

# Legal Aid to Accused – Not A Mere Formality

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**Abstract**—The Supreme Court has recently passed twelve guidelines for legal aid to accused who stand trial for major crimes. This ruling in *Ashok v. State of UP* is a trend setter and goes to show how seriously the Court, especially the Apex Court looks at legal aid for the accused. It is no longer a procedural formality but is a right that forms part of Article 21 of the Constitution of India. Focus is now on good quality of legal aid and not as a mere technicality. This development augurs well for Indian criminal jurisprudence which is founded, like other civilised systems, on the adage that every accused is presumed innocent till he is tried and found guilty by a competent court. Legal aid plays a major role here and helps the innocent while simultaneously building faith in the justice and criminal law systems of the country.

**Index Terms**—Legal aid, accused, representation, amicus curae, prosecution, advocates

## I. THE RULING IN ASHOK'S CASE

In *Ashok v. State of U.P.*,<sup>1</sup> the Supreme Court passed the following twelve directions:

1. "It is the duty of the court to ensure that proper legal aid is provided to an accused;
2. When an accused is not represented by an advocate, it is the duty of every Public Prosecutor to point out to the court the requirement of providing him free legal aid. The reason is that it is the duty of the Public Prosecutor to ensure that the trial is conducted fairly and lawfully;
3. Even if the court is inclined to frame charges or record examination-in-chief of the prosecution witnesses in a case where the accused has not engaged any advocate, it is incumbent upon the Public Prosecutor to request the court not to proceed without offering legal aid to the accused;
4. It is the duty of the Public Prosecutor to assist the trial court in recording the statement of the accused under Section 313 CrPC. If the court omits to put any material circumstance brought on

record against the accused, the Public Prosecutor must bring it to the notice of the court while the examination of the accused is being recorded. He must assist the court in framing the questions to be put to the accused. As it is the duty of the Public Prosecutor to ensure that those who are guilty of the commission of offence must be punished, it is also his duty to ensure that there are no infirmities in the conduct of the trial which will cause prejudice to the accused;

5. An accused who is not represented by an advocate is entitled to free legal aid at all material stages starting from remand. Every accused has the right to get legal aid, even to file bail petitions;
6. At all material stages, including the stage of framing the charge, recording the evidence, etc. it is the duty of the court to make the accused aware of his right to get free legal aid. If the accused expresses that he needs legal aid, the trial court must ensure that a legal aid advocate is appointed to represent the accused;
7. In all the cases where there is a possibility of a life sentence or death sentence, only those learned advocates who have put in a minimum of ten years of practice on the criminal side should be considered to be appointed as Amicus Curiae or as a legal aid advocate. Even in the cases not covered by the categories mentioned above, the accused is entitled to a legal aid advocate who has good knowledge of the law and has an experience of conducting trials on the criminal side. It would be ideal if the Legal Services Authorities at all levels give proper training to the newly appointed legal aid advocates not only by conducting lectures but also by allowing the newly appointed legal aid advocates to work with senior members of the Bar in a requisite number of trials;<sup>2</sup>
8. The State Legal Services Authorities shall issue directions to the Legal Services Authorities at all

levels to monitor the work of the legal aid advocate and shall ensure that the legal aid advocates attend the court regularly and punctually when the cases entrusted to them are fixed;

9. It is necessary to ensure that the same legal aid advocate is continued throughout the trial unless there are compelling reasons to do so or unless the accused appoints an advocate of his choice;
10. In the cases where the offences are of a very serious nature and complicated legal and factual issues are involved, the court, instead of appointing an empanelled legal aid advocate, may appoint a senior member of the Bar who has a vast experience of conducting trials to espouse the cause of the accused so that the accused gets best possible legal assistance;
11. The right of the accused to defend himself in a criminal trial is guaranteed by Article 21 of the Constitution of India. He is entitled to a fair trial. But if effective legal aid is not made available to an accused who is unable to engage an advocate, it will amount to infringement of his fundamental rights guaranteed by Article 21;
12. If legal aid is provided only for the sake of providing it, it will serve no purpose. Legal aid must be effective. Advocates appointed to espouse the cause of the accused must have good knowledge of criminal laws, law of evidence and procedural laws apart from other important statutes. As there is a constitutional right to legal aid, that right will be effective only if the legal aid provided is of a good quality. If the legal aid advocate provided to an accused is not competent enough to conduct the trial efficiently, the rights of the accused will be violated."

## II. CONSEQUENCE OF THESE DIRECTIONS

These guidelines have reiterated that quality of the legal aid should be good and should not only be on paper to satisfy procedural requirements. It is heartening to note that the Apex Court is taking legal aid seriously and directing all the legal aid bodies to follow its directions to the tee. This augurs well for our justice system where undertrials still outnumber the convicted. It is hoped that these directions are implemented in right earnest and justice is not only seen to be done but is actually done for the accused.

After all the fundamental principle of any sound legal system is that everyone accused is presumed innocent till proven guilty by a competent court after a fair trial. India is no exception to this principle and this ruling goes well with our fundamental structure of criminal jurisprudence.

## III. LEGAL AID AND EFFECTIVE REPRESENTATION

"It is by far now well settled for a legal proposition that it is the duty of the court to see and ensure that an accused put on a criminal trial is effectively represented by a defence counsel, and in the event on account of indigence, poverty or illiteracy or any other disabling factor, he is not able to engage a counsel of his choice, it becomes the duty of the court to provide him appropriate and meaningful legal aid at the State expense. What is meant by the duty of the State to ensure a fair defence to an accused is not the employment of a defence counsel for namesake. It has to be the provision of a counsel who defends the accused diligently to the best of his abilities. While the quality of the defence or the calibre of the counsel would not militate against the guarantee to a fair trial sanctioned by Articles 21 and 22, respectively, of the Constitution, a threshold level of competence and due diligence in the discharge of his duties as a defence counsel would certainly be the constitutional guaranteed expectation. The presence of counsel on record means effective, genuine and faithful presence and not a mere farcical, sham or a virtual presence that is illusory, if not fraudulent."

