BASHIRA

v.

STATE OF U.P.

April 19, 1968

[S. M. SIKRI, J. M. SHELAT AND V. BHARGAVA, JJ.]

Constitution of India, 1950, *Art.* 21—*Accused tried for offence of murder—Criminal Procedure Code* (*Act* 5 *of* 1898), *s.* 340 *and Rules made by the High Court, r.* 37 *Counsel appointed by Sessions Court for defending accused—Not given enough time to prepare defence—If violative of Article.*

The appellant was charged with the offence of murder under s. 302 IPC. Just before the beginning of the trial, the Sessions Court appointed an advocate as *amicus curiae* to represent the appellant. After the examination of witnesses, on the day on which the case was posted for argument, appellant's counsel prayed for the recall of the sole eye-witness for further cross-examination as the witness could not be cross-examined effectively. The application was rejected, and after hearing arguments, the court convicted the appellant and sentenced him to death. The conviction and sentence were confirmed by the High Court.

In appeal to this Court, it was contended that the belated appointment of counsel deprived the appellant of adequate legal aid and that he would be deprived of his life in breach of his fundamental right under Art. 21.

HELD : The right on which the accused based his claim is based on r. 37 of the General Rules (Criminal) 1957, promulgated by the High Court in exercise of its powers under Art. 227 of the Constitution and s. 554 of the Criminal Procedure Code. Therefore, the rule is a statutory rule and forms part of the procedure for trial of criminal cases. Its intention is that no accused person should remain unrepresented by a lawyer if he is being tried on a charge for which a capital sentence can be awarded. Notwithstanding the use of the word 'may', considering the purpose of the rule, it must be interpreted as laying down a mandatory direction to the Court to engage a counsel if the conditions laid down therein are satisfied. As the rule supplements the provision contained in s. 304 Cr. P.C. under which such appointment of counsel is not mandatory, it is not in conflict with the section. The last clause of the rule requires that the counsel appointed under the Rules shall be furnished with necessary papers free of cost and allowed *sufficient time* to prepare for the defence. [35D—E; 36—E; 38, D, E—F]

In the present case, when the counsel was appointed just before the trial started, there was a failure to comply with the requirements of the rule. Even though counsel did not ask for time it was the duty of the court, under the rule, to grant sufficient time to counsel, and, when sufficient time was not granted to counsel to prepare the defence, prejudice must necessarily be inferred and the trial held vitiated. Further, as the word 'law' in Art. 21 includes subordinate legislation promulgated by delegated authority there is a breach of Art. 21, and therefore the question of prejudice does not arise. [38C; 40B. G—H; 41B]

Maqbool Hussain v. *State of Bombay*, [1953] S.C.R. 730, *Pandit M. S. M. Sharma* v. *Shri Sri Krishna Sinha*, [1959] Supp. 1 S.C.R. 806 and *Makhan Singh* v. *State of Punjab*, [1964] 4 S.C.R. 797, followed.

A *A. K. Gopalan* v. *State of Madras*, [1950] S.C.R. 88, 111-112; *Janardan Reddy* v. *State of Hyderabad*, [1951] S.C.R. 344 and *Tara Singh* v. *The State*, [1951] S.C.R. 729, explained.

Re : *Alla Nageswara Rao*, A.I.R. 1957 A.P. 505 and *Mathai Thommen* v. *State* A.I.R. 1959 Kerala 241, referred to.

B CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 25 of 1968.

Appeal by special leave from the judgment and order, dated July 20, 1967 of the Allahabad High Court in Cr. A. No. 469 of 1967 and Ref. No. 21 of 1967.

K. K. Luthra, for the appellant.

C *O. P. Rana*, for the respondent.

