Ranjan Dwivedi vs Union Of India (Uoi) on 26 April, 1983

Equivalent citations: AIR1983SC624, 1983CRILJ1052, 1983(1)CRIMES1170(SC), 1983(1)SCALE487, (1983)3SCC307, [1983]2SCR982

Bench: A.P. Sen, R.S. Pathak

JUDGMENT

1. This petition under Article 32 of the Constitution raises a question of some nicety. The question is whether the 'right to be defended by a legal practitioner of his choice' under Article 22(1) of the Constitution comprehends the right of an accused to be supplied with a lawyer by the State.

2. The petitioner is an advocate-on-record practising in this Court and has been arraigned along with four others to stand his trial for the commission of an alleged offence of murder in furtherance of criminal conspiracy punishable under Section 302 read Section 120-B of the Indian Penal Penal Code in what is known as the Samastipur Bomb Blast case in the Court of the Additional Sessions Judge, Delhi. Bawa Gurcharan Singh engaged by the main accused Santoshanand and Sudevanand as senior counsel was also appearing for the petitioner as a matter of professional courtesy to a fellow member of the Bar. The evidence of the first approver P.W. 1 Madan Mohan Srivastava @ Visheshwaranand was concluded on March 25, 1981 and he was cross-examined by Bawa Gurcharan Singh on behalf of the main accused as well as the petitioner, and by P.P. Grover appearing on behalf of the other two accused Arteshanand and Gopalji. On the same day, Bawa Gurcharan Singh withdrew his appearance for the petitioner and thereafter the petitioner himself has been conducting the case. The recording of the evidence of the second approver P.W. 2 Jaldhar Dass @ Vikram has already commenced.

3. The petitioner contends that although he is not an indigent person he as a struggling lawyer has neither the capacity nor the means to engage a competent lawyer for his defence. He complains that under the rules framed by the Delhi High Court, a princely sum of Rs. 24 per day is fixed as fee payable to a lawyer appearing in the Court of Sessions as amicus curiae, and as the sessions trial in which he is involved lasts three days on an average in a week, no lawyer of sufficient standing will find it possible to appear as counsel for his defence. He alleges that the prosecution is being conducted by a special public prosecutor assisted by a galaxy of lawyers specially engaged by the State and large amounts are being paid as their fees. As a matter of processual fair play it is incumbent on the State to provide him with a counsel for his defence on a basis of equal opportunity as guaranteed under Article 39A of the Constitution. Upon this basis, he seeks the issuance of a writ in the nature of Mandamus and other appropriate writs, directions and orders to ordain the Union of India to give financial assistance to him to engage a counsel of his choice on a scale equivalent to, or commensurate with, the fees that are being paid to the counsel appearing for the State.

4. During the pendency of the writ petition, the Court by its interim order dated June 4, 1981 having regard to the fact that the petitioner is a practising lawyer and is involved in a long drawn sessions

trial, directed that the State should undertake to help him in the matter of his defence so far as the payment of fees to his counsel to defend him in the trial was concerned. It directed that the petitioner will inform the Court of Sessions the name of the counsel who would be appearing for him with a direction that the State would make necessary arrangement to pay the amount required to be expended on his fees subject to final accounting to be made depending on the result of the writ petition. By the subsequent order dated August 18, 1981 the Court in modification of the earlier order quantified that a sum of Rs. 500 per day will be paid by the State to the senior counsel and Rs. 250 per day to the junior for representing the petitioner.

5. At the hearing it was urged by learned Counsel for the petitioner that suitable directions be made in conformity with the interim orders passed by the Court for payment of a reasonable amount as fees to the amicus curiae who appears for the petitioner at the trial. The learned Additional Solicitor-General on the other hand takes serious exception to the directions made by the Court and contends that the petitioner has no legal right to be supplied with a lawyer by the State nor is there any corresponding obligation cast on the State to give financial assistance to him to engage a counsel of his choice. According to him, the remedy of the petitioner is to make an application before the learned Additional Sessions Judge under Sub-section (1) Section 304 of the CrPC, 1973 to provide him with free legal aid and it is for the learned Additional Sessions Judge to be satisfied on material placed before him that the petitioner is not possessed of sufficient means to engage a counsel. The submission is that it is upon the fulfilment of this condition that a direction can be made to provide a counsel for his defence at the expense of the State. He accordingly contends that no petition under Article 32 of the Constitution is maintainable.