Section 304 CrPC<sup>3</sup> refers to legal aid to the accused at State expenses in certain cases which reads thus:

"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 (1);

(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.”

The Court in *Kishore Chand v. State of H.P.*<sup>4</sup> held thus:

“Though Article 39-A of the Constitution provides fundamental rights to equal justice and free legal aid and though the State provides *Amicus Curiae* to defend the indigent accused, he would be meted out with unequal defence if, as is common knowledge the youngster from the bar who has either a little experience or no experience is assigned to defend him. It is high time that Senior Counsel practising in the court concerned, volunteer to defend such indigent accused as a part of their professional duty. If these remedial steps are taken and an honest and objective investigation is done, it will enhance a sense of confidence of the public in the investigating agency.”

The Court in *Zahira Habibullah Sheikh (5) v. State of Gujarat*<sup>5</sup>, has observed “Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice. The operative principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involves a delicate judicial balancing of competing interests in a criminal trial : the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences. 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. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an over hasty stage-managed, tailored and partisan trial. The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice.”

In *Ranchod Mathur Wasawa v. State of Gujarat*,<sup>6</sup> it is observed that, the Sessions Judge should view with sufficient seriousness the need to appoint State counsel for undefended accused in grave cases. Indigence should never be a ground for denying fair trial or equal justice. Therefore, particular attention should be paid to appoint competent advocates, equal to handling the complex cases, not patronising gestures to raw entrants to the Bar. Sufficient time and complete papers should also be made available to the advocate chosen so that he may serve the cause of justice with all the ability at his command, and the accused also may feel confident that his counsel chosen by the court has had adequate time and material to defend him properly.

In *Ramanand v. State of U.P.*,<sup>7</sup> the Court observed “This case provides us an opportunity to remind the learned District and Sessions Judges across the country conducting Sessions trials, more particularly relating to serious offences involving severe sentences, to appoint experienced lawyers who had conducted such cases in the past. It is desirable that in such cases Senior Advocate practising in the trial court shall be requested to conduct the case himself or herself on behalf of the undefended accused or at least provide good guidance to the advocate who is appointed as Amicus Curiae or an advocate from the legal aid panel to defend the case of the accused persons. Then only the effective and meaningful legal aid would be said to have been provided to the accused.”

The Court in *M.H. Hoskot v. State of Maharashtra*<sup>8</sup> had emphasised upon the need of securing the competent and efficient legal services for a prisoner who is standing trial in a criminal case or for the commission of alleged offence. He Court ruled that “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: [ Earl Johnson, Jr., *Justice and Reform*, p. 11.]

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?

Gideon's trumpet has been heard across the Atlantic. Black, J. there observed: (*Gideon case* [*Proccessual Justice to the People*, (May 1973) p. 69 [Gideon v. Wainwright,<sup>9</sup> ]

‘9. ... Not only those precedents but also reason and reflection require us to recognize 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 trial in some countries, but it 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 idea cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.’

The Court went on to observe “The American Bar Association has upheld the fundamental premise that counsel should be provided in the criminal proceedings for offences *punishable by loss of liberty*, except those types of offences for which such punishment is not likely to be imposed. Thus, in America, strengthened by cases, counsel for the accused in the more serious class of cases which threaten a person with imprisonment is regarded as an essential component of the administration of criminal justice and as part of procedural fair play. This is so without regard to the sixth amendment because lawyer participation is ordinarily an assurance that deprivation of liberty will not be in violation of procedure established by law. In short, it is the warp and woof of fair procedure in a sophisticated, legalistic system plus lay illiterate indigents aplenty. The Indian socio-legal milieu makes free legal service, at trial and higher levels, an imperative processual piece of

criminal justice where deprivation of life or personal liberty hangs in the judicial balance.”

#### IV. CONCLUSION

Thus, it can be seen that the Supreme Court has always been insisting on quality over procedural formality requirements when it comes to legal aid. Quality remains a major challenge till date and while legal aid is indeed provided the quantity and quality of such

assistance leaves a lot to be desired. There have to be urgent reforms in the sector. The Legal Services Authorities Act, 1987 as a statute after being amended significantly in 2023 by bringing in prelitigation mediation and settlement, suffers from no major infirmity but there is a great slip between the cup and the lip when it comes to implementation on the ground level. This is one of the major challenges that has to be addressed by all the stakeholders.

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<sup>1</sup> (2025) 2 SCC 381.

<sup>2</sup> As held in *Anokhilal v. State of M.P.*, (2019) 20 SCC 196.

<sup>3</sup> Now Section 341 of BNSS, 2023.

<sup>4</sup> *Kishore Chand v. State of H.P.*, (1991) 1 SCC 286.

<sup>5</sup> *Zahira Habibullah Sheikh (5) v. State of Gujarat*, (2006) 3 SCC 374.

<sup>6</sup> *Ranchod Mathur Wasawa v. State of Gujarat*, (1974) 3 SCC 581.

<sup>7</sup> (2023) 16 SCC 510.

<sup>8</sup> *M.H. Hoskot v. State of Maharashtra*, (1978) 3 SCC 544,

<sup>9</sup> *Gideon v. Wainwright*, 9 L Ed 2d 799: 372 US 335.