

(1977) 01 CAL CK 0008
In the Calcutta High Court
Case No : Criminal Revision No. 987 of 1974

Sadhan Dutta Ray

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 12-01-1977

Acts Referred:

Constitution of India, 1950 — Article 22(1)
Criminal Procedure Code, 1898 (CrPC) — Section 340
Criminal Procedure Code, 1973 (CrPC) — Section 30, 303, 304, 304(1), 304(2)
Madhya Bharat Panchayat Act, 1949 — Section 63
Penal Code, 1860 (IPC) — Section 395, 397

Citation : 81 CWN 440 : (1978) 1 ILR (Cal) 464

Hon'ble Judges : Anil K. Sen, J;A.P. Bhattacharya, J

Bench : Division Bench

Advocate : Barindra Nath Roy, for the Appellant;N.R. Biswas, for the Respondent

Judgement

Anil K. Sen, J

1. This Rule issued on a revisional application preferred by two of the accused persons now standing trial on a charge under Sections 395/397 of the Indian Penal Code in Sessions Case No. 26(7) of 1974 is directed against an order dated August 29, 1974, passed by the learned Additional Sessions Judge, Alipore. The two accused/Petitioners made a prayer before the learned Sessions judge for appointing Shri Shibapada Banerji and Shri Basu deb Mazumder, two Advocates to defend them at the expense of the State/opposite party in this Rule. Such Advocates were very junior Advocates. The learned Sessions judge took the view that the accused/Petitioners cannot have a lawyer of their own choice appointed by the Court at the expense of the State. Proceeding to act u/s 304(1) of the new Code of Criminal Procedure he appointed one Shri R.K. Mandal, an Assistant Public Prosecutor as the lawyer to defend the accused/Petitioners at the cost of the State. The accused/Petitioners objected to such an appointment being made and insisted that the lawyers of their choice should be appointed to defend them at the expense of the State. That prayer was not conceded by the learned

Sessions judge and was overruled by the impugned order. Hence, this revisional application.

2. The only question in such circumstances that has been debated before us on behalf of the accused/Petitioners is as to whether in law the accused/Petitioners can assert a right to be re-presented by a lawyer of their own choice appointed by the Court at the expense of the State in a criminal prosecution?

3. Mr. Roy, the learned Advocate appearing on behalf of the Petitioners, has very strongly contended that such a right follows from the provision of Section 30 read with Section 303 of the new Code of Criminal Procedure and Art, 22(1) of the Constitution. Mr. Biswas, the learned Advocate for the State, has seriously contested such a claim and according to Mr. Biswas though the accused/Petitioner may have a constitutional as also a statutory right to have themselves defended by a lawyer of their own choice yet, such a right does not extend to the extent of having such lawyers for their defence at the cost to be borne by the State.

4. In considering this rival contention it would be necessary to refer to the two statutory provisions, namely, Sections 303 and 304 of the new Code of Criminal Procedure which are set out hereunder:

303. Any 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.

304. (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 rules 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

(c) the fees 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 Courts of Session.

5. Section 303, as aforesaid, incorporated the same provision as it was in Section 340(1) of the old Code of Criminal Procedure, 1898, with this much of the material difference, namely, that while under the old Code the accused had a right to be defended by a pleader, under the new provision he has such a right to

be defended by a pleader of his choice. This alteration in the text of the provision has necessarily been made to bring it in consonance with the provisions of Article 22(1) of the Constitution which guarantees a fundamental right in favour of alt accused to be defended by a legal practitioner of his choice. Neither Section 303 of the new Code of Criminal Procedure nor Article 22(1) of the Constitution speaks of any right in favour of the accused to be defended by a lawyer of his own choice but at the cost of the State. These provisions merely guarantee and confer a right on the accused to have the opportunity to engage a lawyer so that he may not be prosecuted denying him an opportunity to be defended by a lawyer. These provisions, however, presupposes that the accused must be in a position to engage a lawyer of his own. We agree with Mr. Biswas that such right can never extend to such an extent as to claim a lawyer of choice at the expense of the State. Strong reliance is placed by Mr. Roy, the learned Advocate for the Petitioners on a Bench decision of this Court in the case of Panchu Gopal Das Vs. The State, . In particular, reliance is placed on an observation to the following effect to be found in the report, namely,

the question raised by Mr. Bose, however, is whether the State can engage a defence lawyer without ascertaining the wishes of the accused and without giving him any choice of selecting his lawyer. In that bareness that question can only be answered in the negative, for the reason that Article 22(1) of the Constitution guarantees that choice of lawyer for the defence can only be of the accused himself.

