

(2001) 10 J&K CK 0023
In the Jammu And Kashmir High Court
Case No : Criminal Revision No. 38/2001

Tarlok Chand Mahajan

APPELLANT

Vs

State through Public Prosecutor

RESPONDENT

Date of Decision : 16-10-2001

Acts Referred:

Jammu and Kashmir Consumer Protection Act, 1987 — Section 268

Citation : (2002) KashLJ 356

Hon'ble Judges : R.C.Gandhi, J

Bench : Single Bench

Advocate : Shakeel Ahmed, Shaishta Hakim, J.P.Singh, Advocates appearing for the Parties

Judgement

1. Petitioneraccused facing trial under sections 452/302 RFC and 3/25 Arms Act seeks to quash order dated 8.5.2001 whereby he has been

charge sheeted by the trial court on his being pleaded not guilty of the alleged commission of offence.

2. Learned counsel for the petitioner, Mr J.P. Singh, has at the outset submitted that he is seeking to quash the impugned order only on the ground

that he has not been provided opportunity of being heard as mandated by law and is not pressing the other reliefs including the alternative relief for

quashing the proceedings in exercise of power u/s 561A Cr.P.C.

3. The impugned order to that extent has been challenged on the ground that the trial court has erred in refusing to provide either an opportunity of

engaging the service of a lawyer of his choice or to provide a lawyer to the petitioner at State expense for his defence in the trial and has thus

violated the mandate of Article 39A of the Constitution of India and the provisions of the Criminal Procedure Code which guarantee legal aid to an

un represented accused which also amounts to depriving him of his fundamental right of a fair trial. The other ground set up is that trial court has violated the provisions of sections 268 and 269 of the Criminal Procedure Code, 1989 by providing an opportunity of hearing before deciding as to whether a case for charge is made out. The petitioner has not been provided copy of challan or translation version thereof in Hindi language which he understands. It is also one of the grounds that trial court has violated section 267 of the Criminal Procedure Code dealing with the opening of the case for prosecution. Mrs Shahista Hakim has appeared on behalf of respondents. She has stated that the impugned order does not suffer on account of any illegality or impropriety.

4. Heard the learned counsel for the parties and perused the record.

5. Record of the trial court has been summoned, perusal whereof reveals that the challan was presented before the Chief Judicial Magistrate,

Jammu on 7.12.2000 and after committal was presented before the learned sessions judge, Jammu on 18.12.2000. Learned Sessions Judge, was

unable to hear the case as the learned advocate appearing on behalf of the accused was related to him and the challan, therefore, was transferred

to the court of 1st. Additional Sessions Judge, Jammu. On 5.1.2001, the challan was taken up by the learned 1st Addl Sessions Judge Jammu. Mr

Rajesh Kumar appeared on behalf of the accused. Special Prosecutor appearing in the case was not present and it was fixed for 6.2.2001. It

could not be taken up because of imposition of curfew from 5th to 7th February 2001 and was taken up on 9.2.2001. On 9.2.2001 accused was

not produced by the jail authorities and it was fixed on 5.3.2001. On 5.3.2001 accused sought time to engage counsel which was granted to him

fixing the date on 15.3.2001 for hearing the arguments regarding charge/discharge. On 15.3.2001 accused was not produced and the case was

fixed for 12.4.2001. On that date also accused sought adjournment on the same pretext to engage counsel which was granted to him by the trial

court observing that:

Accused has been granted time since Jan. 2001. Last opportunity is granted to the accused and it is made clear that case will not be adjourned on

this plea on the next date of hearing and the charge stage shall be completed.

6. On 8.5.2001 the learned trial court appreciating the evidence collected by the

prosecution framed the charge in the following terms:

That on 27th of Sept. 2000 at place Gangyal Industrial area with intention to commit murder of Rahul Sharma, a disabled person, after

preparation, entered into the factory premises (Olympian Paints) of Rahul Sharma with loaded revolver and dragged him out from the office of

factory and fired two rounds on him with your revolver as a result he died and on that day the licence of your revolver was not renewed, thus

committed offences punishable under sections 452/302 RPC. That you were armed with revolver not duly licenced that you used in the

commission of offence, thus, committed offence punishable under section 3/25 Act.

The above said offences are within the cognizance of this court. I accordingly direct that you be tried for the commission of above said offences by

this court under law.

