REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1091 OF 2006

Mohd. Hussain @ Julfikar Ali .... Appellant

Versus

The State (Govt. of NCT) Delhi ....Respondent

JUDGMENT

R.M. Lodha, J.

We are called upon to decide in this appeal the issue on reference by a two-Judge Bench, whether the matter requires to be remanded for a *de novo* trial in accordance with law or not?

2. The above question arises in this way. On 30.12.1997 at about 6.20 p.m. one Blueline Bus No. DL-1P-3088 carrying passengers on its route to Nangloi from Ajmeri Gate stopped at Rampura Bus Stand at Rohtak Road for passengers to disembark. The moment the bus stopped, an explosion took place inside the bus. The incident resulted in

death of four persons and injury to twenty-four persons. The FIR of the incident was registered and investigation into the crime commenced. On completion of investigation, the police filed a charge-sheet against four accused persons – one of them being the present appellant, a national of Pakistan – for the commission of offences under Sections 302/307/120-B of Indian Penal Code (for short, 'IPC') and Sections 3 and 4 of the Explosive Substances Act, 1908 (for short, 'ES Act'). The appellant and the other three accused were committed to the Court of Session by the concerned Magistrate. The three accused other than the appellant were discharged by the Additional Sessions Judge, Delhi. The appellant was charged under Sections 302/307 IPC and Section 3 and, in the alternative, under Section 4(b) of the ES Act.

3. The appellant pleaded not guilty to the charges framed against him and claimed to be tried.

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4. Sixty-five witnesses were examined by the prosecution. On conclusion of the prosecution evidence, the statement of the appellant under Section 313 of the Code of Criminal Procedure, 1973 (for short, 'Code') was recorded. The Additional Sessions Judge vide his judgment dated 26.10.2004 held that the prosecution had been successful in proving beyond reasonable doubt that the appellant had planted a bomb in Bus No. DL-1P-3088 on 30.12.1997 with intention to cause death and

the bomb exploded in which four persons died and twenty-four persons sustained injuries. The Additional Sessions Judge found the appellant guilty and convicted him under Sections 302/307 IPC read with Section 3 of the ES Act. On the point of sentence, the matter was kept for 3.11.2004. On that date, after hearing the additional public prosecutor and the defence counsel, the Additional Sessions Judge awarded death sentence to the appellant under Section 302 IPC and also awarded to him imprisonment for life for the offences under Section 307 IPC and Section 3 of the ES Act. Fine and default sentence were also ordered and it was directed that sentence of death shall not be executed unless the same was confirmed by the High Court.

5. Aggrieved by his conviction and sentence, the appellant preferred an appeal before the Delhi High Court. The reference was also made to the Delhi High Court for confirmation of death sentence. The death reference and the criminal appeal were heard together by the Delhi High Court. Vide judgment dated 4.8.2006, the Division Bench of Delhi High Court confirmed the death sentence imposed on the appellant under Section 302 IPC. The other sentences imposed on the appellant were also maintained.

6. It is from the judgment of the Delhi High Court dated 4.8.2006 that the appellant preferred the present appeal before this Court.

7. The criminal appeal came up for hearing before the Bench of H.L. Dattu and C.K. Prasad, JJ. In his judgment, H.L. Dattu, J. thought it fit to deal with the issue whether the appellant was denied due process of law and whether the conduct of trial was contrary to the procedure prescribed under the provisions of the Code and, in particular, that he was not given a fair and impartial trial and was denied the right of the counsel before discussing the merits of the appeal. The proceedings of the trial court were then noticed and discussed elaborately. H.L. Dattu, J. observed as follows:

> **"**In the present case, not only was the accused denied the assistance of a counsel during the trial but 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 CrPC.

> 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 be simply to ignore actualities and also would be to ignore the fundamental postulates, already adverted to."

8. H.L. Dattu, J. recorded his conclusions thus:

> **"**In view of the above discussion, I cannot sustain the judgments impugned and they must be reversed and the matter is to be remanded to the trial court with a specific direction that the trial court would assist the accused by employing a State counsel before the commencement of the trial till its conclusion, if the accused is unable to employ a counsel of his own choice. Since I am remanding the matter for fresh disposal, I clarify that I have not expressed any opinion regarding the merits of the case.
>
> In view of the above, I allow the appeal and set aside the conviction and sentence imposed by the Additional Sessions Judge in Sessions Case No. 122 of 1998 dated 3-11-2004 and the judgment and order passed by the High Court in *State* v. *Mohd. Hussain* dated 4-8-2006 and remand the case to the trial court for fresh disposal in accordance with law and in the light of the observations made by me as above. Since the incident is of the year 1997, I direct the trial court to conclude the trial as expeditiously as possible at any rate within an outer limit of three months from the date of communication of this order and report the same to this Court."

