REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1091 OF 2006

Mohd. Hussain @ Julfikar Ali …….. Appellant

versus

The State (Govt. of NCT) Delhi .....Respondent

J U D G M E N T

H. L. Dattu, J.

1) A convict, who is facing the threat of death gallows, is before us in this appeal. He is an illiterate foreign national and unable to engage a counsel to defend himself. He is tried, convicted and sentenced to death by the Additional Sessions Judge, Delhi in Sessions Case No.122 of 1998 dated 03.11.2004 without assignment of counsel for his defence. Such a result is confirmed by the High Court on a reference made by the Trial Court for confirmation of death sentence and has dismissed the appeal filed by the appellant vide its order dated 04.08.2006.

2) The convict, (hereinafter referred to as "appellant") is charged, convicted and sentenced under Sections 302/307 of Indian Penal Code (in short, "IPC") and also under Section 3 of The Explosive Substances Act, 1908. The case of the prosecution, as noticed by the High Court, which appears to be accurate statement of facts, proceeds on these lines :

> *" 2. On 30-12-1997 at about 6.20 p.m. one blueline bus No.DL-IP-3088 carrying passengers on its route to Nangloi from Ajmeri Gate stopped at the Ram Pura Bus Stand on Rohtak Road for passengers to get down. The moment that bus stopped there an explosion took place inside the bus because of which its floor got ripped apart. Four passengers of that bus, namely, Ms. Tapoti, Taj Mohd. Narain Jha and Rajiv Verma died and twenty four passengers including the conductor of that bus were injured due to that explosion. Two policemen (PWs 41 & 52) were on checking duty at that but stop at the time of blast. On their informing the local police station police team reached the spot. Crime team and bomb disposal squad were also called and the damaged bus was inspected and from the spot debris etc. were lifted and sealed.*
>
> *3. On the basis of the statement of Head Constable Suresh (PW-41), who was one of the two policemen on duty at the bus stop of Rampura, a case under Section 307 IPC and Section 3, 4 and 5 of the Explosive Substances Act was registered at Punjabi Bagh police station. Investigation commenced immediately. With the death of some of the injured persons on the day of the incident itself Section 302 IPC was also added. Hunt for the culprits responsible for that macabre incident also*

started. However, for over two months nobody could be nabbed.

4. It appears that as a result of different incidents of bomb blasts in Delhi including the present one the intelligence agencies became more active and started gathering information about the incidents of bomb blasts in the city. It came to light that some persons belonging to terrorist organizations were actively operating in the city of Delhi for causing terror by killing innocent people and causing damage to public property by exploding bombs. On the basis of secret information the police raided some houses in different parts of Delhi on 27.02.1998 and from those houses hand grenades and material used for making bombs was recovered in large quantity. The chemicals recovered were sent to CFSL, which confirmed that the same were potassium chlorate and sulphuric acid and were opined to be constituents of low explosives. Some persons were arrested also and during interrogation they had disclosed to the police that they were members of a terrorist organization and their aim was to create terror and panic in different parts of the country by exploding bombs to take revenge for the killings of innocent muslims (sic.) in India and further that they had come to India for Jehad. On 27.02.1998 itself the police had registered a case vide FIR No.49 of 1998 under Sections 121/121-A IPC and Sections 3, 4 & 5 of the Explosive Substances Act as well under Section 25 of the Arms Act at Main Delhi Railway Station. On the basis of information provided by the apprehended terrorists the police made more arrests including that of one Mohd. Hussain (who now is the appellant before us in Crl. A. No.41 of 2005 and reference to him will now onwards be made as 'the appellant'). The appellant was apprehended when his house in Lajpat Nagar was raided pursuant to the information given by other apprehended terrorists. As per the prosecution case the appellant himself had opened the door on being knocked by the police and on seeing the police party he had tried to fire at the policemen from the pistol which he was having in

his hand at that time but could not succeed and was apprehended. His pistol was seized. It appears that during the interrogation by the police the appellant and three more persons, namely, Abdul Rehman, Mohd. Ezaz Ahmed and Mohd. Maqsood confessed about their involvement in the present incident of bomb blast in the bus on 30.12.1997. That information was then passed over to Punjabi Bagh police station on 18.03.1998 by the Crime Branch and accordingly all these four persons were formally arrested for the present case also on 21.3.1998 for which date the investigating officer of the present case had sought their production in court by getting issued production warrants from the court seized of the above referred case of FIR No.49/1998. The investigating officer moved an application before the concerned court on the same day for holding of Test Identification Parade (TIP) in respect of the appellant in view of the suspicion expressed by PW-1 Darshan Kumar, the conductor of the bus involved in the blast regarding one passenger who had boarded his bus from Paharganj bus stop along with a rexine bag for going to Nangloi but instead of going upto Nangloi he had got down from the bus at Karol Bagh leaving his rexine bag underneath the seat which he had taken and which was near the seat of the conductor. The conductor had given the description of that passenger. As per the prosecution case the explosion had taken place below that seat which that passenger had occupied and underneath which he had kept his rexine bag. Although on 21-03-98 the appellant did not object to holding of identification parade but he refused to joint test identification parade which was fixed for 23-03-98 stating that police had taken his photographs.

5. During the investigation of the present case the debris collected from the place of bomb blast and some damaged pieces of the bus etc. were sent to Central Forensic Laboratory (CFSL) and after examination it was revealed that in the seized material contained explosive mixture of chlorate, Nitrate, Sulphate and

sugar were detected. Mixture of these chemicals, as per CFSL, report Ex. PW-34/A, is used for making explosives/bombs and the mixture could have been initiated by the action of sulphuric acid and the mixture was "explosive substance".

6. On completion of investigation of the present case the police filed a charge-sheet in Court against four accused persons for the commission of offences under Sections 302/307/120-B IPC and Sections 3 and 4 of the Explosive Substances Act. In due course the four persons were committed to Sessions Court. The learned Additional Sessions Judge vide order dated 18.2.1999 discharged three accused persons namely, Abdul Rehman, Mohd. Maqsood and Ezaz Ahmed while against fourth accused Mohd. Hussain @ Julfikar (the appellant herein) charges under Sections 302/307 IPC and Section 3 and in the alternative u/s 4(b) of the Explosive Substances Act were framed. The appellant had pleaded not guilty to the charges framed against him and claimed to be tried."

3) The prosecution had examined as many as 65 witnesses and on conclusion of prosecution evidence, statement of the appellant was recorded under Section 313 of the Code of Criminal Procedure (in short, "Cr.P.C"), who had denied his guilt and pleaded false implication. The Trial Court, upon appreciation of evidence of the prosecution witnesses, held the appellant guilty of the charges and accordingly, imposed death penalty. The conviction and sentence is affirmed by the High Court. At this stage itself, it is relevant to notice that the appellant had pleaded, both before the Trial Court and the

High Court, that he was not given a fair and impartial trial and he was denied the right of a counsel. The High Court has noticed this contention and has answered against the appellant. In the words of the High Court :

> *" 45. Faced with this situation Mr. Luthra came out with an arguments that this case, in fact, needs to be remanded back to the trial back for a fresh trial because the trial court record would reveal that the accused did not have a fair trial inasmuch as on most of the hearing when material witnesses were examined he was unrepresented and the trial court did not bother to provide him legal aid at State expense and by not doing that the Trial Court, in fact, failed to discharge its pious duty of ensuring that the accused was defended properly and effectively at all stages of the trial either by his private counsel or in the absence of private counsel by an experienced and responsible amicus curiae. Mr. Luthra also submitted that, in fact, the learned Additional Sessions Judge himself should have taken active part at the time of recording of evidence of prosecution witnesses by putting questions to the witnesses who had been examined in the absence of counsel for the accused. It was contended that the right of the accused ensured to him under Articles 21 and 22 of the Constitution of India for a fair trial has been, thus, violated. In support of this argument which, in fact, appears to us to be the sheet anchor for the appellant, Mr. Siddharth Lutha cited some judgments also of the Hon'ble Supreme Court which are reproduced as AIR 1997 SC 1023, 1994 Supp. (3) SCC 321, AIR 1986 SC 991 and 1983 (III) SCC 307. One judgment of Gauhati High Court reported as 1987 (1) Crimes 133, "Arjun Karmakar Vs. State of Assam" was also relied upon by Mr. Luthra.*

