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ORISSA HIGH COURT, CUTTACK
Jail Criminal Appeal No. 132 of 2005

From the judgment of conviction and order of sentence passed on 30.06.2005 by Sri J.K. Dash, Addl. Sessions Judge (FTC), Baripada convicting the appellant-Habil Sindhu under Section 302/201 of the IPC and sentencing him to undergo R.I. for life in S.T. Case No.40/163 of 2003

Habil Sindhu

...

Appellant

Versus

State of Odisha

...

Respondent

For Appellant

-

*Mr. Himansu Bhusan Das
(Amicus Curiae)*

For Respondent

-

*Mr. M.S. Sahoo
(Addl. Government Advocate))*

P R E S E N T :

SHRI S.K.MISHRA

AND

MISS SAVITRI RATHO

Date of Hearing : 03.03.2021 : Date of Judgment : 13.04.2021

S.K.Mishra, J. In this appeal, the sole appellant-Habil Sindhu had assailed his conviction under Section 302/201 of the Indian Penal Code, 1860, hereinafter referred to as 'Penal Code' for brevity by the learned Addl. Sessions Judge (FTC), Baripada in S.T. Case No.40/163 of 2003. As per

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the judgment dated 30.06.2005, the learned trial Judge convicted the appellant for the aforesaid offence and sentenced him to undergo R.I. for life for the offence under Section 302 of the Penal Code. No separate sentence has been passed for the offence under Section 201 of the Penal Code.

2. The learned Amicus Curiae has assailed the impugned judgment on various grounds pertaining to appreciation of evidence. However, we are inclined to take into consideration the last submission made by the learned Amicus Curiae relying upon the reported case of **Anokhilal v. State of Madhya Pradesh**, (2019) 20 SCC 196. He would submit that in this case the appellant was not provided with effective free legal services by the State Defence Counsel (SDC). The learned counsel for the appellant argued that although the learned trial Judge engaged a SDC to defend him, but such counsel was engaged without assessing his ability to defend the accused, who was charged with murder of three persons. Moreover, it is also argued that the counsel was engaged on the date of trial when the private defence counsel appearing for the appellant did not appear. Though on date of trial, no witnesses were examined on behalf of the prosecution, on the next two dates, majority of the material witnesses were examined.

Before passing any comment on the issues at hand, we would like to rely upon the observations made by the Hon'ble Supreme Court in the case of Anokhilal vs. State of Madhya Pradesh (supra). After

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taking to consideration the plethora of judgments of the Supreme Court, the following principles were recognized:

“ 20.1. Article 39-A inserted by the 42nd amendment to the Constitution, effected in the year 1977, provides for free legal aid to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. The statutory regime put in place including the enactment of the Legal Services Authorities Act, 1987 is designed to achieve the mandate of Article 39-A.

20.2. It has been well accepted that right to free legal services is an essential ingredient of ‘reasonable, fair and just’ procedure for a person accused of an offence and it must be held implicit in the right guaranteed by Article 21. The extract from the decision of this Court in *Zahira Habibulla H. Shekikh v. State of Gujarat*, (2004) 4 SCC 158 : (as quoted in the decision in *Mohd. Hussain v. State (NCT of Delhi)*, (2012) 9 SCC 408) emphasises that the object of criminal trial is to search for the truth and the trial is not about over technicalities and must be conducted in such manner as will protect the innocent and punish the guilty.

20.3. Even before insertion of Article 39-A in the Constitution, the decision of this Court in ***Bashira v. State of U.P.***, (1969) 1 SCR 32 put the matter beyond any doubt and held that the time granted to the *Amicus Curiae* in that matter to prepare for the defense was completely insufficient and that the award of sentence of death resulted in deprivation of the life of the accused and was in breach of the procedure established by law.

20.4. The portion quoted in *Bashira v. State of U.P.*, (supra) from the judgment of the Andhra Pradesh High Court authored by Subba Rao, J., the then Chief Justice of the High Court, stated with clarity that mere formal compliance of the rule under which sufficient time had to be given to the counsel to prepare for the defence would not carry out the object underlying the rule. It was further stated that the opportunity must be real where the counsel is given sufficient and adequate time to prepare.

20.5 In *Bashira v. State of U.P.*, (supra) as well as in ***Ambadas Laxman Shinde v. State of Maharashtra***, (2018) 18 SCC 788 making substantial progress in the matter on the very day after a counsel was engaged as *Amicus Curiae*, was not accepted by this Court as compliance with ‘sufficient opportunity’ to the counsel.”

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3. After conclusion of the hearing in the reported case, the Hon'ble Supreme Court has given the following directions:

“ **31.1.** In all cases where there is a possibility of life sentence or death sentence, learned Advocates who have put in minimum of 10 years' practice at the Bar alone be considered to be appointed as Amicus Curiae or through legal services to represent an accused.