9. C.K. Prasad, J. concurred with the view of H.L. Dattu, J. that the conviction and sentence of the appellant deserved to be set aside as he was not given the assistance of a lawyer to defend himself during trial.

C.K. Prasad, J., however, was not persuaded to remand the matter to the trial court for fresh trial of the appellant for the following reasons:

> "I have given my most anxious consideration to this aspect of the matter and have no courage to direct for his de novo trial at such a distance of time. For an occurrence of 1997, the appellant was arrested in 1998 and since then he is in judicial custody. The charge against him was framed on 18-2-1999 and it took more than five years for the prosecution to produce its witnesses. True it is that in the incident four persons have lost their lives and several innocent persons have sustained severe injuries. Further, the crime was allegedly committed by a Pakistani but these factors do not cloud my reason. After all, we are proud to be a democratic country and governed by rule of law.
>
> The appellant must be seeing the hangman's noose in his dreams and dying every moment while awake from the day he was awarded the sentence of death, more than seven years ago. The right of speedy trial is a fundamental right and though a rigid time-limit is not countenanced but in the facts of the present case I am of the opinion that after such a distance of time it shall be travesty of justice to direct for the appellant's de novo trial. By passage of time, it is expected that many of the witnesses may not be found due to change of address and various other reasons and few of them may not be in this world. Hence, any time-limit to conclude the trial would not be pragmatic.
>
> Accordingly, I am of the opinion that the conviction and sentence of the appellant is vitiated, not on merit but on the ground that his trial was not fair and just.
>
> The appellant admittedly is a Pakistani, he has admitted this during the trial and in the statement under Section 313 of the Code of Criminal Procedure. I have found his conviction and sentence illegal and the natural consequence of that would be his release from the prison but in the facts and circumstances of the case, I direct that he be deported to his country in accordance with law, and till then he shall remain in jail custody."

10. We have heard Mr. Md. Mobin Akhtar, learned counsel for the appellant and Mr. P.P. Malhotra, learned Additional Solicitor General for the respondent.

11. Article 21 of the Constitution provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. Speedy justice and fair trial to a person accused of a crime are integral part of Article 21; these are imperatives of the dispensation of justice. In every criminal trial, the procedure prescribed in the Code has to be followed, the laws of evidence have to be adhered to and an effective opportunity to the accused to defend himself must be given. If an accused remains unrepresented by a lawyer, the trial court has a duty to ensure that he is provided with proper legal aid.

12. Article 22(1) of the Constitution provides that no person who is arrested shall be detained in custody without being informed of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

13. Article 39A of the Constitution, inter-alia, articulates the policy that the State shall provide free legal aid by a suitable legislation or schemes to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

14. Section 303 of the Code confers a right upon any person accused of an offence before a criminal court to be defended by a pleader of his choice.

15. Section 304 of the Code mandates legal aid to accused at State's expense in a trial before the Court of Session where 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.

16. The two-Judge Bench that heard the criminal appeal, was unanimous that the appellant was denied the assistance of a counsel in substantial and meaningful manner in the course of trial although necessity of counsel was vital and imperative and that resulted in denial of due process of law. In their separate judgments, the learned Judges agreed that the appellant has been put to prejudice rendering the impugned judgments unsustainable in law. They, however, differed on the course to be adopted after it was held that the conviction and sentence awarded to the appellant by the trial court and confirmed by the High Court were vitiated. As noted above, H.L. Dattu, J. ordered the matter to be remanded to the trial court for fresh disposal in accordance with law after providing to the appellant the assistance of the counsel before the commencement of the trial till its conclusion if the accused was unable to engage a counsel of his own choice. On the other hand, C.K.

Prasad, J. for the reasons indicated by him held that the incident occurred in 1997; the appellant was awarded the sentence of death more than seven years ago and at such distance of time it shall be travesty of justice to direct for the appellant's *de novo* trial.

17. Section 386 of the Code sets out the powers of the appellate court. To the extent it is relevant, it reads as under :

> "S. 386. Powers of the Appellate Court.—After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal under section 377 or section 378, the accused if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—
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> (a) xxx xxx xxx
>
> (b) in an appeal from a conviction—
>
> (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or
>
> xxx xxx xxx"

18. Section 311 of the Code empowers a criminal court to summon any person as a witness though not summoned as a witness or recall and re-examine any person already examined at any stage of any

enquiry, trial or other proceeding and the court shall summon and examine or recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.

19. If the appellate court in an appeal from a conviction under Section 386 orders the accused to be re-tried, on the matter being remanded to the trial court and on re-trial of the accused, such trial court retains the power under Section 311 of the Code unless ordered otherwise by the appellate court.

