thereafter, when he was not able to obtain the requisite permission from that officer, to the Deputy Superintendent of Police. The latter was apparently of the opinion that an interview could be allowed to the counsel but such interview would be in the presence and within the hearing of the police. Aggrieved by this state of affairs, an application was presented by Sri Mahaveer Singh, learned counsel for the accused, to the Second Additional Magistrate, First Class, praying that the police be directed to allow him interview with the accused out of the hearing of the police though in their presence. The learned Magistrate ordered the application to be put up on the next day i.e., 18-6-1954. The learned Magistrate in his explanation has pointed out that this application was submitted to him after the Court hours, and this position does not appear to be contested. Eventually the learned Magistrate filed the application as learned counsel did not put in appearance before him on the 18th June. Thereafter a revision was taken to the learned Sessions Judge who has made the present reference.

3. It is submitted by the learned Deputy Government Advocate that the accused had since been transferred to judicial custody and, therefore, the present reference has in a way become infructuous, and no directions need to be given to the police allowing counsel for the accused to interview her any longer. On the other hand, it is contended by learned counsel for the accused that even though the accused had since been remanded to judicial custody, the question raised by him is one of considerable importance and as important rights of the accused in relation to their interviews with their legal advisers are involved, the question may be considered, and the correct law laid down on the point. This contention of learned counsel seems reasonable.

4. A few outstanding provisions of law deserve to be borne in mind in this connection. First and foremost I may refer to Article 22 (1) of the Constitution of India, which reads as follows:

"No person who is arrested shall be detained in custody without being informed, as soon as may be, of the ground for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice."

This is a fundamental right which the authors of the Constitution in their wisdom have guaranteed to every person who may be arrested, and detained in custody. The requirement is that no such person shall be detained without being informed at the earliest possible opportunity of the ground for his arrest and that such person shall have a right to consult and to be defended by a legal practitioner of his own choice. In order that this right "to consult a legal practitioner of one's choice" can properly and reasonably be given effect to, it must follow that such legal practitioner must be allowed the facility to consult the accused whom he seeks to defend, and I may further point out that if such consultation is to be useful, it must be allowed without the hearing of the police though in their presence. The presence of the police is obviously needed so that the accused may not abscond from custody or do anything which may be objectionable otherwise. It deserves to be noticed in this connection that the right of the

accused enshrined in this Article begins right from the day of his arrest. The position, therefore, at this date is crystal clear that learned counsel for Motibai was within his rights to consult her ever since she was put under arrest and that the police were not right in not allowing such consultation as seems to have been their attitude throughout.

5. Another important provision in this connection to which reference may be made is Section 340, Criminal P. C. That section is in these terms:

"Any person accused of an offence before criminal court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader."

Before the Constitution came into force, this was probably the only provision from which the right of the accused to have consultation between him and his legal advisers appears to have been derived and sustained. It was contended in some of the cases decided under that section that this was a matter for which the Criminal Procedure Code did not make any provision and that it was a matter of an executive nature with which the criminal Courts or the High Court were not concerned. This view was, however, repelled, and it has been held in a number of decisions to which I propose to refer presently that u/s 561-A the High Court" had the power to interfere and direct the police to permit an interview to an accused by his legal adviser on the ground that the accused after 24 hours of his arrest was remanded by the Court to the police custody, and if the police acted in a manner so as to deprive the accused of an opportunity to consult his legal adviser for the preparation of his defence, that would be an abuse of the process of the Court.

Thus in -- In Re: Llewelyn Evans, it was held that

"The provisions of Section 340 extend to the cases not only of a person accused of an offence in a criminal Court, but to the case of any person against whom proceedings are instituted under the Code in any Court. That section certainly contemplates that the accused should not only be at liberty to be defended by a pleader at the time the proceedings are actually going on, tout also implies that he should have a reasonable opportunity, if in custody, of getting into communication with his legal adviser for the purpose of preparing his defence, unless there are exceptional circumstances."