The Judgment of the Court was delivered by

Bhargava, J. The appellant Bashira was convicted by the Court of Session for having committed the murder of his own wife Saira *alias* Mahobawali with an axe inside his house at about D 11 a.m. on 22nd August, 1966. The First Information Report of this incident was lodged on the same day at 5-15 p.m. by Naziran, the mother of the appellant, who went to the Police Station accompanied by the Chaukidar. The investigation of the case began on 23rd August, 1966. The appellant surrendered himself in Court on 24th August, 1966. On 15th September, E 1966, the Challan was presented in the Court of the Magistrate who recorded some evidence, proceeded in accordance with section 207A of the Code of Criminal Procedure, and then, on 28th November, 1966, committed the appellant for trial to the Court of Session for the offence of committing the murder of his wife punishable under section 302 of the Indian Penal Code. The Temporary Civil & Sessions Judge of Hamirpur fixed 28th F February, 1967 as the date for starting the actual trial of the case. On that day, before beginning the trial, he appointed one Sri Sirish Chandra, Advocate, as *amicus curiae* counsel to represent the appellant. He amended the charge which was read out to the appellant who pleaded not guilty. Thereafter, on that very day, evidence of two principal prosecution witnesses was recorded. G The first witness was Smt. Naziran, the mother of the appellant, who had lodged the F.I.R., and the second witness was Khan Bahadur, son of the appellant, who was the sole eye-witness of the incident of murder. The remaining evidence was recorded on 1st March, 1967, on which date the appellant was also examined under section 342, Cr. P.C. The appellant stated that H he would not produce any defence. A joint application of counsel for parties was presented on that day requesting the court to make a local inspection and 12th March, 1967 was fixed for local inspection. The Temporary Sessions Judge in that order

directed that a suitable conveyance should be arranged for him as he had no conveyance of his own. On 8th March, 1967, the Public Prosecutor gave it in writing that no conveyance could be arranged and, therefore, prayed that the local inspection may be cancelled. The Judge cancelled the direction for local inspection and then fixed 10th March, 1967 for arguments. On that day, Sri Shukla, counsel representing the appellant presented an application praying for the recall of P. W. 2 Khan Bahadur for further cross-examination on the ground that there had been an omission in drawing his attention to a contradiction with his statement recorded in the Court of the Committing Magistrate. He added that there were many other things to be seen and made this request in the interest of justice. The Judge held that the ground for recall that the witness could not be cross-examined effectively would hardly justify the recall of the witness for further cross-examination. He further expressed his opinion that, even if the statement attributed to the witness as having been made by him in the Court of the Committing Magistrate is brought on the record, it would not help the appellant to any appreciable degree in his defence. On these grounds, the application was rejected. Arguments were then heard on the same day and judgment was delivered on 13th March, 1967, convicting the appellant for the offence of murder under s. 302, I.P.C. and sentencing him to death. The appellant appealed in the High Court of Allahabad and the Tempy. Sessions Judge also made a reference for confirmation of the sentence of death. The High Court dismissed the appeal, accepted the reference and confirmed the sentence of death. The appellant has now come up to this Court against that judgment of the High Court in appeal by special leave.

In this case, the principal ground urged on behalf of the appellant raises an important question of law. Learned counsel appearing for the appellant emphasised the circumstance that the *amicus curiae* counsel to represent the appellant was appointed by the Sessions Judge on the 28th February, 1967, just when the trial was about to begin and this belated appointment of the counsel deprived the appellant of adequate legal aid, so that he was unable to defend himself properly. It was urged that the procedure adopted by the Court was not in accordance with law, so that, if the sentence of death is carried out, the appellant will be deprived of his life in breach of his fundamental right under Article 21 of the Constitution which lays down that no person shall be deprived of his life or personal liberty, except according to procedure established by law.

The main procedure for trial of a criminal case is laid down in the Code of Criminal Procedure and, in this case, there is no grievance that the procedure laid down therein was not followed by the Court of Session. The grievance, however, is that there

A are provisions supplementing the procedure laid down by the Criminal Procedure Code and the course adopted by the Court of Session was in breach of these supplementary rules. Reference was made to Rule 37 in Chapter V of the General Rules (Criminals), 1957 (hereinafter referred to as "the Rules") promulgated by the High Court of Allahabad in exercise of its powers under B Article 227 of the Constitution and section 554 of the Code of Criminal Procedure. These Rules were published under Notification No. 241/A/VIII-a-I, dated September 4, 1956 in the Supplement to the Government Gazette of Uttar Pradesh, dated 3rd November, 1956. The notification clearly mentions the powers under which the High Court promulgated the Rules and also con- C tains a clear recitation that the Rules were being published with the previous approval of the Government of Uttar Pradesh. We have mentioned these details, because at one stage it was urged by learned counsel appearing for the respondent State Government that R. 37 of the Rules had no statutory force at all. The notification in the Gazette makes it perfectly clear that these Rules were all framed by the High Court in exercise of the powers con- D ferred on it by the Constitution or by the Code of Criminal Procedure. The Rules are, therefore, clearly statutory Rules and, as such, they form a part of the procedure for trial of criminal cases by courts subordinate to the High Court of Allahabad, in addition to the procedure laid down by the Code of Criminal Procedure.