20. In *Machander* v. *State of Hyderabad*[1], it has been stated by this Court that while it is incumbent on the court to see that no guilty person escapes but the court also has to see that justice is not delayed and the accused persons are not indefinitely harassed. The court further stated that the scale must be held even between the prosecution and the accused.

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21. In *Gopi Chand* v. *Delhi Administration*[2], a Constitution Bench of this Court was concerned with the criminal appeals wherein plea of the validity of the trial and of the orders of conviction and sentence was raised by the appellant. That was a case where the appellant was charged for three offences which were required to be tried as a warrant case by following the procedure prescribed in the Criminal Procedure Code, 1860

[1] (1955) 2 SCR 524
[2] AIR 1959 SC 609

but he was tried under the procedure prescribed for the trial of a summons case. The procedure for summons case and warrants case was materially different. The Constitution Bench held that having regard to the nature of the charges framed and the character and volume of evidence led, the appellant was prejudiced; the trial of the three cases against the appellant was vitiated and the orders of conviction and sentence were rendered invalid. The Court, accordingly, set aside the orders of conviction and sentence. While dealing with the question as to what final order should be passed in the appeals, the Constitution Bench held as under:

> "29. ……..The offences with which the appellant stands charged are of a very serious nature; and though it is true that he has had to undergo the ordeal of a trial and has suffered rigorous imprisonment for some time that would not justify his prayer that we should not order his retrial. In our opinion, having regard to the gravity of the offences charged against the appellant, the ends of justice require that we should direct that he should be tried for the said offences de novo according to law. We also direct that the proceedings to be taken against the appellant hereafter should be commenced without delay and should be disposed as expeditiously as possible."

22. A two-Judge Bench of this Court in *Tyron Nazareth* v. *State of Goa*[3], after holding that the conviction of the appellant was vitiated as he was not provided with legal aid in the course of trial, ordered retrial. The brief order reads as follows:

[3] 1994 Supp (3) SCC 321

> "2. We have heard the learned counsel for the State. We have also perused the decisions of this Court in *Khatri (II)* v. *State of Bihar [(1981) 1 SCC 627]* and *Sukh Das* v. *Union Territory of Arunachal Pradesh [(1986) 2 SCC 401]*. We find that the appellant was not assisted by any lawyer and perhaps he was not aware of the fact that the minimum sentence provided under the statute was 10 years' rigorous imprisonment and a fine of Rs 1 lakh. We are, therefore, of the opinion that in the circumstances the matter should go back to the tribunal. The appellant if not represented by a lawyer may make a request to the court to provide him with a lawyer under Section 304 of the Criminal Procedure Code or under any other legal aid scheme and the court may proceed with the trial afresh after recording a plea on the charges. The appeal is allowed accordingly. The order of conviction and sentence passed by the Special Court and confirmed by the High Court are set aside and a de novo trial is ordered hereby."

23. This Court in *S. Guin & Ors.* v. *Grindlays Bank Ltd.*[4] was concerned with the case where the trial court acquitted the appellants of the offence punishable under Section 341 of the IPC read with Section 36-AD of Banking Regulation Act, 1949. The charge against the appellants was that they had obstructed the officers of the bank, without reasonable cause, from entering the premises of a branch of the bank and also obstructed the transaction of normal banking business. Against their acquittal, an appeal was preferred before the High Court which allowed it after a period of six years and remanded the case for retrial. It was from the order of remand for re-trial that the matter reached this Court. This Court while setting aside the order of remand in paragraph 3 of the Report held as under :

[4] (1986) 1 SCC 654

> "**3.** After going through the judgment of the magistrate and of the High Court we feel that whatever might have been the error committed by the Magistrate, in the circumstances of the case, it was not just and proper for the High Court to have remanded the case for fresh trial, when the order of acquittal had been passed nearly six years before the judgment of the High Court. The pendency of the criminal appeal for six years before the High Court is itself a regrettable feature of this case. In addition to it, the order directing retrial has resulted in serious prejudice to the appellants. We are of the view that having regard to the nature of the acts alleged to have been committed by the appellants and other attendant circumstances, this was a case in which the High Court should have directed the dropping of the proceedings in exercise of its inherent powers under Section 482, Criminal Procedure Code even if for some reason it came to the conclusion that the acquittal was wrong. A fresh trial nearly seven years after the alleged incident is bound to result in harassment and abuse of judicial process ……."