This observation, however, must be read in its context. The question which the learned judges were considering in the above case was whether the Court can thrust upon the accused a lawyer of its choice without ascertaining the wishes of the accused. In our opinion, the answer given in the negative was perfectly justified because if the accused has a fundamental right to be defended by a lawyer of his own choice no lawyer can be thrust upon him even for his defence. That would really be inconsistent with his right under Article 22(1) of the" Constitution. Their Lordships, however were riot called upon to consider any issue presently under consideration by us. Nonetheless other observation in the very same judgment runs counter to the claim put forward by Mr. Roy on behalf of the accused-Petitioners. In para. 18 their lordships referring to Article 22(1) and Section 340(1) of the old Code clearly observed that neither of the two provisions

enjoins any duty on the State which is the prosecuting authority to provide a lawyer for defence of the accused on trial.

Reliance is also placed by Mr. Roy on the decision of the Supreme Court in the case of State of Madhya Pradesh Vs. Shobharam and Others, . In this decision, the Supreme Court was considering really the constitutional validity of Section 63 of the Madhya Bharat Panchayat Act, which provided that no legal practitioner shall appear on behalf or shall plead for and defend any party in any dispute, case or proceeding before the Panchayat. It was held that such a provision runs

counter to Article 22(1) of the Constitution and a trial held by the Panchayat leading to the conviction of the accused who was not allowed to be represented by a lawyer because of such a provision was struck down. In this case too, the Supreme Court was not called upon to consider any issue now under consideration by us and nothing said in this decision can support such an extreme argument as put forward before us by Mr. Roy. On the other hand, the decision of the Supreme Court in the case of Janardan Reddy and Others Vs. The State of Hyderabad and Others, , in a manner supports the view that we take. In that case, the Petitioners before the Supreme Court were convicted of murder and sentenced to death and also convicted of certain other offences and sentenced to various terms of imprisonment by a special Tribunal. The validity of such conviction was challenged amongst others on the ground that the Petitioners were afforded no opportunity to be represented by a counsel of their choice and they had remained undefended throughout the trial. Such a claim was overruled when it was found that the special Tribunal had not denied an opportunity to the accused persons to be defended by a lawyer. Considering the implications of a provision analogous to Section 340 of the old Code of Criminal Procedure, the Supreme Court observed:

The proper view seems to us to be: (1) that it cannot be laid down as a rule of law that in every capital case where the accused is unrepresented, the trial should be held to be vitiated and (2) that a court of appeal or revision is not powerless to interfere, if it is found that the accused was so handicapped for want of legal aid that the proceedings against him may be said to amount to negation of a fair trial.

6. Though the provision of Article 22(1) was not expressly referred to we cannot think that the Supreme Court was not aware of the said provision in deciding this case. When, therefore, the Supreme Court took the view that the accused not having been denied an opportunity to engage a lawyer of his own there has been no illegality affecting the trial, it must be held that the Supreme Court was interpreting the constitutional as also the legal right of the accused in this respect to extend only to have an opportunity to be defended by a lawyer of his own choice but not so at the cost of the State in every case. Similarly, in the case of Ram Sarup Vs. The Union of India (UOI) and Another, , it was held that where the accused had not made any request to engage a lawyer of his own and no such request has been refused by the Tribunal there has been no violation of his fundamental right under Article 22(1) of the Constitution.

