Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 2310 of 2010
(arising out of S.L.P.(Crl.) No.6820 of 2008)

A.S. Mohammed Rafi .. Appellant(s)

-versus-

State of Tamil Nadu .. Respondent(s)
Rep. by Home Dept. & Ors.

WITH

CIVIL APPEAL NOS. 10304-10308 of 2010
(arising out of S.L.P.(C) Nos.26659-26663 of 2008)

J U D G M E N T

Markandey Katju, J.

CRIMINAL APPEAL NO. 2310 of 2010
(arising out of S.L.P.(Crl.) No.6820 of 2008)

1. Leave granted.

2. Heard learned counsel for the parties.

3. This appeal has been file against the impugned judgment and order of the High Court of Madras dated 29.4.2008 passed in Writ Petition No.716 of 2007.

4. The facts have been set out in the impugned judgment and order and hence we are not repeating the same here.

5. The High Court had appointed a Commission of Enquiry headed by Hon'ble Mr. Justice K.P. Sivasubramaniam, a retired Judge of the High Court of Madras which is on record.

6. During the course of the proceedings today, we had requested Mr. Altaf Ahmad, learned senior counsel, to assist us as Amicus Curiae in this case and we are grateful to Mr. Altaf Ahmad and we appreciate his assistance to us in this case.

7. As suggested by Mr. Altaf Ahmad, without going into the merits of the controversy, we direct that a sum of Rs.1,50,000/- (Rs. One Lakh and Fifty Thousand only) be given to the appellant by the State of Tamil Nadu as compensation. We have been informed that the appellant had already received a sum of Rs.50,000/- (Rs. Fifty Thousand only) and hence the remaining sum of Rs.1,00,000/- (Rs. One Lakh only) shall be paid by the State of Tamil Nadu to the appellant within a period of two months from today.

8. FIR No.2105 of 2006 dated 15.12.2006 on the file of B-4 Police Station (Law and Order), Race Course Police Station, Coimbatore city against the appellant stands quashed.

9. To put quietus to the matter FIR No.2106 of 2006 on the file of B-4 Police Station (Law and Order), Race Course Police Station, Coimbatore city against the police also stands quashed under Article 142 of the Constitution of India.

10. The impugned judgment and order of the High Court is substituted by our order. The appeal is disposed off accordingly.

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11. Leave granted.

12. Mr. P.H. Parekh, learned senior counsel, appears for the Coimbatore Bar Association.

13. We agree with the submission of Mr. P.H. Parekh that the observations made against the Coimbatore Bar Association in para 13 of the impugned judgment and order of the High Court should be quashed. We order accordingly.

14. Before parting with this case, we would like to comment upon a matter of great legal and constitutional importance which has caused us deep distress in this case. It appears that the Bar Association of

Coimbatore passed a resolution that no member of the Coimbatore Bar will defend the accused policemen in the criminal case against them in this case.

15. Several Bar Association all over India, whether High Court Bar Associations or District Court Bar Associations have passed resolutions that they will not defend a particular person or persons in a particular criminal case. Sometimes there are clashes between policemen and lawyers, and the Bar Association passes a resolution that no one will defend the policemen in the criminal case in court. Similarly, sometimes the Bar Association passes a resolution that they will not defend a person who is alleged to be a terrorist or a person accused of a brutal or heinous crime or involved in a rape case.

16. In our opinion, such resolutions are wholly illegal, against all traditions of the bar, and against professional ethics. Every person, however, wicked, depraved, vile, degenerate, perverted, loathsome, execrable, vicious or repulsive he may be regarded by society has a right to be defended in a court of law and correspondingly it is the duty of the lawyer to defend him.

17. We may give some historical examples in this connection.

18. When the great revolutionary writer Thomas Paine was jailed and tried for treason in England in 1792 for writing his famous pamphlet 'The Rights of Man' in defence of the French Revolution the great advocate Thomas Erskine (1750-1823) was briefed to defend him. Erskine was at that time the Attorney General for the Prince of Wales and he was warned that if he accepts the brief, he would be dismissed from office. Undeterred, Erskine accepted the brief and was dismissed from office.

19. However, his immortal words in this connection stand out as a shining light even today :

> "From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in court where he daily sits to practice, from that moment the liberties of England are at an end. If the advocate refuses to defend from what he may think of the charge or of the defence, he assumes the character of the Judge; nay he assumes it before the hour of the judgment; and in proportion to his rank and reputation puts the heavy influence of perhaps a mistaken opinion into the scale against the accused in whose favour the benevolent principles of English law

> make all assumptions, and which commands the very Judge to be his Counsel"

20. Indian lawyers have followed this great tradition. The revolutionaries in Bengal during British rule were defended by our lawyers, the Indian communists were defended in the Meerut conspiracy case, Razakars of Hyderabad were defended by our lawyers, Sheikh Abdulah and his co-accused were defended by them, and so were some of the alleged assassins of Mahatma Gandhi and Indira Gandhi. In recent times, Dr. Binayak Sen has been defended. No Indian lawyer of repute has ever shirked responsibility on the ground that it will make him unpopular or that it is personally dangerous for him to do so. It was in this great tradition that the eminent Bombay High Court lawyer Bhulabhai Desai defended the accused in the I.N.A. trials in the Red Fort at Delhi (November 1945 – May 1946).

