GAHC040003592020

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)
(ITANAGAR BENCH)

Case No. : Crl.A. 5/2020

1:Nanwang Rongrang
S/o Shri Wanggan Ronrang, R/o Balinong village, Longding, PO Kharsang, Tirap District, AP

VERSUS

1:THE STATE OF AP
represented by the PP

Advocate for the Petitioner : Khoda Tama

Advocate for the Respondent : P P of AP

BEFORE
HONBLE MR. JUSTICE SONGKHUPCHUNG SERTO

JUDGMENT

Date : 29-06-2020

Heard Mr. Khoda Tama, learned counsel for the appellant and also heard Mr. Jambey Tsering, learned P.P for the State of Arunachal Pradesh.

2. This is an appeal filed under section 36(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985, read with section 374 of the Criminal Procedure Code, 1973, directed against the judgment & order dated 17.02.2020, passed in NDPS Case No. 22(T)/2016, by Special Judge (NDPS) at East Session Division, Tezu, Lohit District, wherein the appellant was held guilty of the charges levelled against him under section 17(b) of the NDPS Act and sentenced him to undergo rigorous imprisonment of 3(three) years with a fine of Rs. 25,000/-, with default stipulated sentenced of 6(six) months simple imprisonment.

3. The case of the prosecution in brief was that on 08.01.2016 at about 8:30 P.M a complaint was received by Khonsa P.S from one Constable Hakap Tesia which stated that, on the evening of the same day, at about 8:00 P.M., while a Police party was patrolling around Bank Colony at Khonsa, a person was found moving on a motor cycle in a suspicious manner. On checking his body, 150 grams of opium was recovered from his possession, therefore, he was arrested after observing all the formalities and brought him to the Police Station from where he was also sent to the District Hospital for medical check-up. The seized article was kept in the Malkhana for further necessary action and statement of witnesses were recorded including that of the accused. During the interrogation, the accused stated that he use to consume opium since 2014 and, the opium in his possession was purchased from two unknown woman. While the case was under investigation, sample of the seized article was sent to FSL and as per the report received from the FSL, the seized article was opium. Accordingly, the charge-sheet was submitted against the accused under section-17(b) of NDPS Act.

As per the report and the judgment of the learned trail court, 5(five) PWs were examined and out of the 5(five) witnesses, PW No. 1 and PW No.2 were not cross-examined.

The learned trail court, after examining the evidence, examined the accused under section 313 of Cr.PC and recorded his statement and thereafter, heard the learned P.P and the defense counsel. And after that the Court considered the evidence on record came to the finding or conclusion that accused/appellant was guilty of having committed the offence punishable under 17(b) of NDPS Act. Accordingly, the accused/appellant was held guilty and convicted, and sentenced to rigorous imprisonment of 3(three) years with a fine of Rs. 25,000/- with stipulated default sentenced of simple imprisonment of 6(six) months.

4. At the very outset, the learned counsel for the accused/appellant submitted that the appeal is confined to only two grounds and they are;

(i) That the accused/appellant was not given the opportunity to cross-examined the PW No.1 and PW No.2 and this has deprived him of his right to fair trial.

(ii) That the accused/appellant was not informed by the Court of his right to adduce his evidence at the conclusion of his examination under section 313 of Cr.PC and this has deprived him of his opportunity to effectively defend himself.

5. Mr. Khoda Tama, learned counsel for the accused/appellant in elaboration of the grounds of appeal as stated above submitted that, PW No.1 was the informant of the FIR case, therefore, he was very important witness. He also submitted that PW No. 2 was one of the persons among the patrol party who happened to find the accused/appellant and arrested him in the night of the incident, therefore, he is also very important witness. However, on the day the deposition of the two witnesses

were recorded i.e on 13.04.2017, the learned counsel representing the accused/appellant was absent and the accused/appellant who has no awareness regarding of Court proceedings did not know what to do. But the learned trial Judge, knowing fully well the importance of cross-examination, proceeded by fixing another date for recording evidence of other PWs instead of giving a chance to the accused/appellant to cross-examined the two witnesses thereby denying the opportunity of cross-examination of the two witnesses to the accused/appellant.

