

HOW TO GET LEGAL AID IN CRIMINAL TRIAL?

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INTRODUCTION:

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.

This article is an interpretative tool for Article 39A of Indian constitution.

Legal aid is the provision of assistance to people otherwise unable to afford legal representation and access to the court system. Legal aid is regarded as central in providing access to justice by ensuring equality before the law, the right to counsel and the right to a fair trial. ²

The Judgment of the Court was delivered by BHAGWATI, C.J. This appeal by special leave raises a question of considerable importance relating to the administration of criminal justice in the country. The question is whether an accused who on account of his poverty is unable to afford legal representation for himself in a trial involving possibility of imprisonment imperiling his personal liberty, is entitled to free legal aid at State cost and whether it is obligatory on him to make an application for free legal assistance or the Magistrate or the Sessions Judge trying him is bound to inform him that he is entitled to free legal aid and inquire from him whether he wishes to have a lawyer provided to him at State cost: if he is not so informed and in consequence he does not apply for free legal assistance and as a result he is not represented by any lawyer in the trial and is convicted, is the conviction vitiated and liable to be set aside?

This question is extremely important because we have almost 50% population which is living below the poverty line and around 70% is illiterate and large sections of people just do not know

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² Wikipedia.org

that if they are unable to afford legal representation in a criminal trial, they are entitled to free legal assistance provided to them at State cost.³

If a prisoner sentenced to imprisonment, is virtually unable to exercise his constitutional and statutory right of appeal, inclusive of special leave to appeal, for want of legal assistance, there is implicit in the Court under Art. 142, read with Arts. 21, and 39A of the Constitution, power to assign counsel for such imprisoned individual for doing complete justice.

This is a necessary incident of the right of appeal conferred by the Code and allowed by Art. 136 of the Constitution. The inference is inevitable that this is a State's duty and not government's charity. Equally affirmative is the implication that while legal services must be free to the beneficiary, the lawyer himself has to be reasonably remunerated for his services.

Surely, the profession has a public commitment to the people but mere philanthropy of its members yields short mileage in the long run. Their services, especially when they are on behalf of the State, must be paid for. Naturally, the State concerned must pay a reasonable sum that the court may fix when assigning counsel to the prisoner.

Of course, the court may judge the situation and consider from all angles whether it is necessary for the ends of justice to make available legal aid in the particular case. In every country where free legal services are given it is not done in all cases but only where public justice suffers otherwise. That discretion resides in the court.⁴ Legal aid is paid through three different schemes:

- advice and assistance
- civil legal aid
- criminal legal aid

let us see about the criminal aspect in regard to legal aid. "Right of person against whom proceedings are instituted to be defended. Any person accused of an offence before a Criminal

³ 1986 AIR 991, 1986 SCR (1) 590.

⁴ Madhav Hayawadanrao Hoskot vs State Of Maharashtra on 17 August, 1978-Equivalent citations: 1978 AIR 1548, 1979 SCR (1) 192.

Court, or against whom proceedings are instituted under this Code, may of right be defended by a pleader of his choice."

It is also contended that the Criminal Procedure Code has made the specific provision that where an accused is neither represented by a pleader nor can afford to engage a lawyer, a duty is cast on the Court to provide the legal assistance to such accused by assigning a pleader, for his defence at the expense of the State. Developing the argument further, on the strength of the provisions of Sections 303 and 304 Cr.P.C., it is also contended that the Court cannot compel an accused to seek his defence through a lawyer, who is not of his choice.⁵

LEGAL AID TO ACCUSED:

Article 6(3)(c) European Convention on Human Rights: Everyone charged with a criminal offence has the following minimum rights: ...To defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

Legal aid system does not cover the criminal cases. In criminal cases, the system has been structured differently. You can request legal aid in regular courts (civil courts) and administrative courts when you file a case or when a case is filed against you.⁶ Legal aid will help you only for private law and administrative cases. A different procedure has been adopted in criminal cases. If you are the suspect of a crime that has a lower limit of more than 5 years of imprisonment, a lawyer will be assigned for your case without your request and; with your request, if you are not able to select a lawyer. Furthermore, the state assigns a lawyer for the deaf and speech-disabled and the suspects under 18.

Section 304, CrPC- 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.