24. The Constitution Bench of this Court in *Abdul Rehman Antulay and others* v. *R.S. Nayak and another*[5] considered right of an accused to speedy trial in light of Article 21 of the Constitution and various provisions of the Code. The Constitution Bench also extensively referred to the earlier decisions of this Court in *Hussainara Khatoon and others (I)* v. *Home Secretary, State of Bihar*[6], *Hussainara Khatoon and others (III)* v. *Home Secretary, State of Bihar,Patna*[7], *Hussainara Khatoon and others (IV)* v. *Home Secretary, State of Bihar,Patna*[8] *and Raghubir Singh & others* v. *State of Bihar*[9] and noted that the provisions of the Code are consistent with the constitutional guarantee of speedy

[5] (1992) 1 SCC 225
[6] (1980) 1 SCC 81
[7] (1980) 1 SCC 93
[8] (1980) 1 SCC 98
[9] (1986) 4 SCC 481

trial emanating from Article 21. In paragraph 86 of the Report, the Court framed guidelines. Sub-paragraphs (9) and (10) thereof read as under :

> "86(9). Ordinarily speaking, where the court comes to the conclusion that right to speedy trial of an accused has been infringed the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open. The nature of the offence and other circumstances in a given case may be such that quashing of proceedings may not be in the interest of justice. In such a case, it is open to the court to make such other appropriate order — including an order to conclude the trial within a fixed time where the trial is not concluded or reducing the sentence where the trial has concluded — as may be deemed just and equitable in the circumstances of the case.
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> (10). It is neither advisable nor practicable to fix any time-limit for trial of offences. Any such rule is bound to be qualified one. Such rule cannot also be evolved merely to shift the burden of proving justification on to the shoulders of the prosecution. In every case of complaint of denial of right to speedy trial, it is primarily for the prosecution to justify and explain the delay. At the same time, it is the duty of the court to weigh all the circumstances of a given case before pronouncing upon the complaint. The Supreme Court of USA too has repeatedly refused to fix any such outer time-limit in spite of the Sixth Amendment. Nor do we think that not fixing any such outer limit ineffectuates the guarantee of right to speedy trial."

25. In *Kartar Singh* v. *State of Punjab*[10], it was stated by this Court that no doubt liberty of a citizen must be zealously safeguarded by the courts but nonetheless the courts while dispensing justice should

[10] (1994) 3 SCC 569

keep in mind not only the liberty of the accused but also the interest of the victim and their near and dear and above all the collective interest of the community and the safety of the nation so that the public may not lose faith in the system of judicial administration and indulge in private retribution. In that case, the Court was dealing with a case under the TADA Act.

26. In *State of Punjab* v. *Ajaib Singh*[11], a two-Judge Bench of this Court was concerned with the question whether the order of acquittal passed by the High Court of Punjab and Haryana was liable to interference under Article 136 of the Constitution. That was a case where the respondent was tried along with other two accused persons for the offences under Section 302 IPC and Section 27 of the Arms Act. While one of the accused was acquitted and the other was convicted for a smaller offence and given probation, insofar as respondent was concerned, he was convicted under Section 302 IPC and sentenced to undergo life imprisonment. He was also convicted under Section 27 of the Arms Act and given two years' rigorous imprisonment. The High Court held that the act of the respondent was covered within clauses first and secondly in Section 100 of the IPC and, therefore, he was entitled to acquittal. While maintaining the order of acquittal the Court did notice the

[11] (1995) 2 SCC 486

time lag of more than 18 years from the date of incident and nearly 15 years from the date of acquittal and hearing.

27. In *Hussainara Khatoon and others (VII)* v. *Home Secretary, Bihar & Others.*[12], a three-Judge Bench of this Court while dealing with the rights of under-trial prisoners observed that sympathy for the under-trials who were in jail for long terms on account of pendency of cases had to be balanced having regard to the impact of crime on society and the fact situation.

28. *Phoolan Devi* v. *State of M.P. and others*[13], was concerned with the release of the petitioner on the ground that her right to speedy trial had been violated and her continued custody was without any lawful authority. The Court observed that by lapse of several years since the commencement of prosecution, it cannot be said that for that reason alone the continuance of prosecution would violate the petitioner's right to speedy trial.

29. In *Raj Deo Sharma (I)* v. *State of Bihar*[14], the matter reached this Court at the instance of an accused charged with offences under Sections 5(2) and 5(1)(e) of the Prevention of Corruption Act, 1947. He was aggrieved by the order of the High Court whereby his prayer for quashing the prosecution against him on the ground of violation of right to

[12] (1995) 5 SCC 326
[13] (1996) 11 SCC 19
[14] (1998) 7 SCC 507

speedy trial was rejected. In that case, a three-Judge Bench of this Court issued certain directions supplemental to the propositions laid down in *Abdul Rehman Antulay*[5]*. Raj Deo Sharma (I)*[14] came up for consideration once again in *Raj Deo Sharma (II)* v. *State of Bihar*[15]*.* In his dissenting judgment, M.B. Shah, J. held that prescribing time-limit would be against the decisions rendered in *Abdul Rehman Antulay*[5] and *Kartar Singh*[10].