The learned counsel submitted also that it is the duty of the Court to see that fair and impartial trial take place in any criminal case and, the accused's right to be tried under the due process of law is not denied in any manner. In support of his submission, the learned counsel referred to the judgment of the Hon'ble Supreme Court passed in the case of **Modh. Hussain** –versus- **State (Government of NCT of Delhi)**, reported in **(2012) 2 SCC 584**. The learned counsel particularly referred to paragraph-23 to 26 & 42 to 43. The contents of the paragraphs are reproduced here below for easy reference;

"*23. 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.*

24. 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.

25. 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.

26. 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.

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42. 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.

43. 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."

6. The learned counsel for the accused/appellant, by referring to the record of the examination of the accused under section 313 of Cr. PC submitted that nowhere in the record it is found that the accused/appellant was asked as to whether he would like to adduce his evidence in defence. It is duty of the Court to inform the accused/appellant that he has the right to produce evidence in his defence. In any criminal proceeding or trial, an accused has the right to produce his evidence in defence against the prosecution case and denial of such right would amount to denial of fair trial.

7. The learned P.P. for the State of Arunachal Pradesh, Mr. J. Tsering by referring to the order dated 12.06.2017 of the trial court submitted that on that day both the accused/appellant and his counsel were absent but one Sri. Tenyok Ruttum (PW No. 2) was present however, the Court in order to ensure fair trial adjourned the hearing fixed it on 13.09.2017. But on that day also, though the accused/appellant was present his counsel was again absent. Therefore, the learned trial Judge who is bounded by law to ensure that not only fair trial but speedy trial takes place went ahead with the trial by recording the deposition of the PW No.1 and PW No.2. However, that itself did not bar the accused/appellant to ask for permission to cross-examine the two witnesses if he really wanted to, specially, when the trial continued thereafter, for a fairly long time. Since, he did not do so he cannot now claim a benefit out of his own negligent or deliberate in action.

The learned P.P further submitted that criminal trial should continue from day to day basis and adjournment should be an exception. In fact, no adjournment can be granted when witnesses are in attendance. In support of his submission, the learned P.P referred to 2nd proviso of section-309(2) of Cr.PC which reads as follows;

> "*Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing*:"

After having referred to the above, the learned P.P. submitted that it was keeping this in view that the learned trial court went ahead with the trial by recording the deposition of the PW No. 1 and PW No.2 who were in attendance on that day though the learned counsel of the accused/appellant was absent. However, as submitted earlier that did not bar the accused/appellant from asking the Court to grant permission to cross-examine the two PWs. Therefore, no wrong has been committed by the learned trial Judge. As such, recording of the deposition of two PWs in the absence of the learned

counsel of the accused/appellant and, their none cross-examination cannot be a ground for quashing and setting aside the impugned judgment.

The learned P.P further submitted that cross-examination should be done as soon as examination-in-chief of witnesses is completed for delay in cross-examination for a long time is likely to vitiate the trial. Therefore, the Hon'ble Supreme Court in catena of cases has stated that cross-examination should be done immediately after examination-in-chief of witnesses is over. In support of his submissions, the learned P.P referred to the three judgments of the Hon'ble Supreme Court passed in the following cases;

(i) **Vinod Kumar** –versus- **State of Punjab**, reported in **(2015) 3 SCC 220**, para-41,

(ii) **State of U.P** –versus- **Shambhu Nath Singh & Others**, reported in **(2001) 4 SCC 667**, para-12 & 13 and,

(iii) **Nishi Kant Jha** –versus- **State of Bihar**, reported in **(1969) 1 SCC 347**, para- 23. The relevant portions of the three judgments referred to by the learned P.P are reproduced here below one after the other;

(**i**). Vinod Kumar –versus- State of Punjab, para-41.