⁵Tehsiladar singh v. state of M.P

⁶ <http://www.hukukiyardim.gov.tr>

(2) The High Court may, with the previous approval of the State Government, make rules 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 fees 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 Courts of Session.⁷

Hon'ble Supreme Court in the case of **Zahira Habibullah Sheikh & Anr v State Of Gujarat** has held that, "the principle of fair trial now informs and energizes many areas of the law. It is reflected in numerous rules and practices.... fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated

In **re Sundaram Ayyar, ILR 55 Mad 256 : (AIR 1931 Mad 775)**. In that case, the decision in 6 Bom L.R. 361 was followed and it was held that when a Sessions Judge thinks that the jury had, by committing an error of law, committed an error of judgment but not that they had delivered a verdict, which they did not intend to deliver, he cannot address another charge to the jury on the law and request them to reconsider their verdict in the light of the same, but should, if he discharged with the verdict of the jury, submit the case to the High Court under Section 307 Criminal Procedure Code.

It was observed in the same case that Section 304 Criminal Procedure Code has no application where there is no accident or mistake in the delivery of the verdict and the mistake lies in the misunderstanding of the law by the jury. For the reasons, which I have already given, it seems to us, however, that where a verdict of the jury obviously appears to be due to a misunderstanding

⁷ Criminal Procedure Code, 1973.

or mistake of law, the Sessions Judge can, under Section 304, Criminal Procedure Code, draw the attention of the jury to that mistake.

"It is not in our knowledge and learned counsel appearing in the case are also unaware that any rules have been framed by the High Court with the previous approval of the State Government under Section 304(2) of the Code of Criminal Procedure. Probably no such rules have been framed. There are some rules framed for payment of fee and selection of lawyers who appeared on behalf of legal aid committees, but whether they are statutory rules or not, is not known."

Apparently, the said Division Bench was not made aware of "Legal Aid to Poor Accused Rules 1976" framed in exercise of the powers conferred by sub-section (2) of Section 304, Criminal Procedure Code, by the High Court with the previous approval of the Government of Tamil Nadu. It was therefore that the learned Special Government Pleader submitted that the directions issued by the said Division Bench to the State Government, to pay Mr. Shankaran, a Senior Counsel of this Court, in the same way and as the same rate as the counsel for the prosecution cannot be held to have laid any uniform or rigid principle for universal acceptances, since the said Division Bench had no occasion to consider the rules framed under Section 304(2), Cr.P.C.⁸

Duty of the Court:

The further question which arises is as to whether the trial judge can remain content with steps taken by the police and the prosecution to secure presence of witnesses without anything more? On the aspect of the duty of the trial judge in ensuring the presence of the witnesses at the time of trial, we may usefully advert to the pronouncement of the Supreme Court reported at (2002) 1 SCC 655, **Shailendra Kumar v. State of Bihar** wherein it was held thus :

"9. In our view, in a murder trial it is sordid and repulsive matter that without informing the police station officer-in-charge, the matters are proceeded with by the court and by the APP and tried to be disposed of as if the prosecution has not led any evidence. From the facts stated above, it appears that the accused wants to frustrate the prosecution by unjustified means and it appears that by one way or the other the Additional Sessions Judge as well as the APP have not

⁸ T. suthendraja and another v. State of Tamil Nadu.

taken any interest in discharge of their duties. It was the duty of the Sessions Judge to issue summons to the investigating officer if he failed to remain present at the time of trial of the case. The presence of investigating officer at the time of trial is must. It is his duty to keep the witnesses present. If there is failure on the part of any witness to remain present, it is the duty of the court to take appropriate action including issuance of bailable/non-bailable warrants, as the case may be. It should be well understood that the prosecution cannot be frustrated by such methods and victims of the crime cannot be left in a lurch."

State-funded legal aid is therefore essential in ensuring the right to defence as recognized in international legal instruments and national constitutions around the world. The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems state that "legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law" and that "it is a foundation for the enjoyment of other rights, including the right to a fair trial, as a precondition to exercising such rights and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process".⁹

LEGAL AID AND CRIMINAL LAW:

Justice P.N. Bhagwati aptly stated that legal aid means providing an arrangement in the society which makes the machinery of administration of Justice easily accessible and in reach of those who have to resort to it for enforcement of rights given to them by law

In the case of Hussainara khatoon vs. State of Bihar, it was held that if any accused is not able to afford legal services then he has a right to free legal aid at the cost of the state.