46. There can be no dispute about the legal proposition put forward by the learned counsel for the appellant that it is the duty of the Court to see and ensure that an accused in a criminal trial is represented with diligence by a defence counsel and in case an accused during the trial remains unrepresented because of poverty etc., it becomes the duty of the Court to provide him legal aid at State expense. We find from the judgment of the trial Court that this point was raised on behalf of the accused during the trial also by the amicus curiae provided to the accused when his private counsel stopped appearing for him. The learned trial Court dealt with this arguments in para no.101 of the judgment which is as under:-

"It is next submitted that material witnesses have not been cross examined by the accused and as such, their testimony cannot be read against him. I may add that from the very beginning of the trial, the accused has been represented by a counsel Sh. Riaz Mohd. and he had cross-examined some of the witnesses. Later on, when Sh. Riaz Mohd. did not appear in the Court on some dates, Mrs. Sadhna Bhatia was appointed as Amicus-Curiae to defend the accused at State expenses. If the accused did not choose to cross examine some witnesses, he cannot be forced to do so. Moreover, later one accused prayed for cross-examination of PW-1 Sh. Darshan Kumar, which was allowed though it was filed at a belated stage after a long period of time. The accused did not desire any other witness to be cross examined. Not only this, statement of PW-1 Sh. Darshan Kumar was recorded on 18-05-1999 and he was also present on 3-6-1999 and 13-08-1999, but on all three dates, the cross-examination of this witness was deferred at the request of the accused, who was ultimately discharged with nil cross-examination. This shows that accused himself was not interested in cross-examining the witnesses. As such, this submission is also without merit."

> *47. We have ourselves also perused the trial court record and we are convinced that it is not a case where it can be said that the accused did not have a fair trial or that he had been denied legal aid. We are in full agreement with the above quoted views of the learned Additional Sessions Judge on this objection of the accused and we refuse to accept the plea of the appellant that this case should be remanded back for a re-trial.* **"**

4) I have heard learned counsel Mr. Mobin Akhtar for the appellant and Mr. J.S. Atri, learned senior counsel for the State.

5) In this Court, the judgments are assailed, apart from the merits, that the appellant is denied due process of law and the conduct of the trial is contrary to procedure prescribed under the provisions of Cr. P.C. and, in particular, that he was not given a fair and impartial trial and was denied the right of a counsel. Since the aforesaid issue is of vital importance, I have thought it fit to answer that issue before I discuss the merits of the appeal. Therefore, firstly, I will consider the issue; whether the appellant was given a fair and impartial trial and, whether he was denied the right of a counsel. To answer this issue, it may not be necessary to discuss the facts of the case or the circumstances surrounding the prosecution case except so far they reflect upon the aforesaid issue.

6) To answer the aforesaid issue, it is necessary to look at the proceedings of the Trial Court which are as under:

"6.7.98
Pr: APP
All accused in j/c.
All accused stated that they are not in position to engage any lawyer and be provided with a lawyer from legal aid.

Legal assistance be provided to all accused from legal aid.

All accused requested further time for making scrutiny of documents. Allowed. Put up on 20.7.98 for scrutiny..

Sd/-
MM/Delhi

20/7/98

Pr: APP

All accused in judicial custody with Sh. V.K. Jain,Adv.

Sh. Jain requested time for making scrutiny of documents.

Sh. Jain sates that he is applying for further time (illegible)_____.

Allowed.

Put up on 29/7/98 for scrutiny.

Sd./-
MM/Delhi
20.7.98

29/7/98

Pr: APP

All accused in j/c with Sh. V.K. Jain,Adv. from Legal Aid.

Shri Jain requests for further time.

Allowed. Put up on 6/8/98 for scrutiny.

Sd./-
MM/Delhi
29.7.98

6.8.98

Pr: APP

All accused in j/c with Sh. Vijay Kr. Jain,Adv.

Sh. Jain stated that all accused have been supplied with complete copies of documents filed alongwith the chargesheet. Hence provision of Sec. 207 Cr.P.C. are complied with.

Present case also pertains to offence punishable u/s. 302/307 IPC & 3, 4, 5 Explosive Substances Act which are exclusively triable by Court of Sessions. Present case is liable to be commit to court of sessions. I accordingly commit the present case to court of Sessions.

Accused are directed to appear before court of sessions on 20.8.98.

Ahlmad is directed to send the file complete in all respects to court of sessions.

Notice to PP be also issued.

Sd./-
MM/Delhi
6.8.98

18/5/99

Pr: Spl PP for State.

Accused in J/C.

PW.1 partly examined and his cross-examination deferred at the request of accused as his counsel Firoz Khan has not put his appearance in the court.

PW.1 is bound down for the next date of hearing.

PW.2 examined and discharged.

No other PW. Present except IO Satya Prakash present.

To come up for remaining evidence on 3/6/99.

Sd./-
ASJ/Delhi
18/5/99

3/6/99

Pr: Spl. PP for the State.

Accused present in j/c with counsel.

PW.3, 4 present, examined and discharged.

PW.1, Darshan Kumar, Ganesh Sharma are present but they are not examined on the request of defence counsel as he has not gone through the statement.

Considering the request, both the witnesses are bound down for next date of hearing.

Inspector Satya Prakash IO is also and ischarged (sic.).

Now to come for P.E. on 20/7/99. *Sd/-*

ASJ/Delhi
3/6/99

20.7.99

Pr: Spl PP for the State

Accused in J.C. with Sh. Feroz Khan, Adv., Amicus Curae (sic.)

PW 5, 6 & PW7 are examined and discharged. PW Darshan Kumar served but absent despite service. Issue B/W in the sum of Rs.500/-. PW Satya Prakash, Insp. is reported to be on leave upto 26.7.99. Now to come up for remaining P.E. for 13.8.99.

Sd./-
ASJ
20.7.99

13.8.99

Present : Spl. PP for the State

Accused in j/c

PW1, 8 and 9 examined and discharged.

No other PW is present except IO of this case.

PW Santosh Kr. Jha has shifted to Vill. Ghagjai, Distt. Madhumani Panna, P.S. Mani Patti, Post Office Ghagjari, Bihar. He be summoned at his new address.

PW Ashok Kumar could not be served. He be served though IO. SI Ashok Kumar is served but he sent a request that he had gone to High Court.

To come up for RPE on 1.9.99.

Sd./-
ASJ/Delhi

4/10/99

Pr: Spl. PP for the State.

Accused in J/C.

PW. 10, 11, 12 & 13 present, examined and discharged.

PW. Santosh Kumar Jha is served but absent despite service. PW. Ashok Kumar served but sent request that he had to attend a duty and may be exempted today.

IO present is discharged for today. Witnesses be summoned again.

List the matter for evidence on 2/11/99.

Sd./-
ASJ/Delhi
4/11/99 (sic.)

2.11.99

Present: As before.

PW 14 examined and discharged.