21. However, disturbing news is coming now from several parts of the country where bar associations are refusing to defend certain accused persons.

22. The Sixth Amendment to the US Constitution states "In all criminal prosecutions the accused shall enjoy the right …….to have the assistance of counsel for his defence".

23. In **Powell** vs. **Alabama** 287 US 45 1932 the facts were that nine illiterate young black men, aged 13 to 21, were charged with the rape of two white girls on a freight train passing through Tennessee and Alabama. Their trial was held in Scottsboro, Alabama, where community hostility to blacks was intense. The trial judge appointed all members of the local bar to serve as defense counsel. When the trial began, no attorney from the local bar appeared to represent the defendants. The judge, on the morning of the trial, appointed a local lawyer who undertook the task with reluctance. The defendants were convicted. They challenged their convictions, arguing that they were effectively denied aid of counsel because they did not have the opportunity to consult with their lawyer and prepare a defense. The U.S. Supreme Court agreed. Writing for the court, Mr. Justice George Sutherland explained :

> "It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a

> fair opportunity to secure counsel of his own choice. Not only was that not done here, but such designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid….."

24. In the same decision Justice Sutherland observed:

> "What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense".

25. In this connection we may also refer to the legendry American lawyer Clarence Darrow (1857-1930) who was strongly of the view that every accused, no matter how wicked, loathsome, vile or repulsive he may be regarded by society has the right to be defended in court. Most lawyers in America refused to accept the briefs of such apparently wicked and loathsome persons, e.g. brutal killers, terrorists, etc. but Clarence Darrow would accept their briefs and defend them, because he was firmly of the view that every persons has the right to be defended in court, and correspondingly it was the duty of the lawyer to defend. His defences in various trials of such vicious, repulsive and loathsome persons became historical, and made him known in America as the 'Attorney for the Damned', (because he took up the cases of persons who were regarded so vile, depraved and despicable by society that they had already been condemned by public opinion) and he became a legend in America (see his biography 'Attorney for the Damned').

26. In *Re* **Anastaplo**, 366 US 82 (1961), Mr. Justice Hugo Black of the US Supreme Court in his dissenting judgment praised Darrow and said :

> "Men like Lord Erskine, James Otis, Clarence Darrow, and a multitude of others have dared to speak in defense of causes and clients without regard to personal danger to themselves. The legal profession will lose much of its nobility and its glory if it is not constantly replenished with lawyers like these. To force the Bar to become a group of thoroughly orthodox, time-serving, government-fearing individuals is to humiliate and degrade it."

27. At the Nuremberg trials, the Nazi war criminals responsible for killing millions of people were yet defended by lawyers.

28. We may also refer to the fictional American lawyer Atticus Finch in Harper Lee's famous novel 'To Kill a Mocking Bird'. In this novel Atticus Finch courageously defended a black man who was falsely charged in the State of Alabama for raping a white woman, which was a capital offence in that State. Despite the threats of violence to him and his family by the racist white population in town, and despite social ostracism by the predominant while community, Atticus Finch bravely defended that black man (though he was ultimately convicted and hanged because the jury was racist and biased), since he believed that everyone has a right to be defended. This novel inspired many young Americans to take up law as a profession in America.

29. The following words of Atticus Finch will ring throughout in history :

> "Courage is not a man with a gun in his hand. It is knowing you are licked before you begin, but you begin anyway and you see it through no matter what. You rarely win, but sometimes you do."

30. In our own country, Article 22(1) of the Constitution states :

> "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for which arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice".

31. Chapter II of the Rules framed by the Bar Council of India states about 'Standards of Professional Conduct and Etiquette', as follows :

> "An advocate is bound to accept any brief in the Courts or Tribunals or before any other authorities in or before which he proposes to practice at a fee consistent with his standing at the Bar and the nature of the case. Special circumstances may justify his refusal to accept a particular brief".

32. Professional ethics requires that a lawyer cannot refuse a brief, provided a client is willing to pay his fee, and the lawyer is not otherwise engaged. Hence, the action of any Bar Association in

passing such a resolution that none of its members will appear for a particular accused, whether on the ground that he is a policeman or on the ground that he is a suspected terrorist, rapist, mass murderer, etc. is against all norms of the Constitution, the Statute and professional ethics. It is against the great traditions of the Bar which has always stood up for defending persons accused for a crime. Such a resolution is, in fact, a disgrace to the legal community. We declare that all such resolutions of Bar Associations in India are null and void and the right minded lawyers should ignore and defy such resolutions if they want democracy and rule of law to be upheld in this country. It is the duty of a lawyer to defend no matter what the consequences, and a lawyer who refuses to do so is not following the message of the Gita.

33. The Registry of this Court will circulate copies of this judgment/order to all High Court Bar Associations and State Bar Councils in India. The High Court Bar Associations are requested to circulate the judgment/order to all the District Court Bar Associations in their States/Union territories.

34. With these observations, these appeals are disposed of. No costs.

…….J.
(Markandey Katju)

……J.
(Gyan Sudha Misra)

New Delhi;
6th December, 2010