E Rule 37 of the Rules is as follows :—

"In any case which comes before a Court of Session, the court may engage counsel to defend the accused person if—

(a) the charge against him is such that a capital F sentence is possible, and

(b) it appears that he has not engaged counsel and is not possessed of sufficient means to do so.

To enable the Sessions Court to arrive at a decision as regards the second condition in the preceding paragraph, the committing Magistrate shall in such cases G make enquiries from the accused at the time of commitment and after making such other enquiries as may be necessary, report within a month of the commitment order to the court to which the commitment is made whether the accused is possessed of sufficient means to engage counsel. Each case must be decided on its H merits and no hard and fast rule as to sufficiency of means should be applied. The Sessions Court in making its decision shall not be bound by the report of the committing magistrate.

Counsel appointed under this rule shall be furnished with the necessary papers free of cost and allowed sufficient time to prepare for the defence."

On the basis of the language used in this Rule, learned counsel for the State urged that this Rule should not be held to be mandatory, but only a Rule enabling a Court to engage a counsel to defend a person accused of an offence punishable with capital sentence. It is true that the word used is "may" in this Rule, but, in our opinion, the purpose of the Rule will be completely defeated if we were to accept this submission. It appears that the word "may" was used only because there are certain conditions laid down, on the existence of which depends the appointment of the *amicus curiae* counsel to represent the accused. The principal pre-condition is that the accused has himself not engaged a counsel and is not possessed of sufficient means to do so. The Rule adds that no hard and fast rule as to the sufficiency of means should be applied when the court has to decide whether an *amicus curiae* counsel should be provided at the cost of the Government, and each case must be decided on its merits. It was because of these conditions that the word "may" was used in the Rule; but the intention of the Rule is perfectly clear that no accused person should remain totally unrepresented by a lawyer, if he is being tried on a charge for which a capital sentence can be awarded. Considering the purpose of this Rule, we hold that the word "may" in this Rule must be interpreted as laying down a mandatory direction to the Court to engage a counsel, if the conditions laid down in the Rule are otherwise satisfied.

In this connection, learned counsel for the State drew our attention to two decisions of this Court reported in *Janardan Reddy and Others* v. *The State of Hyderabad and Others and connected Appeals*(1), and *Tara Singh* v. *The State*(2). In the first of these two cases, this Court was considering the effect of section 271 of the Hyderabad Criminal Procedure Code read along with the Rules and Circular Orders issued by the Hyderabad High Court and, in that connection, held that, though s. 271 of the Hyderabad Criminal Procedure Code corresponds to section 340 of the Indian Criminal Procedure Code, these provisions did not lay down as a rule of law that in every capital sentence case, where the accused is unrepresented, the trial should be held to be vitiated. In the second case, this Court examined the scope of the right conferred on an accused by s. 340(1) of the Code of Criminal Procedure and held that it does not extend to a right in an accused person to be provided with a lawyer by the State or by the Police or by the Magistrate. The privilege conferred by this provision only gave a right to an accused to be represented by a counsel if he wanted to engage one himself or to

(1) (1951) S.C.R. 344. (2) [1951] S.C.R. 729.

A get his relations to engage one for him. The only duty cast on the Magistrate is to afford him the necessary opportunity for this purpose. It appears to us that neither of these two cases is applicable to the case before us, because, in those cases, no question arose of taking into account a provision laying down procedure for trial of cases such as is contained in r. 37 of the Rules.
B These cases, no doubt, show that s. 340, Cr. P.C. by itself, does not cast any duty on a court to provide a counsel at State expense even when the offence triable is punishable with death; but that is immaterial, because the right, on which the appellant is basing his claim, is sought to be justified under r. 37 of the Rules.

Learned counsel for the State, in view of these two decisions,
C urged before us that we should hold that r. 37 of the Rules was void as contravening the principle laid down by s. 340, Cr. P.C., explained in the two cases referred to above. We are unable to appreciate this argument. Section 340, Cr. P.C., does not prohibit the appointment of a counsel by the Court at State expense, though it does not prescribe such an appointment as a mandatory
D direction to be carried out by the Court. Rule 37 of the Rules only supplements the provision contained in s. 340, Cr. P.C., and is, therefore, in no way in conflict with s. 340, Cr. P.C., and it cannot be held that it is void on any such ground.