No other PW is present except IO Satya Prakash. Mother of Sunil Kr. Sharma is present and submits that he is not in a position to move from bed. Considering her request and there are other number of witnesses to prove the explosion in the bus. Let his name be dropped from the list of witness and need not be summoned.

List the matter for RPE on 3.12.99.

Sd./-
ASJ/Delhi

27/7/2000

Pr: Addl. PP for the State.

Accused in J/C.

PWs.15 to 17 examined and discharged.

PWs. SI Om Prakash and SI Satya Prakash, IOs have sent requests. PWs. Dr. K. Goyal and Dr. Ashok Jaiswal are unserved. Re-summon.

Now, List the case for RPE on 25/08/2000.

Sd./-
ASJ/Delhi

20/9/2000

Pr: Addl. PP for the State.

Accused in J/C.

PWs.18 & 19 examined, cross-examined and discharged.

No other witness served for today.

Now, list the matter for P.E. on 6/11/2000.

Sd./-
ASJ/Delhi

29.11.2000

Present: Addl. PP for the State.
Accused in j/c.

PW 20 examined and discharged.

No other PW is present. PW SI Om Prakash is served but absent despite service. Issue B/W in the sum of Rs.500/-.

Entire remaining witnesses be summoned through IO on 10.1.2001.

Sd./-
ASJ/Delhi

10.1.2001

Present: Spl PP for State.
Accused in J/C.
PW-21 and 22 examined, cross-examined and discharged. No other PW is present except IO.
PW Rajinder Singh Bist is absent despite service. Issue B/W against him in the sum of Rs.500/-.
Now list the case for RPE on 14.2.2011.

Sd./-
ASJ/Delhi

14/2/2001

Pr: Addl. PP for the State.Accused in J/C.
PW. 23 & 24 examined, cross-examined and discharged.
No other witness served for today.
IO, SI Om Prakash is absent despite service. Issue B/Ws against him in the sum of Rs.500/-.
Now, put up the case for entire RPE on 14/3/2001.

Sd./-
ASJ/Delhi

14.3.2001

Present: Spl. PP for the State.
Accused in J/C with counsel.
PW-25, PW-26, PW-27 examined, cross-examined and discharged.
No other witness is present, as none else has been served.
Now list the case for P.E. on 11.4.2001.

Sd./-
ASJ/Delhi

11.4.2001

Present: Sp. PP for the State.
Accused in J/C.
PW-28 examined, cross-examined and discharged.
Witnesses Sunil Kumar, Md. Naria, Bhagirat Prasad and Raj Kumar Verma are reported to be not residing at the given addresses. They all be summoned through IO.
No other PW is present.
Last opportunity be granted to the prosecution to lead the entire R.P.E.
Now to come up for (sic.) 8.5.2001.

Sd./-
ASJ/Delhi

4/7/2001

Pr. Spl. PP for the State.
Accused in J/C.
PWs. 29, 30, 31 & 32 examined, cross-examined and discharged.
No other witness is served for today.
Now put up the case for entire RPE on 13/8/01.

Sd./-
ASJ/Delhi

11.2.2002
Present: Addl. PP for the State.
Accused is present in J/C.
PW-33 examined, cross-examined and discharged.
No other PW is present except the IO.
Now to come up for RPE on 26.3.2002.

Sd./-
ASJ/Delhi

26/3/02
Pr: Addl. PP for the State.
Accused in J/C.

PW.34, 35, 36 & 37 examined, cross-examined and discharged.
No other PW. is present.
Now to come up for RPE on 7/5/02.

Sd./-
ASJ/Delhi

24/09/02
Present: Spl. PP for the State.
Accused in J/C.
PW-42 & PW-43 examined, cross-examined and discharged.
No other PW is present.
Now to come up for entire R.P.E. on 18.10.02.

Sd./-
ASJ/Delhi

18/10/02
Pr. Sh. Jitender Kakkar, Addl. PP for the State.
Accused in J/C.
PW.44 & PW.45 examined, cross-examined and discharged.
No other PW. is present.
Now list the matter for entire RPE on 13/12/02.

Sd./-
ASJ/Delhi

13.12.02
Present: Accused in judicial custody.
Ld. _____ is on leave today.
Illigible
17/1/2003 for RPE.

Sd./-
Reader
13.12.02

25/02/03

Pr: Sh. Bakshish Singh, Spl. PP for State.
Accused in J/C with counsel.
Two PWs. 46 & 47 have been examined, cross-examined and discharged.
No other witness is present.
Ld. Spl. PP seeks another opportunity for adducing evidence. In the interest of justice one more opportunity is granted to the prosecution to lead the entire evidence on 26.03.03.

Sd./-
ASJ/Delhi

26/3/2003

Pr. : Addl. PP Sh. Jitender Kakkar, for the State.
Accused in J/C.
PW-48 examined, cross examined and discharged.
No other PW is present.
PW Vinod Kumar has not been served.
PW Vinod Kumar along with all the public witnesses be summoned through IO for 22.4.2003.

In the interest of justice, one more opportunity is granted to the prosecution to lead its entire evidence for the date fixed.

ASJ/Delhi

22.4.03

Present : Addl. PP Sh. Jitender Kakkar for the State
Accused in J.C.
PW-49, PW-50 and PW-51 examined, cross-examined and discharged. Put up for RPE on 09.05.03. On the request of Ld. APP one more opportunity is given to the prosecution to lead entire remaining evidence. The witnesses be summoned through I.O. Put up for P.E. on 09.05.03.

ASJ/Delhi
22.04.03

09/05/03

Present Sh. Bakshish Singh Spl. PP for the state
Accused in JC
PW-52 has been examined, cross-examined and discharged. No other PW is present. None has been served. Both the remaining witnesses be summoned through I.O. In the interest of justice, one more opportunity is granted to the prosecution to read entire evidence on 15/07/03.

ASJ/Delhi
09/05/03

1102/97
15.07.03

Present : Accused in J.C.

Sh. Bakshish Singh, Ld. State Counsel is present
PW-53 Ins. Data Ram has been examined, cross-examined and discharged. No other PW except the IO is present. PW Vinod Kumar is absent despite service. Issue B/w in the sum of Rs.500/-. PW Bhagirathi Prasad and Sunil Kumar are reported to be not residing at the given address. IO of the present case is directed to produce these witnesses on his own responsibility. Last opportunity is granted to the prosecution to lead the entire evidence on 13.8.03.

ASJ/Delhi
15.07.03

01/09/03
Present : Spl. P.P. for the State
Accused in J.C.
Ins. Satya Prakash, ZO is present.
PW-54 & PW-55 recorded and discharged.
No other PW is present or served.
IO is discharged for today only.
Put up for RPE on 01/10/03.

ASJ/Delhi
01/09/03

01/10/03

Present : Spl. P.P. for the State.
Accused in J.C. It is 2.35 PM. Heard.
PW-56 recorded and discharged.
Ins. Tandon and one more witness Vinod are present. However, they were discharged for today as they have some urgent work. Their prayer is allowed. Put up for RPE on 01/11/03. The accused is directed to bring his advocate on next date.

ASJ/Delhi
01/10/03

7) The recording in the order sheet of the trial Judge is not accurate. I say so for the reason that examination of witnesses from 1 to 56 was done when accused was not represented by an advocate. I have come to this conclusion after carefully reading the evidence of these witnesses recorded by the learned trial Judge. By way of illustration, I have extracted evidence of some of the witnesses recorded on different dates :-

"PW 1

Darshan Kumar

S/o Fakir Chand, Age – 30 years, Driver, R/o B-48, Piragarhi, New Delhi - 43

I was working as conductor in blue line bus No. DL1P3088 and the said bus used to ply from Nangloi to Ajmeri Gate.

x x x x x x

deferred as defence counsel is not available.