7. The only other provision which needs to be considered is Section 304 of the new Code of Criminal Procedure referred to hereinbefore. Sub-section (1) of this section provides that in a trial before a Court of Session if the accused is not represented by a lawyer and if it appears to the Court that the accused has no sufficient means to engage a lawyer, the Court shall assign a lawyer for his defence at the expense of the State. Such a provision as this, really runs counter to the contention that the right of an accused to be defended by a lawyer of his

own choice at the cost of the State flows from Section 303 of the same Code or Article 22(1) of the Constitution. Had that been the position, Section 304 would have been wholly unnecessary. On the other hand, this section enjoins the Court to assign a lawyer where the accused is (i) unrepresented by a lawyer and (ii) has not sufficient means to engage a lawyer. This is a new provision incorporated in the Code of Criminal Procedure which was not there in the old Code. It would be pertinent to note that this provision gives statutory recognition to a principle that where a person prosecuted as a Defendant in a criminal trial is incapable of making an arrangement for his own defence which would nonetheless be necessary, the Court should intervene and assign a lawyer for him. In all capital cases such a principle was held to follow as a necessary requisite of due process of law under the American Constitution. Reference may be made to the case of *Powell v. Alabama* 287 U.S. 45 and the same was considered to be a desirable principle by the Supreme Court in the aforesaid case of *Janardan Reddy Supra*.

8. The principle, as aforesaid and the statutory provision of Section 304(1) of the new Code of Criminal Procedure is based on such principle that enjoins the Court to assign a lawyer. It is obvious, therefore, that the choice would lie with the Court. The Court is to take into consideration the facts and circumstances of the case, the nature and the seriousness of the charges in selecting a proper lawyer so that the unrepresented accused can effectively be defended. There is nothing in this provision which enjoins the Court to appoint a lawyer at the choice of the accused at the expense of the State. Mr. Roy contends that we should interpret Section 304 in the light of Section 303 and Article 22(1) of the Constitution and so interpreted we must hold that when the Court is to assign a lawyer for the defence of the accused at the cost of the State such a lawyer must be of the choice of the accused. We are, however, unable to accept such an interpretation of Section 304. It is a provision for legal aid which comes into operation as and when the accused is incapable of defending himself by a lawyer of his own choice. On the scheme of Section 304 also, it is not possible to accept an interpretation thereof as proposed by Mr. Roy. Sub-section (2) of Section 304 provides that the High Court is to frame rules providing for the mode of selecting a lawyer and the fee payable to such lawyers. If we accept the contention of Mr. Roy and hold that u/s 304(1) the Court is to assign a lawyer for the defence of the accused at his choice, at the expense of the State, there can be no scope for any selection by the Court nor can his fees be limited by any Rules made under Sub-section (2).

9. The statutory provisions in Sections 303 and 304 of the new Code interpreted in the light of Article 22(1) of the Constitution, therefore, enjoins that an accused must have the first choice to be, defended by a, lawyer of his own choice engaged by him and this right must prevail over everything else. In case the accused is unable to engage a lawyer of his own to defend him, the Court shall assign a lawyer on the requirement of Section 304(1) being otherwise fulfilled but even here if the accused objects to be being defended by the lawyer assigned by the Court, the lawyer cannot be thrust upon him and he must be left

to defend himself and that in assigning the lawyer it is for the Court to select in accordance with the provisions of Rules, if any, framed under Sub-section (2) but ensuring the fact that the lawyer so assigned by his experience and standing can effectively defend the accused, who goes unrepresented having regard to the charges on which he is being prosecuted.

10. Such being the position in law, we are of the opinion that the learned Sessions Judge was right in his conclusion that the accused Petitioners are not entitled in law to have a lawyer of their own choice appointed by the Court at the expense of the State. The learned Sessions Judge, we find, also made a proper assignment of a lawyer to defend the accused/Petitioners when a lawyer of the standing of an Assistant Public Prosecutor was so assigned in preference to very junior lawyers with very little experience at the Bar, prayed for by the accused. But nonetheless, as we have held that an accused has also the right to reject a lawyer assigned by the Court and have him defended by himself, we direct the learned Sessions Judge to ascertain from the accused/Petitioners, when the matter goes back, as to whether they would prefer to defend themselves than be defended by the lawyer assigned by the Court and if the accused/Petitioners or any one of them express the view to be not represented by the lawyer assigned by the Court then they or such of them as express such a view should be left to be defended by them or himself and not by the lawyer assigned by the Court. Subject to the observations, as aforesaid, this application fails and the Rule is discharged.

11. Let the records be sent down forthwith.

A.P. Bhattacharya, J.

12. I agree.