"*41. Before parting with the case we are constrained to reiterate what we have said in the beginning. We have expressed our agony and anguish the manner in which trials in respect of serious offences relating to corruption are being conducted by the trial courts. Adjournments are sought on the drop of a hat by the counsel, even though the witness is present in court, contrary to all principles of holding a trial. That apart, after the examination-in-chief of a witness is over, adjournment is sought for cross-examination and the disquieting feature is that the trial courts grant time. The law requires special reasons to be recorded for grant of time but the same is not taken note of. As has been noticed earlier, in the instant case the cross-examination has taken place after a year and 8 months allowing ample time to pressurize the witness and to gain over him by adopting all kinds of tactics. There is no cavil over the proposition that there has to be a fair and proper trial but the duty of the court while conducting the trial to be guided by the mandate of the law, the conceptual fairness and above all bearing in mind its sacrosanct duty to arrive at the truth on the basis of the material brought on record. If an accused for his benefit takes the trial on the path of total mockery, it cannot be countenanced. The Court has a sacred duty to see that the trial is conducted as per law. If adjournments are granted in this manner it would tantamount to violation of rule of law and eventually turn such trials to a farce. It is legally impermissible and jurisprudentially abominable. The*

trial courts are expected in law to follow the command of the procedure relating to trial and not yield to the request of the counsel to grant adjournment for non-acceptable reasons. In fact, it is not all appreciable to call a witness for cross-examination after such a long span of time. It is imperative if the examination-in- chief is over, the cross-examination should be completed on the same day. If the examination of a witness continues till late hours the trial can be adjourned to the next day for cross-examination. It is inconceivable in law that the cross-examination should be deferred for such a long time. It is anathema to the concept of proper and fair trial. The duty of the court is to see that not only the interest of the accused as per law is protected but also the societal and collective interest is safe-guarded. It is distressing to note that despite series of judgments of this Court, the habit of granting adjournment, really an ailment, continues. How long shall we say, "Awake! Arise!". There is a constant discomfort. Therefore, we think it appropriate that the copies of the judgment be sent to the learned Chief Justices of all the High Courts for circulating the same among the learned trial Judges with a command to follow the principles relating to trial in a requisite manner and not to defer the cross- examination of a witness at their pleasure or at the leisure of the defence counsel, for it eventually makes the trial an apology for trial and compels the whole society to suffer chicanery. Let it be remembered that law cannot allowed to be lonely; a destitute."

(**ii**). State of U.P –versus- Shambhu Nath Singh & Others, para-12 & 13.

"*12. Thus, the legal position is that once examination of witnesses started the court has to continue the trial from day to day until all witnesses in attendance have been examined (except those whom the party has given up). The court has to record reasons for deviating from the said course. Even that is forbidden when witnesses are present in court, as the requirement then is that the court has to examine them. Only if there are special reasons, which reasons should find a place in the order for adjournment, that alone can confer jurisdiction on the court to adjourn the case without examination of witnesses who are present in court.*

13. Now, we are distressed to note that it is almost a common practice and regular occurrence that trial courts flout the said command with immunity. Even when witnesses are present cases are adjourned on far less serious reasons or even on flippant grounds. Adjournments are granted even in such situations on the mere asking for it. Quite often such adjournments are granted to suit the convenience of the advocate concerned. We make it clear that the legislature has frowned at granting adjournments on that ground. At any rate inconvenience of an advocate is not a special reason for bypassing the mandate of Section 309 of the Code."

(**iii**). Nishi Kant Jha –versus- State of Bihar, para-23.