7. Perusal of the FIR reveals that the petitioneraccused is owner of a wire factory. On 27.9.2000 at about 22.45 p.m. accused came to the factory

of the deceased in his car and went to room of the deceased. He showed his loaded revolverto the deceased and commanded him to proceed with

him. On refusal of the deceased, petitioner kicked him. Eye witnesses on spot wanted to interfere for safety of the deceased. They were threatened

by the petitioner of their being killed by him and in the meantime accused petitioner fired two rounds on the deceased with his revolver which hit

him on his head causing his death on spot. Thereafter he fled away in his car.

8. Petitioner on 22.7.2001 filed an application with the request that he has been chargesheeted, he be provided a copy of the challan in Hindi and

to make arrangement for service of the lawyer.

9. The plea of the learned counsel for the petitioner is that the trial court has violated the provisions of section 267. Section 267 Cr.P.C. deals with

the opening of the case by the prosecutor before the court the charge against the accused stating the evidence he possesses to prove guilt of the

accused. The trial court has recorded in its interim order that he has heard APP and considered the documents.

10. This is sufficient to meet the requirement oflaw contained in section 267 Cr. P.O. Therefore, this argument having no substance is rejected.

11. His another plea is that mandate of section 268 and 269 Cr.P.C. has been

violated by the learned trial court for arriving at the conclusion of framing the charge against the petitioner. Stress has been laid on the expression ""and after hearing the submissions of the accused and the prosecution in this behalf"" appearing in sections 268 and 269 of the Cr.P.C. sections 268 and 269 of Cr.P.C. are extracted below and read thus:

268. Discharge: If upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is no sufficient ground for proceeding against the accused, he shall

discharge the accused and record his reasons for so doing.

269. Framing of charge(1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the

accused has committed an offence which (a) is not exclusively triable by the court of sessions, he may frame a charge against the accused and by

order, transfer the case to the chief judicial magistrate or any judicial magistrate competent to try the case, and thereupon the Chief Judicial

Magistrate or any Judicial Magistrate to whom a case has been transferred shall try to offence in accordance with the procedure provided for the

trial of warrant cases instituted on police report,

(b) is exclusively triable by the court, he shall frame in writing a charge against the accused. (2) Whether the Judge frames any charge under clause

(b) of subsection (1) the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence

charged or claims to be tried.

12. His submission is that the petitioner was not represented by a lawyer and sought adjournment to engage service of the lawyer which has been

denied, amounts to denial of an opportunity of hearing provided U/S 268 Cr.P.C. Perusal of the record reveals that petitioner engaged service of

Mr Rajesh Kumar Advocate whose power of attorney duly executed on 18.9.2000 is on the record of the file. The said learned Advocate has

also appeared in the court representing the petitioner. Petitioner sought adjournment on 5.3.2001 which was granted to him by ten days. Another

opportunity was granted to him on 12.4.2001 specifically observing that no further opportunity will be granted on this plea and the case shall be

taken up for further proceedings with regard to the charge or discharge and

accordingly it was taken. Undoubtedly, mandate contained in section 268 Cr.P.C. envisages providing of an opportunity to the accused and the prosecution. He has been provided opportunity. He was represented by an advocate and granted opportunity of engaging services of the lawyer. He was also notified by the court with a caution that the case on this plea shall not be adjourned. Petitioner was well aware that the case is being fixed on the next date for hearing on framing of charge or discharge.

Hearing as provided in the section does not mean that court can compel the accused for exhausting opportunity provided. What required is, that the accused should be provided opportunity of hearing and it is for the accused to exhaust and avail of it. Court has granted opportunities which accused has not availed of for the reasons best known to him. Court has finally cooperated with the accused. Accused has not divulged before the trial court as to why he has not engaged the services of the lawyer or any impediment there for. The petitioner has already engaged the service of counsel Mr Rajesh Kumar. Such an approach of the accused without disclosing reasons for not engaging the services of the lawyers cannot be said denial of opportunity of hearing the submissions of the accused. The court has to provide an opportunity to see that justice is done. It is duty of the accused also to cooperate with the court facilitating the trial of the case. Court is under no obligation to wait and watch till the accused exercises his choice of engaging a lawyer or to select a particular date or to gain time for making submissions with oblique motive. The court has not been taken into confidence by the accused as to why he has not engaged service of the counsel. He has nowhere stated before the court reasons whatsoever that he is not in a position to engage the service of the lawyer. This is sheer excuse projected by the petitioner and deliberately coined to challenge the impugned order. He has also engaged services of an advocate for release of the vehicle which is borne out from the record. He has filed this petition also by engaging service of the counsel. Such an excuse and approach adopted by the accused cannot be said that he has not been heard, Notwithstanding that trial court is under no obligation to compel the accused to make submission. Accused is at liberty to make submissions or opt not to make submission by adopting the method of any kind including the one which has been adopted in this case.