30. In *State of M.P.* v. *Bhooraji and others*[16], this Court was concerned with the question whether retrial was inevitable although the trial proceedings in the case had already undergone over a period of nine years. That was a case where the incident happened on 26.8.1991 in which one person was murdered and three others were wounded. Eleven persons were charge-sheeted by the police in respect of the said incident for various offences including Section 302 read with Section 149 IPC and Section 3(2) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 ('SC/ST Act'). The Additional Sessions Judge, Dhar (M.P.) (Specified Court) on conclusion of trial that took about five years convicted all the eleven accused persons under Sections 148, 323, 302/149 IPC and sentenced them to various punishments including imprisonment for life. The convicted persons filed appeal before the High Court of Madhya Pradesh. During the pendency of the appeal before the

[15] (1999) 7 SCC 604
[16] (2001) 7 SCC 679

High Court, this Court in a decision given in *Gangula Ashok* v. *State of A.P. [(2000) 2 SCC 504]* held that committal proceedings were necessary for a Specified Court under the SC/ST Act to take cognizance of the offences to be tried. In light of the decision of this Court in *Gangula Ashok,* the convicts made an application before the High Court in the pending appeal seeking quashment of the trial proceedings on the ground that the trial was without jurisdiction inasmuch as the Specified Court of Session did not acquire jurisdiction to take cognizance of and try the case, in the absence of it being committed by a Magistrate. The Division Bench of the High Court upheld the contention raised by the convicted persons and ordered the quashment of the trial proceedings and the trial court was directed to return the charge-sheet and the connected papers to the prosecution for resubmission to the Magistrate for further proceedings in accordance with law. It was against the judgment of the High Court that the State of Madhya Pradesh came up in appeal by special leave.

31. While dealing with the question whether the High Court should have quashed the trial proceedings only on account of declaration of the legal position made by the Supreme Court concerning the procedural aspect about the cases involving offences under the SC/ST Act, this Court stated, "a *de novo* trial should be the last resort and that too only when such a course becomes so desperately indispensable. It

should be limited to the extreme exigency to avert 'a failure of justice'. Any omission or even the illegality in the procedure which does not affect the core of the case is not a ground for ordering a *de novo* trial". The Court went on to say further as follows :

> "8…….This is because the appellate court has plenary powers for revaluating and reappraising the evidence and even to take additional evidence by the appellate court itself or to direct such additional evidence to be collected by the trial court. But to replay the whole laborious exercise after erasing the bulky records relating to the earlier proceedings, by bringing down all the persons to the court once again for repeating the whole depositions would be a sheer waste of time, energy and costs unless there is miscarriage of justice otherwise. Hence the said course can be resorted to when it becomes unpreventable for the purpose of averting "a failure of justice". The superior court which orders a de novo trial cannot afford to overlook the realities and the serious impact on the pending cases in trial courts which are crammed with dockets, and how much that order would inflict hardship on many innocent persons who once took all the trouble to reach the court and deposed their versions in the very same case. To them and the public the re-enactment of the whole labour might give the impression that law is more pedantic than pragmatic. Law is not an instrument to be used for inflicting sufferings on the people but for the process of justice dispensation".

32. In *Bhooraji*[16], the Court referred to Chapter XXXV of the Code and, particularly, Sections 461, 462 and 465(1). After noticing the above provisions, the Court observed in paragraphs 15, 16 and 17 of the Report as follows :

"15. A reading of the section makes it clear that the error, omission or irregularity in the proceedings held before or during the trial or in any enquiry were reckoned by the legislature as possible occurrences in criminal courts. Yet the legislature disfavoured axing down the proceedings or to direct repetition of the whole proceedings afresh. Hence, the legislature imposed a prohibition that unless such error, omission or irregularity has occasioned "a failure of justice" the superior court shall not quash the proceedings merely on the ground of such error, omission or irregularity.

16. What is meant by "a failure of justice" occasioned on account of such error, omission or irregularity? This Court has observed in *Shamnsaheb M. Multtani* v. *State of Karnataka [(2001) 2 SCC 577]* thus: (SCC p. 585, para 23)

> "*23*. We often hear about 'failure of justice' and quite often the submission in a criminal court is accentuated with the said expression. Perhaps it is too pliable or facile an expression which could be fitted in any situation of a case. The expression 'failure of justice' would appear, sometimes, as an etymological chameleon (the simile is borrowed from Lord Diplock in *Town Investments Ltd.* v. *Deptt. of the Environment [(1977) 1 All ER 813]*. The criminal court, particularly the superior court should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage."