PW2

Vijay Kumar

s/o Fakir Chand, Age about 28 years, Driver, R/o C-154 Pira Garhi, Relief Camp, Delhi.

I am working as driver in blue line bus DL1P 3088 and the sadi bus plies from Ajmeri Gate to Nangloi.

x x x x x x

Nil opportunity given.

PW3

Moin Khan

S/o Abdul Rashid Khan, Age – 22 years, service, R/o B-104, Prem Nagar, Kirari Village, Delhi.

x x x x x x

by counsel Firoz Khan.

PW4

Imtiyaz Khan

S/o Rustam Khan, Age – 25 years, Machine Operator, R/o H-10, Man Sarover Park, Riti Road, Shahdrah.

x x x x x x

Nil Opportunity given."

8). The records would disclose that during the committal proceedings before the learned Magistrate, the appellant was assisted by one Sri. V.K. Jain, a learned counsel employed by the State. He continued till the case was committed to the Court of Sessions Judge. Before the said Court, one Mr. Feroze Khan was employed by the State to assist the appellant. He participated in the proceedings before the Sessions Judge only on few days of the trial. After he stopped attending the proceedings, that too at the fag end of the trial, another learned counsel was appointed to assist the appellant.

9). The record further discloses that immediately, on completion of the investigation, a charge sheet punishable under Section 302/307/120-B of the IPC read with Section 3/4/5 of The Explosive Substances Act was filed in the court of learned Metropolitan Magistrate against the appellant and others by the prosecuting agency. After completing the necessary formalities, the case was committed to the Court of Sessions by the learned Metropolitan Magistrate. The learned Sessions Judge, after discharging the other accused persons, had framed charges against the appellant under Section 302/307 of the IPC read with Section 3/4 of The Explosive Substances Act, to which, the appellant denied his guilt and claimed to be tried. The appellant

was initially assisted by a learned counsel employed by the learned Sessions Judge. However, in the mid way, the learned counsel disappeared from the scene, that is, before conclusion of the trial. It is apparent from the records that he was not asked whether he is able to employ counsel or wished to have counsel appointed. When the parties were ready for the trial, no one appeared for the accused. The Court did not appoint any counsel to defend the accused. Of course, if he had a defence counsel, I do not see the necessity of the court appointing anybody as a counsel. If he did not have a counsel, it is the mandatory duty of the court to appoint a counsel to represent him. The record reveals that the evidences of 56 witnesses, out of the 65 witnesses, examined by the prosecution in support of the indictment, including the eye witnesses and the Investigating Officer, were recorded by the Trial Court without providing a counsel to the appellant. The record also reveals that none of the 56 witnesses were cross-examined by the accused/appellant. It is only thereafter, the wisdom appears to have dawned on the Trial Court to appoint a learned counsel on 04.12.2003 to defend the appellant. The evidences of the prosecution witnesses from 57 to 65 were recorded in the presence of the freshly appointed learned counsel, who thought it fit

not to cross-examine any of those witnesses. Before the conclusion of the trial, she had filed an application to cross-examine only one prosecution witness and that prayer in the application had been granted by the Trial Court and the learned counsel had performed the formality of cross-examining this witness. I do not wish to comment on the performance of the learned counsel, since I am of the view that 'less said the better'. In this casual manner, the trial, in a capital punishment case, was concluded by the Trial Court. It will, thus, be seen that the trial court did not think it proper to appoint any counsel to defend the appellant/accused, when the counsel engaged by him did not appear at the commencement of the trial nor at the time of recording of the evidence of the prosecution witnesses. The accused did not have the aid of the counsel in any real sense, although, he was as much entitled to such aid during the period of trial. The record indicates, as I have already noticed, that the appointment of learned counsel and her appearance during the last stages of the trial was rather proforma than active. It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case, to confront the witnesses against him not only on facts but also to discredit the witness by showing that his

testimony-in-chief was untrue and unbiased. The purpose of cross-examination of a witness has been succinctly explained by the Constitution Bench of this Court in Kartar Singh Vs. State of Punjab (1994) 3 SCC 569 :

> *"**278.** Section 137 of the Evidence Act defines what cross-examination means and Sections 139 and 145 speak of the mode of cross-examination with reference to the documents as well as oral evidence. It is the jurisprudence of law that cross-examination is an acid-test of the truthfulness of the statement made by a witness on oath in examination-in-chief, the objects of which are :*
> *(1) to destroy or weaken the evidentiary value of the witness of his adversary;*
> *(2) to elicit facts in favour of the cross-examining lawyer's client from the mouth of the witness of the adversary party;*
> *(3) to show that the witness is unworthy of belief by impeaching the credit of the said witness;*
> *and the questions to be addressed in the course of cross-examination are to test his veracity; to discover who he is and what is his position in life; and to shake his credit by injuring his character.* **"**

10) The aforesaid view is reiterated by this Court in Jayendra Vishnu Thakur Vs. State of Maharashtra (2009) 7 SCC 104 wherein it is observed :

> *" **24.** A right to cross-examine a witness, apart from being a natural right is a statutory right. Section 137 of the Evidence Act provides for examination-in-chief, cross-examination and re-examination. Section*

> *138 of the Evidence Act confers a right on the adverse party to cross-examine a witness who had been examined in chief, subject of course to expression of his desire to the said effect. But indisputably such an opportunity is to be granted. An accused has not only a valuable right to represent himself, he has also the right to be informed thereabout. If an exception is to be carved out, the statute must say so expressly or the same must be capable of being inferred by necessary implication. There are statutes like the Extradition Act, 1962 which excludes taking of evidence vis-à-vis opinion.* **"**

11) In my view, every person, therefore, has a right to a fair trial by a competent court in the spirit of the right to life and personal liberty. The object and purpose of providing competent legal aid to undefended and unrepresented accused persons are to see that the accused gets free and fair, just and reasonable trial of charge in a criminal case. This Court, in the case of Zahira Habibullah Sheikh (5) Vs. State of Gujarat (2006) 3 SCC 374 has explained the concept of fair trial to an accused and it was central to the administration of justice and the cardinality of protection of human rights. It is stated :

> ***"35.*** *This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crime being public wrong in breach and violation of public rights and duties, which affects the whole community as a community and is harmful to society*

in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interest of society is not to be treated completely with disdain and as persona non grata. The courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice—often referred to as the duty to vindicate and uphold the "majesty of the law". Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. The courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.

36. *The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that*

was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning a Nelson's eye to the needs of society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.

37. *A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact in issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny.* **"**

12) In M.H. Hoskot Vs. State of Maharashtra 1978 (3) SCC 544, this Court has held :

> ***"14.*** *The other ingredient of fair procedure to a prisoner, who has to seek his liberation through the court process is lawyer's services. Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise; and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side. Our judicature, moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer-power for steering the wheels of equal justice under the law. Free legal services to the needy is part of the English criminal justice system. And the American jurist, Prof. Vance of Yale, sounded sense for India too when he said :*
>
> *"What does it profit a poor and ignorant man that he is equal to his strong antagonist before the law if there is no one to inform him what the law is? Or that the courts are open to him on the same terms as to all other persons when he has not the wherewithal to pay the admission fee?"* ***"***

13) In Mohd. Sukur Ali Vs. State of Assam (2011) 4 SCC 729, it is observed :

> ***"9.*** *In Maneka Gandhi v. Union of India, it has been held by a Constitution Bench of this Court that the procedure for depriving a person of his life or liberty should be fair, reasonable and just. We are of the opinion that it is not fair or just that a criminal case should be decided against an accused in the absence of a counsel. It is only a lawyer who is conversant with law who can properly defend an accused in a criminal case. Hence, in our opinion, if a criminal case (whether a trial or appeal/revision) is decided against an accused in the absence of a counsel, there will be violation of Article 21 of the Constitution.*