"23. In this case the exculpatory part of the statement in Ex. 6 is not only inherently improbable but is contradicted by the other evidence. According to this statement, the' injury which the appellant received was caused by the appellant's attempt to catch hold of the hand of Lal Mohan Sharma to prevent the attack on the victim. This was contradicted by the statement of the accused himself under s. 342 Cr. P.C. to the effect that he had recceived the injury in a scuffle with a herdsman. The injury found on his body when he was examined by the doctor on 13th October 1961 negatives both these versions. Neither of these versions accounts for the profuse bleeding which led to his washing his clothes and having a bath in the river Patro, the amount of bleeding and the washing of the bloodstains being so considerable as to affact the attention of Ram Kishore Pandey, P.W. 17 and asking him about the cause thereof. The bleeding was nora simple one as his clothes all got stained with blood as also his books, his exercise book and his belt and shoes. More than that the knife which was discovered on his person was found to have been stained with blood according to the report of the Chemical Examiner. According to the postmortem report this knife could have been the cause of the injuries on the victim. In circumstances like these there (1) [1953] S.C.R.94. (2) [1963] 3 S.C.R. 678 being enough evidence to reject the. exculpatory part of the statement of the appellant in Ex. 6 the High Court had acted rightly in accepting the inculpatory part and piecing the same with the other evidence to come to. the conclusion. that the appellant was the person responsible for the crime.'

8. The learned P.P lastly submitted that the impugned judgment shows that the accused/appellant was not convicted solely on the evidence given by the PW No. 1 and PW No.2. In fact, without the evidence given by these two witnesses, the evidence given by the other witnesses is still sufficient to hold him guilty of having committed the offence. Therefore, it would be a futile exercises even if the case is send back for cross-examination of the two witnesses.

9. I have considered the submissions of both the learned counsels and I have also perused the relevant records.

In this Country, no one can be held guilty and deprived of his right to life unless he is tried by the Court of competent jurisdiction and in accordance with the procedure established by law. The procedures for trial of accused in criminal cases are provided under statutory laws-in this case, the Code of Criminal Procedure. Cross-examination which is a tool to test the truth or truthfulness or

veracity of evidence given by a witness is also one of the important processes provided in Cr.PC which must be followed. It is a very important weapon of defence for an accused in a criminal trial and denial of such right would amount to denial of fair trial. As per the record, the accused/appellant and his counsel were both absent on 12.06.2017 when the case was fixed for recording the evidence of prosecution side. On the next date i.e. 13.09.2017, though, the accused/appellant was present his learned counsel was absent for the second time. It may be true as submitted by the learned P.P that the learned trial Judge was prompted by his bounden duty not to adjourn the case specially when witnesses were present but, what one must not forget is that the trial must be fair. Here, the right to life of a citizen is at risk. Such right cannot be taken away except by following the due process or procedure established by law. Therefore, the learned trial Judge is also bounded by a duty to ensure that the accused is represented by a competent counsel and also to ensure that the right to cross-examination of the person under trial is not made a walk over. He cannot be one sided. He has to ensure that everything that is required by law is followed. However, in this case, it appears from the record that the learned trial Judge was in a little hurry to examine the witnesses by either ignoring or being oblivious of the consequences the accused/appellant in all probability or is likely to suffer. The PW No. 1 was the informant of the FIR case and, it was based on his information that the case was taken up investigated and charge-sheet was submitted. His information is the very foundation of the case, therefore, his evidence is very important in the determination of the fate of the case. Further, PW No.2 was one among the patrol team who found and arrested the accused/appellant in that evening, therefore, his evidence is also very important. As such, denial or not giving the opportunity of cross-examining these two witnesses to the accused/appellant, certainly amounts to denial of fair trial. Therefore, the trial before the learned trial court, in my view, was short of the ingredients of a fair trial.

10. Chapter XVIII of Cr.PC provides how a trail before Court of Session is to be taken up, and under section 231(1)(2) of that Chapter it is provided as follows;

> "***231. Evidence for prosecution***:- *(1) On the date so fixed, the Judge shall proceed to take all such evidence as may be produced in support of the prosecution.*
>
> *(2) The Judge may, in his discretion, permit the cross-examination of any witness to be deferred until any other witness or witnesses have been examined or recall any witness for further cross-examination*."