17. It is an uphill task for the accused in this case to show that failure of justice had in fact occasioned merely because the specified Sessions Court took cognizance of the offences without the case being committed to it. The normal and correct procedure, of course, is that the case should have been committed to the Special Court because that court being essentially a Court of Session can take cognizance of any offence only then. But if a specified Sessions Court, on the basis of the legal position then felt to be correct on account of a decision adopted by the High Court, had chosen to take cognizance without a committal order, what is the disadvantage of the accused in following the said course?"

33. Finally this Court concluded that High Court should have dealt with the appeal on merits on the basis of the evidence already on record and to facilitate the said course, the judgment of the High Court impugned in the appeal was set aside and matter was sent back to the High Court for disposal of the appeal afresh on merits in accordance with law.

34. *P. Ramachandra Rao* v. *State of Karnataka*[17] was concerned with the appeals wherein the accused persons indicted of corruption charges were acquitted by the special courts for failure of commencement of trial in spite of lapse of two years from the date of framing of the charges and the High Court allowed the State appeals without noticing the respective accused persons. When the appeals came up for hearing before the Bench of three-Judges, the matters were referred to a Constitution Bench to consider whether time-limit of the nature mentioned in, "*Common Cause", A Registered Society (I)* v. *Union of India and others*[18], "*Common Cause", A Registered Society (II)* v. *Union of India*[19], *Raj Deo Sharma (I)*[14], and *Raj Deo Sharma (II)*[15] can under the law be laid down? Before the Bench of five-Judges, the earlier decision of this

[17] (2002) 4 SCC 578
[18] (1996) 6SCC 775
[19] (1996) 4 SCC 33

Court in *Abdul Rehman Antulay*[5] was brought to the notice along with the above referred four cases. The five-Judge Bench, accordingly, referred the matter to a Bench of seven-Judges. The Bench of seven-Judges considered the questions: Is it at all necessary to have limitation bars terminating trials and proceedings? Is there no effective mechanism available for achieving the same end? In paragraph 23 (Pg. 600) of the Report, the Bench made the following observations:

> **"**23**.** Bars of limitation, judicially engrafted, are, no doubt, meant to provide a solution to the aforementioned problems. But a solution of this nature gives rise to greater problems like scuttling a trial without adjudication, stultifying access to justice and giving easy exit from the portals of justice. Such general remedial measures cannot be said to be apt solutions. For two reasons we hold such bars of limitation uncalled for and impermissible: first, because it tantamounts to impermissible legislation — an activity beyond the power which the Constitution confers on the judiciary, and secondly, because such bars of limitation fly in the face of law laid down by the Constitution Bench in *A.R. Antulay case* and, therefore, run counter to the doctrine of precedents and their binding efficacy."

35. In paragraph 29 (Pg. 603) of the Report, the seven-Judge Bench held that the period of limitation for conclusion of trial of a criminal case or criminal proceeding in "*Common Cause" (I)*[18], "*Common Cause" (II)*[19] , *Raj Deo Sharma (I)*[14] , *Raj Deo Sharma (II)*[15] could not have been prescribed. The Bench concluded, inter alia, as follows :

"29. …….

(*1*) The dictum in *A.R. Antulay case* is correct and still holds the field.

(*2*) The propositions emerging from Article 21 of the Constitution and expounding the right to speedy trial laid down as guidelines in *A.R. Antulay case* adequately take care of right to speedy trial. We uphold and reaffirm the said propositions.

(*3*) The guidelines laid down in *A.R. Antulay case* are not exhaustive but only illustrative. They are not intended to operate as hard-and-fast rules or to be applied like a straitjacket formula. Their applicability would depend on the fact situation of each case. It is difficult to foresee all situations and no generalization can be made.

(*4*) It is neither advisable, nor feasible, nor judicially permissible to draw or prescribe an outer limit for conclusion of all criminal proceedings. The time-limits or bars of limitation prescribed in the several directions made in *Common Cause (I)*, *Raj Deo Sharma (I)* and *Raj Deo Sharma (II)* could not have been so prescribed or drawn and are not good law. The criminal courts are not obliged to terminate trial or criminal proceedings merely on account of lapse of time, as prescribed by the directions made in *Common Cause case (I)*, *Raj Deo Sharma case (I)* and *(II)*. At the most the periods of time prescribed in those decisions can be taken by the courts seized of the trial or proceedings to act as reminders when they may be persuaded to apply their judicial mind to the facts and circumstances of the case before them and determine by taking into consideration the several relevant factors as pointed out in *A.R. Antulay case* and decide whether the trial or proceedings have become so inordinately delayed as to be called oppressive and unwarranted. Such time-limits cannot and will not by themselves be treated by any court as a bar to further continuance of the trial or proceedings and as mandatorily obliging the court to terminate the same and acquit or discharge the accused.