10. *The right to appear through counsel has existed in England for over three centuries. In ancient Rome there were great lawyers e.g. Cicero, Scaevola, Crassus, etc. who defended the accused. In fact the higher the human race has progressed in civilisation, the clearer and stronger has that right appeared, and the more firmly has it been held and asserted. Even in the Nuremberg trials the Nazi war criminals, responsible for killing millions of persons, were yet provided counsel. Therefore when we say that the accused should be provided counsel we are not bringing into existence a new principle but simply recognising what already existed and which civilised people have long enjoyed.* ***"***

14) In the case of Hussainara Khatoon and Others v. Home Secy., State of Bihar (1980) 1 SCC 98, it is held :

"6. *Then there are several undertrial prisoners who are charged with offences which are bailable but who are still in jail presumably because no application for bail has been made on their behalf or being too poor they are unable to furnish bail. It is not uncommon to find that undertrial prisoners who are produced before the Magistrates are unaware of their right to obtain release on bail and on account of their poverty, they are unable to engage a lawyer who would apprise them of their right to apply for bail and help them to secure release on bail by making a proper application to the Magistrate in that behalf. Sometimes the Magistrates also refuse to release the undertrial prisoners produced before them on their personal bond but insist on monetary bail with sureties, which by reason of their poverty the undertrial prisoners are unable to furnish and which, therefore, effectively shuts out for them any possibility of release from pre-trial detention. This unfortunate situation cries aloud for introduction of an adequate and comprehensive*

legal service programme, but so far, these cries do not seem to have evoked any response. We do not think it is possible to reach the benefits of the legal process to the poor, to protect them against injustice and to secure to them their constitutional and statutory rights unless there is a nation-wide legal service programme to provide free legal services to them. It is now well settled, as a result of the decision of this Court in Maneka Gandhi v. Union of India that when Article 21 provides that no person shall be deprived of his life or liberty except in accordance with the procedure established by law, it is not enough that there should be some semblance of procedure provided by law, but the procedure under which a person may be deprived of his life or liberty should be "reasonable, fair and just". Now, a procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as "reasonable, fair and just". It is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the court's process that he should have legal services available to him. This Court pointed out in M.H. Hoskot v. State of Maharashtra : "Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise; and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side. Our judicature, moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer-power for steering the wheels of equal justice under the law". Free legal services to the poor and the needy is an essential element of any "reasonable, fair and just" procedure. It is not necessary to quote authoritative pronouncements by Judges and Jurists in support of the view that without the service of a lawyer an accused person would be denied "reasonable, fair and

just" procedure. Black, J., observed in Gideon v. Wainwright :

"Not only those precedents but also reason and reflection require us to recognise that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both State and Federal quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime who fail to hire the best lawyers they can get to prepare and present their defences. That Government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but is in ours. From the very beginning, our State and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realised if the poor man charged with crime has to face his accusers without a lawyer to assist him."

The philosophy of free legal service as an essential element of fair procedure is also to be found in the passage from the judgment of Douglas, J. in Jon Richard Argersinger v. Raymond Hamlin :

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable,

generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate or those of feeble intellect.

Both Powell and Gideon involved felonies. But their rationale has relevance to any criminal trial, where an accused is deprived of his liberty.

The court should consider the probable sentence that will follow if a conviction is obtained. The more serious the likely consequences, the greater is the probability that a lawyer should be appointed .... The court should consider the individual factors peculiar to each case. These, of course would be the most difficult to anticipate. One relevant factor would be the competency of the individual defendant to present his own case." (emphasis added) **"**

15) In the case of Khatri Vs. State of Bihar (1981) 1 SCC 627, this Court has held :

"5. *That takes us to one other important issue which arises in this case. It is clear from the particulars supplied by the State from the records of the various judicial Magistrates dealing with the blinded prisoners from time to time that, neither at the time when the blinded prisoners were produced for the first time before the Judicial Magistrate nor at the time*

when the remand orders were passed, was any legal representation available to most of the blinded prisoners. The records of the Judicial Magistrates show that no legal representation was provided to the blinded prisoners, because none of them asked for it nor did the Judicial Magistrates enquire from the blinded prisoners produced before them either initially or at the time of remand whether they wanted any legal representation at State cost. The only excuse for not providing legal representation to the blinded prisoners at the cost of the State was that none of the blinded prisoners asked for it. The result was that barring two or three blinded prisoners who managed to get a lawyer to represent them at the later stages of remand, most of the blinded prisoners were not represented by any lawyers and save a few who were released on bail, and that too after being in jail for quite some time, the rest of them continued to languish in jail. It is difficult to understand how this state of affairs could be permitted to continue despite the decision of this Court in Hussainara Khatoon (IV) case. This Court has pointed out in Hussainara Khatoon (IV) case which was decided as far back as March 9, 1979 that the right to free legal services is 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 and the State is under a constitutional 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. It is unfortunate that though this Court declared the right to legal aid as a fundamental right of an accused person by a process of judicial construction of Article 21, most of the States in the country have not taken note of this decision and provided free legal services to a person accused of an offence. We regret this disregard of the decision of the highest court in the land by many of the States despite the constitutional

declaration in Article 141 that the law declared by this Court shall be binding throughout the territory of India. Mr K.G. Bhagat on behalf of the State agreed that in view of the decision of this Court the State was bound to provide free legal services to an indigent accused but he suggested that the State might find it difficult to do so owing to financial constraints. We may point out to the State of Bihar that it cannot avoid its constitutional obligation to provide free legal services to a poor accused by pleading financial or administrative inability. The State is under a constitutional mandate to provide free legal aid to an accused person who is unable to secure legal services on account of indigence and whatever is necessary for this purpose has to be done by the State. The State may have its financial constraints and its priorities in expenditure but, as pointed out by the court in Rhem v. Malcolm "the law does not permit any Government to deprive its citizens of constitutional rights on a plea of poverty" and to quote the words of Justice Blackmum in Jackson v. Bishop "humane considerations and constitutional requirements are not in this day to be measured by dollar considerations". Moreover, this constitutional obligation to provide free legal services to an indigent accused does not arise only when the trial commences but also attaches when the accused is for the first time produced before the Magistrate. It is elementary that the jeopardy to his personal liberty arises as soon as a person is arrested and produced before a Magistrate, for it is at that stage that he gets the first opportunity to apply for bail and obtain his release as also to resist remand to police or jail custody. That is the stage at which an accused person needs competent legal advice and representation and no procedure can be said to be reasonable, fair and just which denies legal advice and representation to him at this stage. We must, therefore, hold that the State is under a constitutional obligation to provide free legal services to an indigent accused not only at the stage of trial but also at the stage when he is first

produced before the Magistrate as also when he is remanded from time to time.