31.2. In all matters dealt with by the High Court concerning confirmation of death sentence, Senior Advocates of the Court must first be considered to be appointed as Amicus Curiae.

31.3. Whenever any learned counsel is appointed as Amicus Curiae, some reasonable time may be provided to enable the counsel to prepare the matter. There cannot be any hard-and-fast rule in that behalf. However, a minimum of seven days' time may normally be considered to be appropriate and adequate.

31.4. Any learned counsel, who is appointed as Amicus Curiae on behalf of the accused must normally be granted to have meetings and discussion with the accused concerned. Such interactions may prove to be helpful as was noticed in ***Imtiyaz Ramzan Khan v. State of Maharashtra***, (2018) 9 SCC 160.”

4. Applying the aforesaid principles to the case at hand, we find from the record that originally the appellant had engaged his own counsel. Finally, on 06.07.2004, in the presence of his counsel, charges were framed under Sections 302/201 of the Penal Code by the learned trial Judge and summons were issued to the witnesses. On 16.08.2004, the accused was produced in custody. The Advocates on behalf of the accused did not appear on that date. The accused was asked to engage a private counsel but he failed to engage any counsel during course of the day. Hence, Shri P.D. Sahu, an Advocate was appointed as the SDC on behalf of the accused, who accepted the assignment and filed hazira to that effect. On that day, no witness was present. The case was ordered to be

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posted to 17.08.2004 for trial (which is the next day) and the accused was remanded to custody.

On 17.08.2004, the accused was produced and the SDC took part in the trial. Four witnesses were examined on that day.

On 18.08.2004, two more witnesses were examined. On 19.08.2004, Dr. Pradeep Kumar Misra, who conducted post-mortem examination on the dead bodies of the deceased, was examined and the case was adjourned to 14.09.2004. On 14.09.2004, P.W.8, Ram Narayan Acharya was examined, cross-examined and discharged and the case was adjourned to 15.09.2004 for trial. On that date, no witnesses were present. On 16.11.2004, rest of the witnesses were examined. On 13.12.2004, two more witnesses were examined. The Investigating Officer was examined on 17.01.2005. Then, the case was adjourned for examination of other witnesses and it suffers several adjournments. On 19.04.2005, finally the IO was examined. The prosecution case was closed. Then, it was posted to 21.04.2005 and 22.06.2005 for recording of defence evidence. On that dates, arguments were heard. The case was posted to 23.06.2005 for further arguments. Further arguments were heard on 23.06.2005 and the case was posted to 28.06.2005 for judgment. On 28.06.2005, as per the direction of the learned trial Judge, district police through escort produced the appellant before the court, judgment was not pronounced as it was not ready and the case was adjourned to 30.06.2005. On that day, judgment of conviction was pronounced and later on sentence was awarded.

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The aforesaid facts set in a chronological order show that the appellant was not given proper legal assistance as enshrined under Article 39-A of the Constitution in the true sense. On a date, when a case was posted for hearing in the absence of the counsel, the appellant was directed to be defended by a SDC. Firstly, the learned trial Judge has not recorded whether the SDC engaged by him was among the counsels short listed by the District Judges' office to be appointed as SDC. Secondly, there is no observation by the learned trial Judge that the SDC engaged by the court to defend the appellant was in fact competent in the assessment of the learned trial Judge to defend the appellant in a complex case of a triple murder. Moreover, the SDC has not been given adequate opportunity to prepare the case. It can be well deciphered from the case record that P.W.1-Trimurthy Sundhi, P.W.2-Budhia Boipai, P.W.3-Gourahari Mohanta, P.W.4-Budhurai Baipai, P.W.5-Dr. Sudhir Chandra Malik, P.W.6-Sankarsana Sethi, P.W.7-Dr. Pradip Kumar Mishra, P.W.8-Dr. Ram Narayan Acharya and P.W.9-Barana Sundhi were examined in chief and then cross-examined by the defence on 17th, 18th and 19th August of 2004. They were examined in trial of an accused charged committing murder of three persons by a SDC, who is engaged just one day prior to the examination i.e. on 16.08.2004. So, in our considered opinion, the appellant had no valid, proper and effective legal representation in the case. The learned trial Judge should have granted at least seven days time to the learned counsel appearing for the appellant to prepare the case. We are therefore of the opinion that this is a case where the accused has been denied a fair trial and it is violative of Article 39-A as well as Article 21 of the Constitution. Mr. M.S. Sahoo, learned Addl. Government

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Advocate would strenuously argue that even if there is a violation of the principles enshrined under Articles 39-A and 21 of the Constitution, the appellant cannot be acquitted of the offence as he has committed gruesome murders by severing the head of three persons from the rest of their bodies as he suspected that they were practicing witchcraft. He would argue that the malady of witch-hunting is a big problem in the tribals dominated district of Mayurbhanj and, therefore, the appellant cannot be allowed to go scot free.