> (*5*) The criminal courts should exercise their available powers, such as those under Sections 309, 311 and 258 of the Code of Criminal Procedure to effectuate the right to speedy trial. A watchful and diligent trial Judge can prove to be a better protector of such right than any guidelines. In appropriate cases, jurisdiction of the High Court under Section 482 CrPC and Articles 226 and 227 of the Constitution can be invoked seeking appropriate relief or suitable directions.
>
> xxx xxx xxx"

36. A two-Judge Bench of this Court in *Zahira Habibulla H. Sheikh and another* v. *State of Gujarat and others*[20], known as the "Best Bakery Case", extensively considered the jurisprudence of fair trial, powers of the criminal court under the Code and the Evidence Act including retrial of a criminal case. The Best Bakery Case was a case of mass killing. The trial court directed acquittal of the accused persons. The State of Gujarat preferred appeal against acquittal and a criminal revision was also filed against acquittal by one of the affected persons. The Gujarat High Court dismissed the criminal appeal and criminal revision upholding acquittal of the accused by the trial court. The prayers for adducing additional evidence under Section 391 of the Code and/or for directing retrial were rejected. It is from this order of the Gujarat High Court that the matter reached this Court. In paragraph 33 of the Report (Pg. 183), the Bench observed as follows :

[20] (2004) 4 SCC 158

> "33. The principle of fair trial now informs and energises many areas of the law. It is reflected in numerous rules and practices. It is a constant, ongoing development process continually adapted to new and changing circumstances, and exigencies of the situation – peculiar at times and related to the nature of crime, persons involved – directly or operating behind, social impact and societal needs and even so many powerful balancing factors which may come in the way of administration of criminal justice system."

37. Then in paragraph 35 of the Report (Pg. 184), the Court observed that in a criminal case the fair trial entails triangulation of interests of the accused, the victim and the society. The Court further observed that "interests of the society are not to be treated completely with disdain and as persona non grata".

38. In *Best Bakery Case*[20] , the Court also made the following observations:

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> "38. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny.

> 39. 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 overhasty, stage-managed, tailored and partisan trial.
>
> 40. 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."

39. The Bench emphasized that whether a re-trial under Section 386 of the Code or taking up of additional evidence under Section 391 of the Code in a given case is the proper procedure will depend on the facts and circumstances of each case for which no straitjacket formula of universal and invariable application can be formulated.

40. In *Satyajit Banerjee and others* v. *State of West Bengal and others*[21], a two-Judge Bench of this Court was concerned with an appeal by special leave wherein the accused-appellants were charged for the offences punishable under Section 498-A and 306 of the Indian Penal Code. The trial court acquitted the accused persons. In revision preferred by the complainant, the High Court set aside the order of acquittal and directed a *de novo* trial of the accused. While dealing with the revisional

[21] (2005) 1 SCC 115

jurisdiction of the High Court in a matter against the order of acquittal, the Court observed that such jurisdiction was exercisable by the High Court only in exceptional cases where the High Court finds defect of procedure or manifest error of law resulting in flagrant miscarriage of justice. In the facts of the case, this Court held that the High Court ought not to have directed the trial court to hold the *de novo* trial. With reference to *Best Bakery Case*[20] the Court observed in paragraphs 25 and 26 of the Report (Pgs. 121 and 122) as follows :

> "**25.** Since strong reliance has been placed on *Best Bakery case* (*Gujarat riots case*) it is necessary to *record a note of caution*. That was an extraordinary case in which this Court was convinced that the entire prosecution machinery was trying to shield the accused
>
> i.e. the rioters. It was also found that the entire trial was a farce. The witnesses were terrified and intimidated to keep them away from the court. It is in the aforesaid extraordinary circumstances that the court not only directed a *de novo* trial of the whole case but made further directions for appointment of the new prosecutor with due consultation of the victims. Retrial was directed to be held out of the State of Gujarat.
>
> **26.** The law laid down in *Best Bakery case* in the aforesaid extraordinary circumstances, cannot be applied to all cases against the established principles of criminal jurisprudence. Direction for retrial should not be made in all or every case where acquittal of accused is for want of adequate or reliable evidence. In *Best Bakery case* the first trial was found to be a farce and is described as "mock trial". Therefore, the direction for retrial was in fact, for a real trial. Such extraordinary situation alone can justify the directions as made by this Court in *Best Bakery case*."

