

(2015) 04 AHC CK 0071

In the Allahabad High Court

Case No : Application U/s. 482 No. 11323 of 2015

Santosh Sharma

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 28-04-2015

Acts Referred:

Constitution of India, 1950 — Article 21, 22(1)

Citation : (2015) 8 ADJ 136 : (2015) 90 ALLCC 853

Hon'ble Judges : Manoj Misra, J

Bench : Single Bench

Advocate : Janardan Yadav, for the Appellant

Judgement

Manoj Misra, J.—Heard learned counsel for the applicant; the learned A.G.A. for the State and perused the record.

2. The instant application has been filed seeking quashing of an order dated 16.04.2015 passed by the Additional Session Judge, Court No. 8, Azamgarh in S.T. No. 461 of 2013 by which the application No. 26 Kha to enable the counsel for the applicant to cross-examine Seema Sharma and Vikas Sharma (the prosecution witnesses), whose statements were recorded while the counsels were on strike, has been rejected.

3. The submission of the learned counsel for the applicant is that on 11.03.2015 when the examination-in-chief of the aforesaid two witnesses was recorded, the lawyers were on strike and therefore no one had appeared to cross-examine the said witnesses and the right to cross-examination was closed, therefore, in the interest of justice application 26 Kha was moved by the applicant to summon those witnesses for allowing their cross-examination, which has been wrongly rejected by the court below on the ground that if such application is allowed then it would encourage the lawyers to be on strike.

4. It has been submitted that the reason for rejection of the application is not legally justified since cross-examination is a valuable right of an accused, of

which he should not be deprived on fault of the lawyers.

5. Learned A.G.A. though sought to support the lower court order but could not point out anything material on record which may go to show that the applicant was at fault in not cross-examining the witnesses, who were examined by the Court.

6. In the case of Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid Vs. State of Maharashtra, AIR 2012 SC 3565 : (2012) CriLJ 4770 : (2012) 3 Crimes 209 : (2012) 4 JCC 2929 : (2012) 8 JT 4 : (2012) 7 SCALE 553 : (2012) 9 SCC 234 : (2012) AIRSCW 4942 : (2012) 6 Supreme 1 of the report, the Apex Court had observed as follows:--

"474. We, therefore, have no hesitation in holding that the right to access to legal aid, to consult and to be defended by a legal practitioner, arises when a person arrested in connection with a cognizable offence is first produced before a magistrate. We, accordingly, hold that it is the duty and obligation of the magistrate before whom a person accused of committing a cognizable offence is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the State. The right flows from Articles 21 and 22(1) of the Constitution and needs to be strictly enforced. We, accordingly, direct all the magistrates in the country to faithfully discharge the aforesaid duty and obligation and further make it clear that any failure to fully discharge the duty would amount to dereliction in duty and would make the concerned magistrate liable to departmental proceedings.

477. Every accused unrepresented by a lawyer has to be provided a lawyer at the commencement of the trial, engaged to represent him during the entire course of the trial. Even if the accused does not ask for a lawyer or he remains silent, it is the Constitutional duty of the court to provide him with a lawyer before commencing the trial. Unless the accused voluntarily makes an informed decision and tells the court, in clear and unambiguous words, that he does not want the assistance of any lawyer and would rather defend himself personally, the obligation to provide him with a lawyer at the commencement of the trial is absolute, and failure to do so would vitiate the trial and the resultant conviction and sentence, if any, given to the accused (see Suk Das v. U.T. of Arunachal Pradesh 97)."

7. Having considered the observations of the apex court, this Court is of the view that service of a lawyer is of paramount importance to an accused. If, for some reason, the counsel for the accused fails to appear, then the court must offer service of an amicus curiae to the accused. It is very difficult to imagine as to how, in ordinary circumstances, an accused could cross-examine a witness to discredit his evidence. The right to cross-examine the prosecution witnesses is a very valuable right of an accused and should not mechanically or casually be

forfeited unless there are compelling reasons justifying the same. Of course, the court may forfeit the right to cross examine where, for no cogent reason, either the counsel or the accused refuses to cross-examine the witness offered for cross-examination.

8. In the instant case, admittedly, on the date when those prosecution witnesses were examined, the lawyers were on strike and the counsel for the applicant could not appear to cross-examine the witnesses therefore, either the Court should have deferred the cross-examination to another date or should have offered services of an amicus curiae to assist the applicant for such purpose. Only when the applicant had refused to avail of the services or had consciously chosen not to cross-examine those witnesses, then the right to cross-examine those witnesses could have been forfeited.

9. Accordingly, the order passed by the court below is unsustainable in law and is hereby set aside. The court below is directed to pass a fresh order on the application of the applicant for recall of the witnesses keeping in mind the observations made herein above.

10. The application stands allowed to the extent indicated above.