To use the words of Madgavkar J. in this case,

"if the end of justice is justice and the spirit of justice is fairness, than each side should have equal opportunity to prepare its own case, and to lay its evidence fully, freely and fairly, before the Court. This necessarily involves preparation. Such preparation is far more effective, from the point of view of justice, if it is made with the aid of skilled legal advice--advice so valuable that in the gravest of criminal trials, when life or death hangs in the balance, the very State which undertakes the prosecution of the prisoner, also provides him, if poor, with such

legal assistance."

The same view was taken by a learned single Judge of the Lahore High Court in -- "Sundar Singh v. Emperor" AIR 1930 Lah 945, and it was held that:

"It is in the interests of justice that an accused person should have access to legal advice even while he is in police custody during the course of an investigation. An interview with the legal adviser should not therefore be refused to a prisoner who is remanded to police custody u/s 167."

Again, in -- "Jahangiri Lal v. Emperor" AIR 1935 Lah 230, it was held that

"An under-trial prisoner is entitled to have the assistance of counsel and further he is entitled to communicate with his relations and friends. These rules cannot be evaded by removing the accused person to a place so that nobody knows where he is and his relations and friends cannot communicate with him and legal assistance cannot be availed of. The matter is really reduced to a farce if interviews are allowed only after a confession has been recorded."

It was further held that it was not a compliance with these principles if applications made to the Superintendents of Police or to the District Magistrates were kept pending or delayed until the confession had been secured. In -- Sudha Sindhu Dey Vs. Emperor, it was held that

"An accused person is entitled to be considered innocent until he is actually found to be guilty both during the preparation of his trial and during the hearing of his case, although it may be that for the purpose of bringing the trial about and bringing the accused person before the Court, he must be forcibly placed under restraint."

It was further held that

"All communications between an accused person, or indeed any litigant and his legal advisers are privileged and confidential. It is impossible for the accused to have anything confidential about communication with his lawyer if he and his lawyer are surrounded by police officers. But the professional privilege of advocates can only be upheld if they honourably bear in mind that they are officers of the Court and do not lend themselves in any way to act as intermediaries to facilitate improper communications with other undetected criminal associates of the accused."

The last case to which reference may be made is -- "Kailash Nath v. Emperor" AIR 1947 All 436, in which again it was held that

"The proceedings under Chapter 18 are in the nature of judicial proceedings in a Criminal Court and persons who are accused of an offence are entitled, as a matter of right, to be defended by a pleader. A Magistrate is, therefore, bound to give to the accused sufficient facility to be represented by a lawyer, specially when they are in custody from the time that they had been arrested and accused of an offence."

6. Reference may also be invited to Section 126, Evidence Act, which makes all communications between "professional advisers like a barrister, attorney, pleader or vakil, and their clients confidential, and it is only when the clients express consent, that such a person may disclose any communication made to him in the course and for the purpose of his employment. The proviso to this section rightly provides, however, that the protection of the section will not extend to any communications made in furtherance of an illegal purpose, or to any fact showing that a crime or fraud has been committed since the commencement of the employment. It is remarkable that the obligation laid down in this section continues even after the employment is ceased. As I understand the whole position, the right of an accused to consult his legal adviser and to be defended by him has been put on the highest footing ever since our Constitution came into force with effect from 26-1-1950, and it is really not necessary to derive it now from other enactments.

7. That being the true position at this date, certain propositions seem to follow almost axiomatically from it:

(1) that ever since his arrest, the accused has a right to be consulted by a legal adviser of his choice and to be defended by him;

(2) in order that such consultation may be effective, interviews must be allowed to his counsel, when asked for, out of the hearing of the police though within their presence, and

(3) that such a right must of course not be abused and must be granted subject to reasonable restrictions as to time and convenience of the police authorities, no less than that of the party seeking the interview.

It must be clearly understood, however, that the police must not in any way obstruct such interviews on arbitrary or fanciful grounds with a view to deprive the accused of his fundamental right.

8. I may also point out that the learned Additional Extra Magistrate should not have merely "filed" the application dated 17-6-1954, on the 18th June but should have disposed of it on the merits.

9. The reference is answered accordingly. No particular directions are required to be given to the police in this case as it admitted before me that the accused is now in judicial custody.