41. 'Speedy trial' and 'fair trial' to a person accused of a crime are integral part of Article 21. There is, however, qualitative difference between the right to speedy trial and the accused's right of fair trial. Unlike the accused's right of fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. The right to speedy trial is in its very nature relative. It depends upon diverse circumstances. Each case of delay in conclusion of a criminal trial has to be seen in the facts and circumstances of such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment. The factors concerning the accused's right to speedy trial have to be weighed vis-a-vis the impact of the crime on society and the confidence of the people in judicial system. Speedy trial secures rights to an accused but it does not preclude the rights of public justice. The nature and gravity of crime, persons involved, social impact and societal needs must be weighed along with the right of the accused to speedy trial and if the balance tilts in favour of the former the long delay in conclusion of criminal trial should not operate against the continuation of prosecution and if the right of accused in the facts and circumstances of the case and exigencies of situation tilts the balance in his favour, the prosecution may be brought to an end. These principles must apply as well when the

appeal court is confronted with the question whether or not retrial of an accused should be ordered.

42. The appellate court hearing a criminal appeal from a judgment of conviction has power to order the retrial of the accused under Section 386 of the Code. That is clear from the bare language of Section 386(b). Though such power exists, it should not be exercised in a routine manner. A *de novo* trial or retrial of the accused should be ordered by the appellate court in exceptional and rare cases and only when in the opinion of the appellate court such course becomes indispensable to avert failure of justice. Surely this power cannot be used to allow the prosecution to improve upon its case or fill up the lacuna. A retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice. Obviously, the exercise of power of retrial under Section 386(b) of the Code, will depend on the facts and circumstances of each case for which no straitjacket formula can be formulated but the appeal court must closely keep in view that while protecting the right of an accused to fair trial and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked.

43. Insofar as present case is concerned, it has been concurrently held by the two Judges who heard the criminal appeal that the appellant was denied due process of law and the trial held against him was contrary to the procedure prescribed under the provisions of the Code since he was denied right of representation by counsel in the trial. The Judges differed on the course to be followed after holding that the trial against the appellant was flawed. We have to consider now, whether the matter requires to be remanded for a *de novo* trial in the facts and the circumstances of the present case. The incident is of 1997. It occurred in a public transport bus when that bus was carrying passengers and stopped at a bus stand. The moment the bus stopped an explosion took place inside the bus that ultimately resulted in death of four persons and injury to twenty-four persons. The nature of the incident and the circumstances in which it occurred speak volume about the very grave nature of offence. As a matter of fact, the appellant has been charged for the offences under Section 302/307 IPC and Section 3 and, in the alternative, Section 4(b) of ES Act. It is true that the appellant has been in jail since 09.03.1998 and it is more than 14 years since he was arrested and he has passed through mental agony of death sentence and the retrial at this distance of time shall prolong the culmination of the criminal case but the question is whether these factors are sufficient for appellant's acquittal and dismissal of indictment. We think not. It cannot

be ignored that the offences with which the appellant has been charged are of very serious nature and if the prosecution succeeds and the appellant is convicted under Section 302 IPC on retrial, the sentence could be death or life imprisonment. Section 302 IPC authorises the court to punish the offender of murder with death or life imprisonment. Gravity of the offences and the criminality with which the appellant is charged are important factors that need to be kept in mind, though it is a fact that in the first instance the accused has been denied due process. While having due consideration to the appellant's right, the nature of the offence and its gravity, the impact of crime on the society, more particularly the crime that has shaken the public and resulted in death of four persons in a public transport bus can not be ignored and overlooked. It is desirable that punishment should follow offence as closely as possible. In an extremely serious criminal case of the exceptional nature like the present one, it would occasion in failure of justice if the prosecution is not taken to the logical conclusion. Justice is supreme. The retrial of the appellant, in our opinion, in the facts and circumstances, is indispensable. It is imperative that justice is secured after providing the appellant with the legal practitioner if he does not engage a lawyer of his choice.

44. In order to ensure that retrial of the appellant is not prolonged and is concluded at the earliest, Mr. P. P. Malhotra, Additional Solicitor General submitted that some of the sixty-five witnesses who were earlier

examined by the prosecution but who are not necessary could be dropped by the public prosecutor.

45. Mr. Md. Mobin Akhtar submitted before us that he would appear for the accused (appellant) in the trial. In case he does not appear for the appellant or the appellant does not engage the lawyer on his own, we direct that the trial court shall provide an appropriate Advocate to the accused (appellant) immediately.

46. In what we have discussed above we answer the reference by holding that the matter requires to be remanded for a *de novo* trial. The Additional Sessions Judge shall proceed with the trial of the appellant in Sessions Case No. 122 of 1998 from the stage of prosecution evidence and shall further ensure that the trial is concluded as expeditiously as may be possible and in no case later than three months from the date of communication of this order.

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.....…….. J.
(R.M. Lodha)

.....……J.
(Anil R. Dave)

.....……J.
(Sudhansu Jyoti Mukhopadhaya)

NEW DELHI.
AUGUST 31, 2012.