6. *But even this right to free legal services would be illusory for an indigent accused unless the Magistrate or the Sessions Judge before whom he is produced informs him of such right. It is common knowledge that about 70 per cent of the people in the rural areas are illiterate and even more than that percentage of people are not aware of the rights conferred upon them by law. There is so much lack of legal awareness that it has always been recognised as one of the principal items of the programme of the legal aid movement in this country to promote legal literacy. It would make a mockery of legal aid if it were to be left to a poor ignorant and illiterate accused to ask for free legal services. Legal aid would become merely a paper promise and it would fail of its purpose. The Magistrate or the Sessions Judge before whom the 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. Unfortunately, the Judicial Magistrates failed to discharge this obligation in the case of the blinded prisoners and they merely stated that no legal representation was asked for by the blinded prisoners and hence none was provided. We would, therefore, direct the Magistrates and Sessions Judges in the country to inform every accused who appears before them and who is not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal services at the cost of the State. Unless he is not willing to take advantage of the free legal services provided by the State, he must be provided legal representation at the cost of the State. We would also direct the State of Bihar and require every other State in the country to make provision for grant of free legal services to an accused who is unable to engage a lawyer on account of reasons such as poverty, indigence or*

incommunicable situation. The only qualification would be that the offence charged against the accused is such that, on conviction, it would result in a sentence of imprisonment and is of such a nature that the circumstances of the case and the needs of social justice require that he should be given free legal representation. There may be cases involving offences such as economic offences or offences against law prohibiting prostitution or child abuse and the like, where social justice may require that free legal services need not be provided by the State. **"**

16) In Ram Awadh v. State of U.P. 1999 Cr.L.J. 4083, the Allahabad High Court held :

"*14. The requirement of providing counsel to an accused at the State expense is not an empty formality which may be not by merely appointing a counsel whatever his calibre may be. When the law enjoins appointing a counsel to defend an accused, it means an effective counsel, a counsel in real sense who can safeguard the interest of the accused in best possible manner which is permissible under law. An accused facing charge of murder may be sentenced to death or imprisonment for life and consequently his case should be handled by a competent person and not by a novice or one who has no professional expertise. A duty is cast upon the Judges before whom such indigent accused are facing trial for serious offence and who are not able to engage a counsel, to appoint competent persons for their defence. It is needless to emphasis that a Judge is not a prosecutor and his duty is to discern the truth so that he is able to arrive at a correct conclusion. A defence lawyer plays an important role in bringing out the truth before the Court by cross-examining the witnesses and placing relevant materials or evidence. The absence of proper cross-examination may at times result in miscarriage*

of justice and the Court has to guard against such an eventuality. **"**

(17)The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result, the accused charged with a serious offence must not be stripped of his valuable right of a fair and impartial trial. To do that, would be negation of concept of due process of law, regardless of the merits of the appeal. The Cr.P.C. provides that in all criminal prosecutions, the accused has a right to have the assistance of a counsel and the Cr.P.C. also requires the court in all criminal cases, where the accused is unable to engage counsel, to appoint a counsel for him at the expenses of the State. Howsoever guilty the appellant upon the inquiry might have been, he is until convicted, presumed to be innocent. It was the duty of the Court, having these cases in charge, to see that he is denied no necessary incident of a fair trial. In the present case, not only the accused was denied the assistance of a counsel during the trial and such designation of counsel, as was attempted at a late stage, was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard. The Court ought to have seen to it that in the proceedings before the court, the accused was dealt with justly and fairly by keeping in view

the cardinal principles that the accused of a crime is entitled to a counsel which may be necessary for his defence, as well as to facts as to law. The same yardstick may not be applicable in respect of economic offences or where offences are not punishable with substantive sentence of imprisonment but punishable with fine only. The fact that the right involved is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our judicial proceedings. The necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of a counsel was a denial of due process of law. It is equally true that the absence of fair and proper trial would be violation of fundamental principles of judicial procedure on account of breach of mandatory provisions of Section 304 of Cr.P.C.

(18)After carefully going through the entire records of the trial court, I am convinced that the appellant/accused was not provided the assistance of a counsel in a substantial and meaningful sense. To hold and decide otherwise, would simply to ignore actualities and also would be to ignore the fundamental postulates, already adverted to.

(19) The learned counsel for the respondent-State, Sri Atri contends that since no prejudice is caused to accused in not providing a defence counsel, this Court need not take exception to the trial concluded by the learned Sessions Judge and the conviction and sentence passed against the accused. I find it difficult to accept the argument of the learned senior counsel. The Cr. P.C. ensures that an accused gets a fair trial. It is essential that the accused is given a reasonable opportunity to defend himself in the trial. He is also permitted to confront the witnesses and other evidence that the prosecution is relying upon. He is also allowed the assistance of a lawyer of his choice, and if he is unable to afford one, he is given a lawyer for his defence. The right to be defended by a learned counsel is a principal part of the right to fair trial. If these minimum safeguards are not provided to an accused; that itself is "prejudice" to an accused. It is worth to notice the observations made by this Court in the case of Rafiq Ahmad alias Rafi vs. State of U.P. (2011) 8 SCC 300, wherein it is observed:

> ***"35.*** *When we speak of prejudice to an accused, it has to be shown that the accused has suffered some disability or detriment in the protections available to him under the Indian criminal jurisprudence. It is also a settled canon of criminal law that this has occasioned the accused with failure of justice. One of the other cardinal principles of criminal justice*

administration is that the courts should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage, as this expression is perhaps too pliable. With the development of law, Indian courts have accepted the following protections to and rights of the accused during investigation and trial:

(a) The accused has the freedom to maintain silence during investigation as well as before the court. The accused may choose to maintain silence or make complete denial even when his statement under Section 313 of the Code of Criminal Procedure is being recorded, of course, the court would be entitled to draw an inference, including adverse inference, as may be permissible to it in accordance with law;

(b) Right to fair trial;

(c) Presumption of innocence (not guilty);

(d) Prosecution must prove its case beyond reasonable doubt.

***36.** Prejudice to an accused or failure of justice, thus, has to be examined with reference to these aspects. That alone, probably, is the method to determine with some element of certainty and discernment whether there has been actual failure of justice. "Prejudice" is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial and not matters falling beyond their scope. Once the accused is able to show that there is serious prejudice to either of these aspects and that the same has defeated the rights available to him under the criminal jurisprudence, then the accused can seek benefit under the orders of the court.*

***37.** Right to fair trial, presumption of innocence until pronouncement of guilt and the standards of proof i.e. the prosecution must prove its case beyond reasonable doubt are the basic and crucial tenets of our criminal jurisprudence. The courts are required to examine both the contents*

of the allegation of prejudice as well as its extent in relation to these aspects of the case of the accused. It will neither be possible nor appropriate to state such principle with exactitude as it will always depend on the facts and circumstances of a given case. Therefore, the court has to ensure that the ends of justice are met as that alone is the goal of criminal adjudication."

(20) In view of the above discussion, I cannot sustain the judgments impugned and they must be reversed and the matter is to be remanded to the Trial Court with a specific direction that the Trial Court would assist the accused by employing a State counsel before the commencement of the trial till its conclusion, if the accused is unable to employ a counsel of his own choice. Since I am remanding the matter for fresh disposal, I clarify that I have not expressed any opinion regarding the merits of the case.

(21) In view of the above, I allow the appeal and set aside the conviction and sentence imposed by the Additional Sessions Judge in Sessions Case No.122 of 1998 dated 03.11.2004 and the Judgment and Order passed by the High Court in Crl. Appeal No. 41 of 2005 dated 04.08.2006 and remand the case to the Trial Court for fresh disposal in accordance with law and in the light of the observations made by me as above. Since the incident is of the year 1997, I direct the Trial Court to conclude the trial

as expeditiously as possible at any rate within an outer limit of three months from the date of communication of this order and report the same to this Court.

.....……J.
[H.L. DATTU]

New Delhi,
January 11, 2012.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1091 OF 2006

Mohd. Hussain @ Julfikar Ali … Appellant

Versus

The State (Govt. of NCT) Delhi … Respondent

J U D G M E N T

CHANDRAMAULI KR. PRASAD, J.

1. I have gone through the judgment prepared by my noble and learned Brother, H.L.Dattu, J. and I concur that the conviction and sentence of the appellant is fit to be set aside as he was not given the assistance of a lawyer to defend himself during trial but, with profound respect, I find it difficult to persuade myself that it is a fit case which deserves to be remanded to the Trial Court for fresh trial.