6. The petition is virtually for the enforcement of the Directive Principle of State Policy enshrined in Article 39A of the Constitution which reads:

> 39A. The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

7. There can be no doubt that the petitioner is not entitled to the grant of a writ of Mandamus for the enforcement of the Directive Principle enshrined in Article 39A by ordaining the Union of India to give financial assistance to him to engage a counsel of his choice on a scale equivalent to, or commensurate with, the fees that are being paid to the counsel appearing for the State. As is clear from the terms of Article 39A, the social objective of equal justice and free legal aid has to be implemented by suitable legislation or by formulating schemes for free legal aid. The remedy of the petitioner, if any, lies by way of making an application before the learned Additional Sessions Judge under Sub-section (1) of Section 304 of the CrPC, 1973, and not by a petition under Article 32 of the Constitution.

5. The traditional view expressed by this Court on the interpretation of Article 22(1) of the Constitution in Janardan Reddy and Ors. v. The State of Hyderabad and Ors. [1951] S.C.R. 344 that

the right to be defended by a legal practitioner of his choice could only mean a right of the accused to have the opportunity to engage a lawyer and does not guarantee an absolute right to be supplied with a lawyer by the State, has now undergone a change by the introduction of the Directive Principle of State Policy embodied in Article 39A by the Constitution (Forty-Second) Amendment Act, 1976, and the enactment of Sub-section (1) of Section 304 of the CrPC. It was in this case that the Court observed that the American rule enunciated in the case of Powell, v. Alabama 77 L.Ed. 158 founded on the doctrine of due process was not applicable to India and that under Article 22(1) there was no absolute right to an accused to be supplied with a lawyer by the State. There has been a definite shift in the stance adopted by the Court by its decisions in Maneka Gandhi v. Union of India , E.P. Royappa v. State of Tamil Nudu R.D. Shetty v. The International Airport Authority of India and Ors. [1979]. S.C.R. 1014. In Maneka Gandhis case, supra, the Court observed that the requirement of compliance with natural justice was implicit in Article 21 and that if any penal law did not lay down the requirement of hearing before effecting him, that requirement would be implied by the Court so that the procedure prescribed by law would be reasonable and not arbitrary procedure. The procedure which was arbitrary oppressive or fanciful, was no procedure at all. A procedure which was unreasonable could not be said to be in conformity with Article 14 because the concept of reasonableness permeated that Article and arbitrariness is the antithesis of equality guaranteed under Article 14. It is difficult to hold in view of these decisions that the substance of the American doctrine of due process has not still been infused into the conservative text of Article 21.

8. Although in the earlier decisions the Court paid scant regard to the Directives on the ground that the Courts had little to do with them since they were not justiciable or enforceable, like the Fundamental Rights, the duty of the Court in relation to the Directives came to be emphasized in the later decisions which reached its culmination in Keshavanand Bharti v. Union of India laying down certain broad propositions. One of these is that there is no disharmony between the Directives and the Fundamental Rights because they supplement each other in aiming at the same goal of bringing about a social revolution and the establishment of a welfare State, which is envisaged in the Preamble. The Courts therefore have a responsibility in so interpreting the Constitution as to ensure implementation of the Directives and to harmonize the social objective underlying the Directives with the individual rights. Primarily, the mandate in Article 39A is addressed to the Legislature and the Executive but insofar as the Courts of Justice can indulge in some judicial law-making within the interstices of the Constitution or any statute before them for construction, the Courts too are bound by this mandate.

9. Read with Article 21, the Directive Principle in Article 39A has been taken cognizance of by the Court in M.H. Hoskot v. The State of Maharashtra , State of Haryana v. Durshana Devi and Ors. and Hussainara Khatoon and Ors. v. Home Secretary, State of Bihar, Patna to lead to certain guidelines in the administration of justice. One of these is that when the accused is unable to engage a counsel owing to poverty or similar circumstances, the trial would be vitiated unless the State offers free legal aid for his defence to engage a lawyer whose engagement the accused does not object. This more or less echoes the moving words of Sutherland, J. in Powells case, (supra). The right to the aid of counsel, wrote Sutherland, J., is of a fundamental character. In this country (i.e. United States of America) historically and in practice, a hearing has always included the right to the aid of counsel when desired and provided by the party asserting the right. Sutherland, J. went on to indicate why

this should be so:

> 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 adequate y to prepare his defence, even though he have 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.
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> But he did not stop there. If the accused were unable to get counsel, even though opportunity were offered, then the due process clause in the Fourteenth Amendment required the trial Court to make effective appointment of counsel. This was new law, and so it was natural that the Court would set careful limits for the new principle:
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> Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine. All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defence because of ignorance, feeblemindedness, illiteracy, or the like, it is the duty of the Court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.