We have already quoted above r. 37 of the Rules in full. The grievance on behalf of the appellant is not that no counsel
E at all was engaged to represent him in the Court of Session; but non-compliance with the Rule is urged on the ground that there was breach of the last clause of that Rule. That clause requires that the counsel appointed under the Rules shall be furnished with necessary papers free of cost and allowed sufficient time to prepare for the defence. In this case, the facts mentioned by us
F earlier clearly show that Sri Shukla was appointed counsel for the appellant on 28th February, 1967, which was the date fixed for starting the trial, and the trial was, in fact, started after his appointment on that very day. Thus, sufficient time was not allowed to him to prepare for the defence of the appellant. At one stage, information was attempted to be given to this Court on behalf of the State Government on the basis of entries in the
G register maintained for appointment of *amicus curiae* counsel that, in fact, Sri Shukla had been appointed to represent the appellant on 18th February 1967. That register was sent for by us and it appears that this position was taken on behalf of the State Government, because, at one place in that register, the date showing appointment of Sri Shukla as counsel for the appellant was
H so entered that it could be read as 18th February 1967 as well as 28th February 1967. There were, however, other entries in the register which clarified the position and indicated that even that date must be read as 28th February 1967 and learned coun-

sel for the State conceded that the appointment of the *amicus curiae* counsel was, in fact, made on 28th February, 1967. A

There is nothing on the record to show that, after his appointment as counsel for the appellant, Sri Shukla was given sufficient time to prepare the defence. The order-sheet maintained by the Judge seems to indicate that, as soon as the counsel was appointed, the charge was read out to the accused and, after his plea had been recorded, examination of witnesses began. The counsel, of course, did his best to cross-examine the witnesses to the extent it was possible for him to do in the very short time available to him. It is true that the record also does not contain any note that the counsel asked for more time to prepare the defence, but that, in our opinion, is immaterial. The Rule casts a duty on the court itself to grant sufficient time to the counsel for this purpose and the record should show that the Rule was complied with by granting him time which the court considered sufficient in the particular circumstances of the case. In this case, the record seems to show that the trial was proceeded with immediately after appointing the *amicus curiae* counsel and that, in fact, if any time at all was granted, it was nominal. In these circumstances, it must be held that there was no compliance with the requirements of this Rule. B C D

In this connection, we may refer to the decisions of two of the High Courts where a similar situation arose. In *Re : Alla Nageswara Rao, Petitioner*(1) reference was made to Rule 228 of the Madras Criminal Rules of Practice which provided for engaging a pleader at the cost of the State to defend an accused person in a case where a sentence of death could be passed. It was held by Subba Rao, Chief Justice as he then was, speaking for the Bench, that : E

> "a mere formal compliance with this Rule will not carry out the object underlying the rule. A sufficient time should be given to the advocate engaged on behalf of the accused to prepare his case and conduct it on behalf of his client. We are satisfied that the time given was insufficient and, in the circumstances, no real opportunity was given to the accused to defend himself." F G

This view was expressed on the basis of the fact found that the advocate had been engaged for the accused two hours prior to the trial. In *Mathai Thommen* v. *State*(2), the Kerala High Court was dealing with a Sessions trial in which the counsel was engaged to defend the accused on 2nd August, 1958, when the trial was posted to begin on 4th August, 1958, showing that H

(1) A.I.R. 1957 A.P. 505. (2) A.I.R. 1959 Kerala 241.

A barely more than a day was allowed to the counsel to get prepared and obtain instructions from the accused. Commenting on the procedure adopted by the Sessions Court, the High Court finally expressed its opinion by saying :

> "Practices like this would reduce to a farce the
> B engagement of counsel under rule 21 of the Criminal Rules of Practice which has been made for the purpose of effectively carrying out the duty cast on courts of law to see that no one is deprived of life and liberty without a fair and reasonable opportunity being afforded to hm to prove his innocence. We consider that in cases like this counsel should be engaged at least some
> C 10 to 15 days before the trial and should also be furnished with copies of the records."

In our opinion, no hard and fast rule can be laid down as to the time which must elapse between the appointment of the counsel and the beginning of the trial; but, on the circumstances of each
D case, the Court of Session must ensure that the time granted to the counsel is sufficient to prepare for the defence. In the present case, when the counsel was appointed just before the trial started, it is clear that there was failure to comply with the requirements of the rule of procedure in this behalf.