2. Facts which are necessary for the decision of this appeal are that the appellant, Mohd. Hussain @ Julfikar Ali is a national of Pakistan and he was put on trial for offences under Section 302 and 307 of the Indian Penal Code and Section 3 and 4 of the Explosives Substances Act. He was held guilty under Section 302 and 307 of the Indian Penal Code and Section 3 of Explosives Substances Act and sentenced to undergo imprisonment for life each under Section 307 of Indian Penal Code and Section 3 of the Explosives Substances Act. The trial court, however, punished him with death for offence under Section 302 of the Indian Penal Code and submitted the proceeding for confirmation to the High Court. The appellant preferred appeal before the High Court against his conviction and sentence. Both the appeal and the reference were heard together and by an impugned common judgment the High Court has dismissed the appeal and confirmed the death sentence.

3. This is how the appellant is before us with the leave of the Court. He challenges his conviction and

sentence inter alia on the ground that he was not given a fair trial, which alone vitiates his conviction and sentence. India is the world's largest and most vibrant democracy and the judiciary is to ensure the rule of law. This Court being the Court of last resort cannot brush aside the claim without scrutiny only because the crime is serious and allegedly committed by the citizen of a country with which this country has no cordial relation.

4. According to the prosecution, as usual in a winter evening of 30th December, 1997 at 6.20 P.M., a Blue-line bus carrying passengers was on way to Nangloi from Ajmeri Gate, Delhi and when stopped at Rampura bus stand on Rohtak Road to drop the passengers, an explosion took place inside the bus in which four passengers died and 24 persons sustained serious injuries.

5. A case under Section 302, 307 and 120-B of Indian Penal Code and Section 3 and 4 of the Explosives Substances Act was registered on the same day. During the course of investigation, one Darshan Kumar, the conductor of the aforesaid blue line bus

disclosed to the investigating agency that one passenger boarded the bus from Paharganj with a rexine-bag saying that he would go to Nangloi. He kept the rexine-bag underneath the seat where he was sitting but got down at Karol Bagh leaving the rexine-bag. Further investigation brought to light that some persons belonging to terrorist organizations are operating in the Capital and their object is to create an atmosphere of terror, insecurity and instability in the country by killing innocent citizens. This information prompted raids at different parts of the city in which hand grenades and materials used for making bombs were recovered. Some persons were also arrested and during the interrogation they admitted their association with terrorist organizations. They also admitted to have come to this country for 'JEHAD'. This information received in bits and pieces pointed the needle of suspicion on the appellant in the crime in question and he was apprehended with pistol from his house at Lajpat Nagar. In order to ascertain his role, the Investigating Agency decided to hold test

identification parade for which the appellant did not object in the beginning but later on refused to join in the test identification parade.

6. After usual investigation, the Police submitted charge-sheet under Section 302, 307 and 120-B of the Indian Penal Code and under Section 3 and 4 of the Explosives Substances Act. The charge-sheet along with the police papers were laid before the Metropolitan Magistrate for commitment. The appellant was in jail and produced before the Committal Magistrate on 6th July, 1998. He disclosed to the learned Magistrate that he was "not in a position to engage a lawyer and be provided with a lawyer through legal aid". It seems that the assistance of one Mr. V.K.Jain, Advocate was made available to the appellant who appeared before the Committing Court on 20th July, 1998 and prayed for time for scrutiny of documents. Ultimately, the appellant was committed to the Court of Session on 6th August, 1998. The appellant was produced before the Trial Court from time to time and on 18th February, 1999 was represented by Mr.Firoz Khan and Mr. Riyaj Ahmed,

Advocates. On that date, the argument on framing of charge was heard and the Trial Court framed charges under Section 302 and 307 of the Indian Penal Code and under Section 3 and 4 of the Explosives Substances Act against the appellant to which he pleaded not guilty and the prosecution was directed to produce its witnesses to substantiate the charge. On 18th May, 1999, the appellant was produced before the Trial Court but his counsel did not put in his appearance. Despite that, P.W.l- Darshan Kumar, the conductor of the bus was examined in part and his cross- examination was deferred at the request of the appellant. However, on the same day, P.W.2- Vijay Kumar was examined and discharged. On the next date fixed in the case i.e. 3rd June, 1999 two witnesses namely; P.W.3- Moin Khan and P.W.4- Imtiaz Khan were examined and discharged. But cross-examination of P.W.1- Darshan Kumar did not take place at the request of the defence counsel. The next date relevant is 20th July, 1999 when the appellant was represented by his counsel and on that date, P.W.5- Ganesh Sharma, P.W.6- Basant Verma and P.W.7- Manohar

Lal were examined and discharged. Thereafter, the case was adjourned to 30th August, 1999 and from that date till 1st October, 2003, though the appellant was not represented by any counsel, altogether 56 prosecution witnesses were examined to prove the charges against him. Obviously in the absence of the counsel the truthfulness or otherwise of their evidences were not tested by cross-examination.

7. It is relevant to note that the Trial Court, during all this long period, did not realize that the appellant was not represented by any counsel and it is on 4th December, 2003 the appellant brought to the notice of the Trial Court that for the last several dates, the counsel appointed by the Court was not present and hence a new counsel be appointed. It is on the appellant's prayer that one Ms. Sadhana Bhatia, Advocate present in the Court on the said date, was appointed to defend the appellant at the expenses of the State. Thereafter, on 22nd December, 2003, in the presence of said Ms. Sadhana Bhatia, counsel for the appellant, evidences of P.W.57-Dr.Mamtesh, P.W.58- Dr.Narendra Bhambri and P.W.59-

ASI Mahender Singh were recorded. Thereafter, the statements of the witnesses from P.Ws.60 to 65 were recorded in the presence of appellant's counsel, Ms. Sadhana Bhatia. Ultimately the statement of the appellant was recorded on 6th October, 2004 and argument on behalf of prosecution was heard in part. Next hearing took place on 8th October, 2004 when the argument on behalf of the prosecution was concluded and the case was adjourned to 12th October, 2004 for defence argument. It is relevant here to state that during all this period the appellant was in custody. It is only when the argument on behalf of the appellant was to be heard, counsel representing him later i.e. Ms. Bhatia realized that the witnesses have been examined and discharged without cross-examination in the absence of the defence counsel and accordingly, an application was filed for recall of P.W.1- Darshan Kumar for cross-examination. The said prayer was allowed and P.W.1- Darshan Kumar was cross-examined and discharged on 23rd October, 2004. It is worth mentioning here that the Trial Court has recorded on said date that the accused has not

prayed for cross-examination of any other witness and accordingly, it heard the argument and posted the case for judgment on 26th October, 2004. The appellant was held guilty and sentenced as above.

8. While holding the appellant guilty the trial court has not only relied upon the evidence of the witnesses who have been cross-examined but also relied upon the evidence of witnesses who were not cross-examined. The fate of the criminal trial depends upon the truthfulness or otherwise of the witnesses and, therefore, it is of paramount importance. To arrive at the truth, its veracity should be judged and for that purpose cross-examination is an acid test. It tests the truthfulness of the statement made by a witness on oath in examination-in-chief. Its purpose is to elicit facts and materials to establish that the evidence of witness is fit to be rejected. The appellant in the present case was denied this right only because he himself was not trained in law and not given the assistance of a lawyer to defend him.

Poverty also came in his way to engage a counsel of his choice.