1. **National Legal Services Authority (NALSA):** The NALSA is established by the Central Government and is the supreme body to provide free legal aid. It has been established under Section 3 of the Legal Services Authorities Act, 1987 which provides that the Central Government shall constitute a body to be called the National Legal

⁹ https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Model_Law_on_Legal_Aid.pdf

Services Authority to exercise the powers and perform the functions conferred on, or assigned to the Central Authority under the said Act.

2. **State Legal Services Authority:** Section 6 of the LSA Act provides for the power to State Government to constitute a body to be called the State Legal Services Authority to carry out functions assigned to the body by this Act.

3. **District Legal Services Authority:** The District Authority is established by the State Government in consultation with the Chief Justice of the concerned High Court of the State and that the Authority shall carry out such functions as conferred by the Act. It is established under Section 9 of the LSA Act.

4. **Supreme Court Legal Services Committee:** It is established under Section 3A of the LSA Act and is responsible to carry out such functions as given by the Central Authority.

5. **High Court Legal Services Committee:** This Committee is established under Section 8A of the LSA Act and is responsible to carry out functions as given by the State Authority.

6. **Taluk Legal Services Committee:** It is established under Section 11A of the LSA Act and its jurisdiction cover a Taluk/Mandal or a group of Taluks/Mandals..¹⁰

The police must inform the nearest Legal Aid Committee about the arrest of a person immediately after such arrest.(Sheela Barse V. State of Maharashtra)

The Magistrates and sessions judges must inform every accused who appears before them and who is not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal services at the cost of the State.

Failure to provide legal aid to an indigent accused, unless it was refused, would vitiate the trial. It might even result in setting aside a conviction and sentence. —(Suk Das Vs. Union Territory of Arunachal Pradesh (1986) 2 SCC 401; 1986 SCC (Cri) 166)¹¹

¹⁰ blog.ipleaders.in/procedure-for-legal-aid-in-criminal-matters

¹¹ www.indiankanoon.org

Where can you get legal services?

- a) Taluk Legal Services Committee which is in the premises of the Court in that Taluk
- b) District Legal Services Authority which is in the premises of the District Court in the District Headquarters
- c) The concerned State Legal Services Committee
- d) The High Court Legal Services Committee which is in the premises of the concerned High Court
- e) The Supreme Court Legal Services Committee for cases before the Supreme Court.

For applying free legal aid, one has to fill the application form, which is free- available from all District headquarters and all sub- divisional headquarters of each state. One can also send mail or letter in written form or make orally for assisting. You can also apply through online, which you can find out in NALSA official website. In order to attain free legal aid, one has to submit the income and identity proof document along with the affidavit.

As a recipient of free legal aid, you are entitled to: Payment of court fee, process fees and all other charges payable or incurred in connection with any legal proceedings; An Advocate in legal proceedings; Obtaining certified copies of orders and other documents in legal proceedings; Preparation of appeal documents, including printing and translation of documents in legal proceedings.

CONCLUSION:

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-s. (1) s. 304 of the Code of Criminal Procedure, 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 fulfillment 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 Art. 32 of the Constitution is maintainable.¹² (Lahiri, J.) observed in *Kuthu Goala* (supra) and *Gendra Brahma* (supra) that it is imperative for the Magistrates to explain to the accused his constitutional rights under Article 22(1) of the Constitution as well as the provisions of Section 303 of the Code about his right to consult a lawyer before recording any confession.

It has been held that even at the investigation stage, an indigent accused has a right to free legal aid.

The importance of legal aid to an indigent at the investigation stage and particularly when the accused is produced for making confession was highlighted in the aforesaid decisions.

It has been held that failure to provide free legal aid to an indigent is violative of the basic and fundamental norms of justice and no Court of Justice ought to act upon such confession. One of the ingredients of "fair procedure" is providing free legal aid to the prisoners who are indigent or otherwise disabled from securing legal aid.¹³

¹²Rajan v. Union of India.

¹³ 1982 CriLJ 216