13. Court has considered the record, other documents annexed with the challan and has come to the conclusion that the accused needs to be

chargesheeted and accordingly framed the charge. There is sufficient compliance of section 268 Cr.P.C. by the trial court,

14. His last submission is that the trial court was under legal obligation to provide services of the counsel as mandated by Article 39A read with

Article 21 of the constitution of India at State expense which is fundamental right of the petitioner accused. In support of this plea, learned counsel

has relied upon the case *Suk Das & Anr. Vs. Union Territory of Arunachal Pradesh* AIR 1986 SC 991. The question before the Apex Court was:

The question is whether an accused who on account of his poverty is unable to afford legal representation for himself in a trial involving possibility

of imprisonment imperilling his personal liberty, is entitled to free legal aid at stage cost and whether it is obligatory on him to make an application

for free legal assistance or the Magistrate or the sessions judge trying him is bound to inform him that he is entitled to free legal aid and inquiry from

him whether he wishes to have a lawyer provided to, him at state cost; if he is not so informed and in consequence he does not apply for free legal

aid and as a result he is not represented by any lawyer in the trial and is convicted, is the conviction vitiated and liable to be set aside. This question

is extremely important because we have almost 50% population which is living below the poverty line and around 70% is illiterate and large

sections of people just do not know that if they are unable to afford legal representation in a criminal trial, they are entitled to free legal assistance

provided to them at stage cost".

15. Dealing with this proposition the court further observed as under:

But the question is whether this fundamental right could lawfully be denied to the appellants if they did not apply for free legal aid. Is the exercise

of this fundamental right conditioned upon the accused applying for free legal assistance so that if he does not make an application for free legal

assistance the trial may lawfully proceed without adequate legal representation being afforded to him? Now it is common knowledge that about

70% of the people living in rural areas are illiterate and even more than that percentage of the people are not aware of the rights conferred upon

them by law. Even literate people do not know what are their rights and

entitlements under the law. It is this absence of legal awareness which is responsible for the deception, exploitation and deprivation of rights and benefits from which the poor suffer in this land. Their legal needs always stand to become crisis oriented because their ignorance prevents them from anticipating legal troubles and approaching a lawyer for consultation and advice in time and their poverty magnifies the impact of the legal troubles and difficulties when they come. Moreover, because of their ignorance and illiteracy, they cannot become self-reliant; they cannot even help themselves. The law ceases to be their protector because they do not know that they are entitled to the protection of the law and they can avail of the legal service programme for putting an end to their exploitation and winning their rights. The result is that poverty becomes with them a condition of total helplessness. This miserable condition in which the poor find themselves can be alleviated to some extent by creating legal awareness amongst the poor. That is why it has always been recognised as one of the principal items of the programme of the legal aid movement in the country to promote legal literacy. It would in these circumstances make a mockery of legal aid if it were to be left to a poor, ignorant and illiterate accused to ask for free legal service. Legal aid would become merely a paper promise and it would fail of its purpose. This is the reason why in *Kahtri V. State of Bihar* (1981)2 SCR 408; AIR 1981 SC 298, we ruled that the Magistrate or the Sessions Judge before whom an accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the state".

16. Petitioner is an owner of the wire factory and even at the time of commission of the crime he was having the facility of motoring in car. The trial court has recorded in the interim order that the petitioner is an owner of the factory which has not been denied by him by setting up a ground in the revision petition before this court. This itself shows that petitioner is of sufficient means. He has engaged the services of the counsel at every stage i.e. before the trial court, he is represented by Sh. Rajesh Kumar Advocate. In the application for release of vehicle used in the circumstances of offence, services of advocate Mr Shakeel Ahmed Sheikh were engaged. He is represented by a lawyer before this court also.

17. Free legal aid is a fundamental right and the accused must be provided service of the lawyer and the trial court must ensure that during trial

accused be represented by a lawyer. Judgement (Supra) relied by the counsel for the petitioner deals with the facts and circumstances of the case

where accused on account of poverty or indigent is unable to engage service of a lawyer. Herein the accused is resident of the city, factory owner

and of sufficient means. Moreover, the trial has commenced on 8.5.2001. No evidence so far has been recorded. The trial court is directed to

provide him services of an advocate who will be paid under the rules framed under J&K Legal Service Act, 1997 so that accused is represented

during the trial. So far as plea that accused be given copy of Hindi version of challan is concerned, learned counsel for the petitioner could not

show from any provision of law that the court is under obligation to provide a copy to the petitioner in Hindi version.

18. For the aforesaid reasons, no case for interference is made out. The revision petition is dismissed upholding the impugned order. Record be sent back.