9. Having said so, it needs consideration as to whether assistance of the counsel would be necessary for fair trial. It needs no emphasis that conviction and sentence can be inflicted only on culmination of the trial which is fair and just. I have no manner of doubt that in our adversary system of criminal justice, any person facing trial can be assured a fair trial only when the counsel is provided to him. Its roots are many and find places in manifold ways. It is internationally recognized by covenants and Universal Declaration of Human Rights, constitutionally guaranteed and statutorily protected.

10. Article 14 of the International Covenant on Civil and Political Rights guarantees to the citizens of nations signatory to that covenant various rights in the determination of any criminal charge and confers on them the minimum guarantees. Article 14 (2) and (3) of the said covenant read as under:

"Article 14.

xxx xxx xxx

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;……."

Article 14 (3) (d) entitles the person facing the criminal charge either to defend himself in person or

through the assistance of a counsel of his choice and if he does not have legal assistance, to be informed of his right and provide him the legal assistance without payment in case he does not have sufficient means to pay for it. It is accepted in the civilized world without exception that the poor and ignorant man is equal to a strong and mighty opponent before the law. But it is of no value for a poor and ignorant man if there is none to inform him what the law is. In the absence of such information that courts are open to him on the same terms as to all other persons the guarantee of equality is illusory. The aforesaid International Covenant on Civil and Political Rights guarantees to the indigent citizens of the member countries the right to be defended and right to have legal assistance without payment.

11. Not only this, the Universal Declaration on Human Rights ensures due process and Article 10 thereof provides that everyone is entitled in full equality to a fair hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charges against him.

Article 11 of Universal Declaration of Human Rights guarantees everyone charged with a penal offence all the guarantees necessary for the defence, the same reads as under:

> "(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
>
> (2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

12. These salutary features forming part of the International Covenants and Universal Declaration on Human Rights are deep rooted in our constitutional scheme. Article 21 of the Constitution of India commands in emphatic terms that no person shall be deprived of his life or personal liberty except according to the procedure established by law and Article 22 (1) thereof confers on the person charged to be defended by a legal practitioner of his choice.

Article 39 A of the Constitution of India casts duty on the State to ensure that justice is not denied by reason of economic or other disabilities in the legal system and to provide free legal aid to every citizen with economic or other disabilities.

13. Besides the International Covenants and Declarations and the constitutional guarantees referred to above, Section 303 of the Code of Criminal Procedure gives right to any person accused of an offence before a criminal court to be defended by a pleader of his choice. Section 304 of the Code of Criminal Procedure contemplates legal aid to accused facing charge in a case triable by Court of Sessions at State expense and the same reads as follows:

> **"304. Legal aid to accused at State expense in certain cases.**
>
> (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 rule providing for-
>
> (a) The mode of selecting pleaders for defence under sub-section (2);
>
> (b) The facilities to be allowed to such pleaders by the courts;
>
> (c) The fee 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 the Courts of Session."

From a plain reading of the aforesaid provision it is evident that in a trial before the Court of Sessions if the accused is not represented by a pleader and has not sufficient means, the court shall assign a pleader for his defence at the expense of the State. The entitlement to free legal aid is not dependent on the accused making an application to that effect, in fact, the court is obliged to inform the accused of his right to obtain free legal aid and provide him with the same.

14. In my opinion, the right of a person charged with crime to have the services of a lawyer is fundamental and essential to fair trial. The right to be defended by a legal practitioner, flowing from Article 22 (1) of the Constitution has further been fortified by the introduction of the Directive Principles of State Policy embodied in Article 39 A of the Constitution by the 42nd Amendment Act of 1976 and enactment of sub-section 1 of Section 304 of the Code of Criminal Procedure. Legal assistance to a poor person facing trial whose life and personal liberty is in jeopardy is mandated not only by the Constitution and the Code of Criminal Procedure but also by International Covenants and Human Rights Declarations. If an accused too poor to afford a lawyer is to go thorough the trial without legal assistance, such a trial cannot be regarded as reasonable, fair and just. The right to be heard in criminal trial would be inconsequential and of no avail if within itself it does not include right to be heard through counsel. One cannot lose sight of the fact that even intelligent and educated men, not

trained in law, have more than often no skill in the science of law if charged with crime. Such an accused not only lacks both the skill and knowledge adequately to prepare his defence but many a time looses his equilibrium in face of the charge. A guiding hand of counsel at every step in the proceeding is needed for fair trial. If it is true of men of intelligence, how much true is it of the ignorant and the illiterate or those of lower intellect! An accused without the lawyer faces the danger of conviction because he does not know how to establish his innocence.

15. Bearing in mind the aforesaid principles, I proceed to examine the facts of the present case. In the case in hand the accused is a Pakistani and seems illiterate. He asked for engagement of a counsel to defend him at State expenditure which was provided but unfortunately for him the counsel so appointed remained absent and a large number of witnesses have been examined in the absence of the counsel. Those witnesses have not been cross-examined and many of them have been relied upon for holding the appellant

guilty. The learned Judge in seisin of the trial forgot that he has an overriding duty to maintain public confidence in the administration of justice, often referred to a duty to vindicate and uphold the majesty of law. He failed to realize that for an effective instrument in dispensing justice he must cease to be a spectator and a recording machine but a participant in the trial evincing intelligence and active interest so as to elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth and administer justice with fairness and impartiality both to the parties and to the community itself. Fundamental principles based on reason and reflection in no uncertain term recognize that the appellant haled into court in our adversary system of criminal justice and ultimately convicted and sentenced without a fair trial. There are high authorities of this Court which take this view and I do not deem it expedient to multiply and burden this judgment with those authorities as the same have been referred in the judgment of my learned Brother Dattu, J. except

to refer to a judgment of this Court in the case of Hussainara Khatoon & Others v. Home Secy., State of Bihar, (1980) 1 SCC 98, in which it has been held as follows:

> "**6.** ……Now, a procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as "reasonable, fair and just". It is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the court's process that he should have legal services available to him……."

16. Having found that the appellant has been held guilty and sentenced to death in a trial which was not reasonable, fair and just, the next question is as to whether it is a fit case in which direction be given for the de novo trial of the appellant after giving him the assistance of a counsel. I have given my most anxious consideration to this aspect of the matter and have no courage to direct for his de novo trial at such a distance of time. For an occurrence of 1997, the appellant was arrested in 1998 and since then he is in judicial custody. The charge against

him was framed on 18.02.1999 and it took more than five years for the prosecution to produce its witnesses. True it is that in the incident four persons have lost their lives and several innocent persons have sustained severe injuries. Further, the crime was allegedly committed by a Pakistani but these factors do not cloud my reason. After all, we are proud to be a democratic country and governed by rule of law. The appellant must be seeing the hangman’s noose in his dreams and dying every moment while awake from the day he was awarded sentence of death, more than seven years ago. The right of speedy trial is a fundamental right and though a rigid time limit is not countenanced but in the facts of the present case I am of the opinion that after such a distance of time it shall be travesty of justice to direct for the appellant’s de novo trial. By passage of time, it is expected that many of the witnesses may not be found due to change of address and various other reasons and few of them may not be in this world. Hence, any time limit to conclude the trial would not be pragmatic.

17. Accordingly, I am of the opinion that the conviction and sentence of the appellant is vitiated, not on merit but on the ground that his trial was not fair and just.

18. Appellant admittedly is a Pakistani, he has admitted this during the trial and in the statement under Section 313 of the Code of Criminal Procedure. I have found his conviction and sentence illegal and the natural consequence of that would be his release from the prison but in the facts and circumstances of the case, I direct that he be deported to his country in accordance with law and till then he shall remain in jail custody.

19. In the result the appeal is allowed, appellant's conviction and sentence is set aside with the direction aforesaid.

……J.
(CHANDRAMAULI KR PRASAD)

New Delhi,
January 11, 2012.