Learned counsel for the State urged before us that we should
E not hold that the award of the sentence of death to the appellant in this case is in breach of the fundamental right conferred by Art. 21 of the Constitution, because, he submitted, r. 37 of the Rules was not enacted by any legislature and, consequently, it should not be held to be a part of the procedure established by law. In this connection, he relied on the view expressed by
F Kania, C.J., in *A. K. Gopalan v. The State of Madras*(1), where he held :—

> "No extrinsic aid is needed to interpret the words of article 21, which in my opinion, are not ambiguous. Normally read, and without thinking of other Constitutions, the expression 'procedure prescribed by law'
> G must mean procedure prescribed by the law of the State."

This interpretation was given in order to exclude from the scope of Art. 21 rules of natural justice which are not incorporated in any law. Proceeding further, he dealt with the language of Art. 31 where the expression used is "by authority of law" and held :

> H "It is obvious that in that clause 'law' must mean enacted law".

(1) [1950] S.C.R. 88, 111-12.

We do not think that, in expressing these views, the learned Chief Justice intended to explain the full scope of the word "law" as used in Art. 21. What he was concerned with was to examine whether rules of natural justice could also be covered by that word in this article and he held that this will not be justified. In later cases, the Court has clarified the position and has held that the word "law" in Art. 21 includes subordinate legislation not enacted by the legislature, but promulgated by the delegated authority in exercise of its statutory powers. Thus, in *Maqbool Hussain* v. *The State of Bombay & Connected Cases*(1), the Punjab Communist Detenus Rules, 1950 framed by the Government of Punjab under section 4(a) of the Preventive Detention Act, 1950 were held to be covered by the word "law". In *Pandit M. S. M. Sharma* v. *Shri Sri Krishna Sinha and Others*,(2) Rules made by the Legislature under Arts. 118(1) and 208(1) and the privileges of each House under Arts. 105(3) and 194(3) were held to be law justifying deprivation of personal liberty guaranteed by Art. 21. In the case of *Makhan Singh* v. *State of Punjab & Connected Appeals*(3), the Defence of India Rules made by the Central Government under section 3 of the Defence of India Ordinance, 1962 were held to be "law" for purposes of Article 21. Thus, this Court has clearly laid it down that Rules made by a subordinate legislative authority in exercise of its delegated power of legislation granted by the Constitution or a Statute enacted by the legislature are "law" for purposes of Art. 21, though, of course, it is always open to the person affected to challenge the validity of those Rules. In the present case, we have already held that r. 37 of the Rules has been framed in exercise of the powers of the High Court under Art. 227 of the Constitution and section 554 of the Code of Criminal Procedure, and is a valid Rule. In these circumstances, the conviction of the appellant in a trial held in violation of that Rule and the award of sentence of death will result in the deprivation of his life in breach of the procedure established by law.

Learned counsel also urged that we should not hold the conviction and sentence to be void when it is not shown that there was any prejudice to the appellant by the failure of the court to observe the procedure laid down by the Rule. In our opinion, in such a case, the question of prejudice does not arise when a citizen is deprived of his life without complying with the procedure prescribed by law. We may, however, add that, in this case, the facts indicate that there was, in fact, prejudice to the accused caused by the non-compliance with the requirement of r. 37 of the Rules. The two principal witnesses, Naziran and Khan Bahadur, were examined immediately after the appointment of

(1) [1953] S.C.R. 730. (2) [1959] Supp. 1 S.C.R. 806.
(3) [1964] 4 S.C.R. 797.

A *amicus curiae* counsel and the application presented on behalf of the accused on 10th March, 1967, to which we have referred above clearly shows that the counsel felt that he had not been able to cross-examine at least the sole eye-witness Khan Bahadur properly. That is why he presented an application for recall of that witness. It is obvious that, in rejecting that application, the Sessions Judge
B failed to notice that the counsel had been appointed on the very day when that witness was examined and sufficient time had not been granted to him to prepare the defence. In fact, we feel that, in such cases, if sufficient time is not granted to the counsel to prepare defence, prejudice must necessarily be inferred and the trial will be vitiated.

C As a consequence, we set aside the conviction and sentence of the appellant. Since we are holding that the conviction is void because of an error in the procedure adopted at the trial, we direct that the appellant shall be tried afresh for this charge after complying with the requirements of law, so that the case is remanded to the Court of Session for this purpose.

D V.P.S. *Appeal allowed and retrial order.*