On careful reading of the above, specially the (2), it would be seen that the Judge before whom witnesses are produced enjoys the discretion to either allow the cross-examination to begin

right after the examination is over or to defer the same until the other witness or witnesses have been examined. The discretion is only regarding the time as to when cross-examination should be allowed or done. It does not extend to either allowing or not to allow. In other words, the Judge has no discretion regarding, as to whether the cross-examination should be allowed or not. It is mandatory for the Judge to let the defence counsel to cross-examine the prosecution witness. He has no discretion on that.

As per the record, the order passed by the learned Special Judge after the depositions of the PW No.1 and PW No.2 were recorded is as follows;

> "*Learned P.P, Mr. T.Boo is present. Learned PDC, Mr. W. Wangsu remained absent without step.*
>
> *Accused Nannang Ronrang is present and directed to appear on the next date.*
>
> *Sumonee PWs Sri. Tenyok Ruttum and Sri. Hakap Tesia who appeared today for second time have been examined even in absence of learned PDC.*
>
> *Issue summon to all remaining PWs and seizure witness.*
>
> *Let this case be listed on 18.12.2017 for evidence."*

It would be seen from the order reproduced herein above that the learned counsel of the accused/appellant was absent on that day but despite is absence the examination-in-chief of the PWs, namely Sr. Tenyok Ruttum and Sri. Hakap Tesia who are PW No. 2 and PW No. 1 respectively were recorded and thereafter, direction was given for issuing summon to the remaining PWs. It would also be seen from the order that no mention is made as to whether a chance of cross-examination of the two witnesses would be given to the accused or not. But what can be inferred is that cross-examination has been given a walk over. Further, in the subsequent orders passed by the learned Special Judge, there is no indication of having given the opportunity of cross-examination of the two PWs to the accused/appellant.

From all these it can safely be concluded that the accused/appellant was not given the opportunity of cross-examination of the two PWs. There cannot be any no gain in saying that the trial thereafter also continued for a long time, therefore, if the accused was interested in cross-examination of the two witnesses he could have asked for permission from the Court to do so. Obviously, because, the Judge as the empire is not a mere spectator, he is there to ensure that not only speedy but fair trial takes place.

11. Now coming to the question of whether the accused/complainant was given opportunity to produce his defence witnesses or not. It is true that as per the record sheet on which statement of the witness was recorded under section 313 of Cr. PC, there is nothing indicating that the accused/appellant was asked as to whether he would like to adduce evidence in defence or not which is normally asked. Further, it appears from the statement of the accused/appellant recorded under section 313 of Cr. PC that his case was of total denial. Therefore, he ought to have been asked whether he would like to adduce evidence in his defence. The fact that it was recorded in the order sheet that his learned counsel submitted that he has no evidence to adduce is not sufficient, specially, when the accused himself was present. The behaviour of the learned counsel representing the accused/appellant as seen from the record does not appear to be satisfactory. One may say that he has not represented the accused/appellant properly. Therefore, the learned Special Judge should have been a little more sensitive and asked the accused himself as to whether he would like to adduce evidence in support of his plea that he is not guilty of the charge.

The offence charged against the accused/appellant is a serious offence punishment on which, if found guilty, may extend to 10 years with a fine which may also extend to Rs. One lakh. Therefore, in such cases care should have been taken by any Judge who is holding the trial so that all the ingredients of a fair trial are met. However, sadly in this case, such care seems to have been given amiss.

12. In view of the reasons stated above, this Court is of the view that the case needs a fresh trial. Accordingly, the impugned judgment and sentence are quashed and set aside. The learned trial court may begin the trial afresh by giving the opportunity of cross-examining the PW No.1 and PW No.2 to the accused/appellant and by giving him the opportunity to adduce evidence. The evidence given by other PWs shall remain as it were. In other words, the PWs who are examined and cross-examine already need not be re-examined again.

This Criminal Appeal stands disposed.

Send back the LCR forthwith along with a copy of this order.

JUDGE

Comparing Assistant