10. It must be stated that Powells case involved a capital punishment where the accused was unable to employ counsel due to his indigence and therefore was incapable adequately of making his own defence, and according to the Supreme Court, the failure of the trial court to give reasonable time and opportunity to secure counsel was a clear denial of due process.

11. There was a clear departure by the Supreme Court of the United States in Betts v. Brady 86 L.Ed. 1595 where the Court made an abrupt break and held that the due process clause of the Fourteenth Amendment did not impose upon the States, as the Sixth Amendment imposed upon the Federal Government, an absolute requirement to appoint counsel for all indigent accused in criminal cases. It required the State to provide a counsel only where the particular circumstance of a case indicated that the absence of counsel would result in a trial lacking fundamental fairness. Ever since the decision in Betts case, the problem of the constitutional right of an accused in a State Court became a continuing source of controversy until it was set at rest in the celebrated case of Guideon v. Wainrigh 9th L.Ed. 799. Under the rule laid down in Betts case, the Court had to consider the special circumstances in each case to determine whether the denial of counsel had amounted to a

constitutional defect in the trial and in an era of constantly expanding federal restrictions on State criminal processes, it was hardly startling that the Court in Gideons case explicitly rejected the rule laid down in Belts case and held that Sixth Amendments (unqualified) guarantee of counsel for all indigent accused was a "fundamental right made obligatory upon the State by the Fourteenth Amnndment". We are however not in the United States of America and therefore not strictly governed by the due process clause in the Fourteenth Amendment. We therefore need not dilate on the subject any further.

12. In recent years, it has increasingly been realized that there cannot be any real equality in criminal cases unless the accused gets a fair trial of defending himself against the charge laid down and unless he has competent professional assistance. The Law Commission in its Fourteenth Report Volume I on the subject "Reform of Judicial Administration" made certain recommendations for State aid. One of those was that "representation by a lawyer should be made available at Government expense to accused persons without means in all cases tried by a Court of Sessions". This recommendation has now been codified in Sub-section (1) of Section 304 of the CrPC which reads:

> 304. Legal aid to accused at state expense in certain cases:
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> (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.

13. The Law Commission in its Forty-Eighth Report suggested for making provision for free legal assistance by the State for all accused who are undefended by a lawyer for want of means. This recommendation still remains to be implemented. Many a time, it may be difficult for the accused to find sufficient means to engage a lawyer of competence. In such a case, the Court possesses the power to grant free legal aid if the interests of justice so require. The remedy of the petitioner therefore is to make an application before the Additional Sessions Judge making out a case for the grant of free legal aid and if the learned Additional Sessions Judge is satisfied that the requirements of Sub-section (1) of Section 304 of the Code are fulfilled, he may make necessary directions in that behalf. While fixing the fee of counsel appearing for the petitioner, the learned Additional Sessions Judge shall fix the amount of fee having regard to the interim orders passed by this Court. But if he feels that he is bound by the constraints of the rules framed by the Delhi High Court prescribing scales of remuneration for empanelled lawyers, he shall make a reference to the High Court for suitable direcations. On such reference being made, the High Court shall consider in its undoubted jurisdiction under Article 227(3) of the Constitution whether the scales of remuneration prescribed for empanelled lawyers appearing in sessions trials are not grossly insufficient and call for a revision. That however is a matter which clearly rests with the High Court and we wish to say no more.

14. We only wish to impress that the contention advanced before us has been that the existing rules are wholly antiquated and do not take into account the realities of the situation. It was urged that

under the present scales of fee as prescribed by the Delhi High Court for empanelled lawyers appearing in sessions trials, it is impossible for a person facing a sessions trial on a capital charge to get competent professional assistance. Surely, the High Court has ample power to fix a reasonable amount as fee payable to counsel appearing for the petitioner m the facts and circumstances of the present case. We direct that in case the amount so fixed is lower than the scales of fee fixed by this Court by its interim orders, the excess amount paid to the petitioner in terms thereof shall not be recoverable.

15. With these observations, the writ petition must fail and is dismissed with no order as to costs.