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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Decided on : September 2, 2022*

+ **CRL.A. 1161/2019 & CRL.M.A. 37692/2019**

NARENDER @ LALA Appellant
Represented by: Mr. Abhay Kumar, Mr. Rahul Ranjan,
Advs.
versus

STATE OF NCT OF DELHI Respondent
Represented by: Mr. Mukesh Kumar, APP for State
with Insp. Rajiv, PS Mangol Puri.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA
HON'BLE MR. JUSTICE ANISH DAYAL

MUKTA GUPTA, J. (ORAL)

1. By this appeal the appellant challenges the impugned judgment dated 20th March, 2018 convicting the appellant for offence punishable under Section 302 IPC and the order on sentence dated 4th May, 2018 directing him to undergo life imprisonment and to pay a fine of ₹10,000/-
2. The allegations of the prosecution against the appellant are that he committed the murder of his wife Anju by strangulating her to death. The main challenge of the appellant in this appeal and the application filed is that during the substantial course of trial, the appellant was not represented by a lawyer and hence the trial in the absence of a lawyer has seriously

prejudiced him. The appellant by the application thus seeks recalling of all the prosecution witnesses so that he is ensured a fair trial.

3. A perusal of the Trial Court Record would reveal that when the trial started at the stage of arguments on charge and till PW-8 was recorded, the appellant was represented by a counsel duly appointed by him. However, at the time when PW-9 to PW-18 were recorded from 17th November, 2017, the appellant was not represented by the counsel and thus these witnesses were examined with opportunity to the accused himself to cross-examine the said witnesses. Thereafter, on 11th December, 2017 another counsel from legal aid was assigned the case and on the same date PW-20 and PW-21, PW-22 were examined and discharged. Obviously, since learned counsel for the legal aid had been appointed on that day itself, there was no cross-examination of the said witnesses done by the legal aid counsel. However, on the next date PW-19 was cross-examined by the learned counsel on behalf of the appellant provided through legal aid to the appellant and thus PW-19 was cross-examined but she failed to cross-examine PW-23 and PW-24. Though on a subsequent date cross-examination of PW-25 and PW-29 was duly carried out.

4. The manner in which the trial is conducted, there was a serious denial of fair trial to the appellant. The appellant is required to be given an opportunity to cross-examine the witnesses i.e. the witnesses examined in the absence of the lawyer, or the lawyer having been appointed on the same day from the legal aid and asked to cross-examine the witnesses.

5. In the decision reported as (1980) 1 SCC 98 Hussainara Khatoon (IV) Vs. Home Secretary, State of Bihar Supreme Court dealing with Article 39-A, added to the Constitution, emphasized that free legal aid was an

unalienable element of a “reasonable, fair and just” procedure, for without it a person suffering from economic or other disabilities would be deprived from securing justice. It was held:.

“...The right to free legal services is, therefore, clearly an essential ingredient of “reasonable, fair and just”, procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer. We would, therefore, direct that on the next remand dates, when the undertrial prisoners, charged with bailable offences, are produced before the Magistrates, the State Government should provide them a lawyer at its own cost for the purpose of making an application for bail, provided that no objection is raised to such lawyer on behalf of such under-trial prisoners and if any application for bail is made, the Magistrates should dispose of the same in accordance with the broad outlines set out by us in our Judgment dated February 12, 1979. The State Government will report to the High Court of Patna its compliance with this direction within a period of six weeks from today.”

6. In similar facts Hon’ble Supreme Court in the decision reported as (2012) 2 SCC 584 Mohd. Hussain Vs. State (Govt. of NCT of Delhi) (in short Mohd. Hussain-I) on going through the record of proceedings of the learned Sessions Court noted that mid-way through the case the learned counsel appointed for the appellant disappeared from the scene and the accused was not asked whether he would be able to engage a counsel or wish to have a counsel appointed for him. The Supreme Court noted that

out of 65 witnesses of the prosecution examined, evidence of 56 witnesses were examined by the accused without the learned counsel and that when evidence of witnesses 57 to 65 were recorded in the presence of newly appointed counsel, who for some reason thought it fit not to cross-examine any of those witnesses. Though the two learned Judges agreed that the same resulted in grave miscarriage of justice to the accused not having services of a counsel throughout the trial, since on the consequential orders there was difference of opinion, the matter was referred to the larger Bench.

7. Thereafter Hon'ble Supreme Court in the unanimous verdict reported as (2012) 9 SCC 408 Mohd. Hussain Vs. State (Govt. of NCT of Delhi) (in short Mohd. Hussain-II) held that since the offences with which the accused had been charged were of a serious nature, the prosecution has to be taken to its logical conclusion. If there had to be no failure of justice, "the re-trial of the appellant in the facts and circumstances is indispensable". The Three Judge Bench in Mohd. Hussain-II held:

"41. The appellate court hearing a criminal appeal from a judgment of conviction has power to order the retrial of the accused under Section 386 of the Code. That is clear from the bare language of Section 386(b). Though such power exists, it should not be exercised in a routine manner. A de novo trial or retrial of the accused should be ordered by the appellate court in exceptional and rare cases and only when in the opinion of the appellate court such course becomes indispensable to avert failure of justice. Surely this power cannot be used to allow the prosecution to improve upon its case or fill up the lacuna. A retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice. Obviously, the exercise of power of retrial under Section 386(b) of the Code, will depend on the facts and circumstances of each case for which no straitjacket formula can be formulated but the appeal court must closely

keep in view that while protecting the right of an accused to fair trial and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked.”

8. In the light of the facts noted above, this Court is of the considered opinion that there has been a grave miscarriage of justice to the appellant when number of witnesses were examined when the appellant was not represented by a counsel and then when the legal aid counsel who was present in the Court was appointed on the same day was asked to cross-examine the witnesses.
9. Consequentially, the impugned judgment of conviction and order on sentence are set aside. The matter is remanded back to the Trial Court for cross-examination of PW-9 to PW-18, PW-20, PW-21, PW-22, PW-23, PW-24, PW-26, PW-27 & PW-28. Thereafter, the learned Additional Sessions Judge will follow due process of law and will record the statement of the appellant under Section 313 Cr.P.C. if required and permit leading the defence evidence if so required.
10. Appeal and application are disposed of.
11. The Trial Court Record be sent back forthwith by special messenger.
12. The case be listed before the learned Trial Court on 26th September, 2022 when Superintendent Tihar Jail will produce the appellant before the learned Trial Court.
13. Learned Trial Court is requested to expedite the trial and conclude the same preferably within four months.
14. Needless to note that the appellant will be at liberty to file an application seeking bail as per law before the learned Trial Court.

15. Copy of the judgment be uploaded on the website of this Court and be also communicated to the appellant through the Superintendent Jail.

**(MUKTA GUPTA)
JUDGE**

**(ANISH DAYAL)
JUDGE**

**SEPTEMBER 2, 2022
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HIGH COURT OF DELHI



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