5. The learned counsel for the appellant submits that the appellant is in custody since the date of his arrest i.e. 03.01.2003 and in the meantime, more than 18 years has elapsed and therefore, he should be set at liberty.

6. It is true that there is a delay in disposal of the appeal. However, the delay in disposal of the appeal cannot be attributed only to the judiciary. There are certain factors, which are beyond the control to the judiciary for which the delayed disposal has occasioned.

7. Keeping in view the entire facts of the case and taking a holistic view of the matter at hand, we are of the opinion that the case should be remanded back to the learned trial Judge for *de nove* trial. It is further brought to our notice that in the meantime, the FTC has been abolished and at present no judge is posted as Addl. Sessions Judge (FTC), Baripada. Be that as it may, we remand the case to the court of learned Sessions Judge, Mayurbhanj, Baripada with a direction to dispose of the case as early as possible preferably within a period of three months from the date of receipt of copy of this judgment. While

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disposing of the session trial, the learned Sessions Judge shall keep in mind the following observations:-

7.1. In a case where the privately engaged counsel does not appear on a date of hearing or trial, then effort should be made by the learned Sessions Judge to draw attention of the counsels appearing to the various provisions of the Bar Council Rules and Advocates Act and they should be politely reminded of their duties towards the client, the court and the society. In this connection, our judgment in ***Sapua Das and others v. State of Orissa***, Criminal Misc. Case No.403 of 2018, decided on 20.04.2018 is relevant.

7.2. While preparing list of a State Defence Counsel or Amicus Curiae, care must be taken by the learned District and Sessions Judge to include the names of those counsels, who have at least ten years of practice. In all such cases, the learned District Judge with inputs of Chief Judicial Magistrate as well as the Registrar of the Civil Court and inputs of the Public Prosecutor, President of the local Bar (s) should form an opinion about the ability of the counsel to provide meaningful assistance to the accused. Only when the District Judge is satisfied, either on his own information or information received by him, then only a counsel should be included in the panel of State Defence Counsel for the

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purpose of defending persons, who do not have enough means to engage their own private counsel.

7.3. If a situation arises where the privately engaged counsel do not come forward or their assistance cannot be obtained without considerable delay and expenses, then the Presiding Judge of the court, in seisin of the case, may appoint a State Defence Counsel or Amicus Curiae.

7.4 While appointing a counsel to defend an accused, the Presiding Judge of that Court, in seisin of the trial, should be satisfied about his ability to defend the accused.

7.5 In this connection, the learned trial Judge may look into or take into consideration the list prepared by the District Court office. But, it is not binding upon him. If he finds that as per his own judgment while deciding the case that the counsel mentioned in the Penal do not have the ability to defend and give meaningful assistance to the accused, the learned trial Judge may appoint a counsel of his choice, *de hors* the list that has been prepared.

7.6 In such cases of appointment beyond/outside the State Defence Counsel list prepared by the District Court, the payment of the dues (which in our opinion is not sufficient) should not be withheld by the Registrar or such other officer in charge of the finances and accounts of the District Court.

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7.7. Such appointment from outside the list of the State Defence Counsel prepared by the District Office shall not be considered as a financial irregularity. We must hasten to add that the learned trial Judge should record a finding that the counsel named in the list, in his opinion, may not be able to render meaningful assistance to the accused. It shall be proper on the part of the learned Judge to record the reasons for his opinion. It is further observed that in order to expedite sessions trial, the learned trial Judge should not procrastinate the trial as is seen in this case. In his anxiety to examine witnesses on that date, though the trial commenced on the next date of appointment of State Defence Counsel, the learned trial Judge went on to adjourn the case for several times thereafter as noted by us in the preceding paragraphs.

8. With such observation, we dispose of the appeal, set aside the conviction and sentence of the appellant and remit the matter back to the learned Sessions Judge, Mayurbhanj, Baripada for *de nove* trial. We further direct that the learned Sessions Judge shall observe the directions given by us in the preceding paragraphs, especially paragraphs 7.1 to 7.7 while conducting the trial. We hope and trust that the trial should be concluded within a period of three months from the date of receipt of copy of this judgment along with Trial Court Records. We further direct the Registry of this Court to forthwith communicate the copy of this judgment along with TCRs by Special Messenger so to ensure that the records

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are delivered in the office of the learned Sessions Judge within a period of seven days.

As the restrictions due to the COVID-19 situation are continuing, the learned counsel for the parties may utilize a soft copy of this judgment available in the High Court's website or print out thereof at par with certified copy in the manner prescribed, vide Court's Notice No.4587, dated 25th March, 2020.

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S.K. Mishra,J.

Savitri Ratho,J. I agree

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Savitri Ratho,J.

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Orissa High Court, Cuttack
Dated, the 13th April, 2021/PCD