State of Andhra Pradesh

Vs

P. T. Appaiah and Another

Criminal Appeal No. 112 of 1975

(R. S. Sarkaria, A. C. Gupta JJ)

28.08.1980

JUDGMENT

GUPTA, J. –

1. This appeal preferred by the State of Andhra Pradesh is directed against a judgment of the Andhra Pradesh High Court by which a leaned Judge of that court exercising jurisdiction under Section 429 of the Code of Criminal Procedure, 1898 set aside the order of conviction and the sentences passed on the respondents before us by the Sessions Judge, Chittoor Division. The charge against the respondents was that at about ten on the night of September 5, 1971 Venkataramaiah Chetty and Chakala Giddappa (PW 1) were returning to their village Sanganapalle from Kadepalle where they had gone and when they were about a mile from Sanganapalle, respondent 1 armed with a billhook and respondent 2 with a stout stick attacked them and beat Venkataramaiah Chetty severely causing multiple injuries as result of which he died. The Sessions Judge accepted the evidence of PW 1 and the dying declaration said to have been made by Venkataramaiah Chetty in the presence of several witnesses including PW 1 and convicted the respondents under Section 302 read with Section 34 of the Indian Penal Code and sentenced each of them to undergo imprisonment for life. On appeal preferred by the accused a Division Bench of the High Court rejected the dying declaration but accepted the evidence of PW 1 to find that the accused caused the injuries to which Venkataramaiah Chetty succumbed; the learned Judges composing the Division Bench however differed on the nature of the offence that was committed by the accused in causing these injuries. Madhava Reddy, J., held that having regard to the nature of the injuries it was not possible to find that the accused intended to cause death and that the offence committed by the accused was culpable homicide not amounting to murder punishable under Section 304, Part I of the Indian Penal Code. Sriramulu, J., was of the opinion that in causing the injuries the accused had the common intention to kill Venkataramaiah Chetty. He also observed that even assuming the offence did not fall under clause "Firstly" of Section 300 of the Indian Penal Code, it undoubtedly fell under clause "Thirdly" of that section and on this view reached the conclusion that the Sessions Judge was justified in convicting the accused persons under Section 302 read with Section 34 of the Indian Penal Code. The case was then referred to a third Judge, Ramchandra Raju, J., under Section 429 of the Code of Criminal Procedure, 1898. Raju j., found on a consideration of the evidence that "there does not appear to be any motive, much less sufficient motive, for the accused to commit the offence". The immediate motive for the offence according to the prosecution was an incident said to have taken place on September 1, 1971, four days prior to the date of occurrence, when PW 5, a son of the deceased, was beaten by the accused when cattle of the deceased strayed into the field of the first respondent. According to Raju, J., what happened on September 1, was a trivial incident, PW 5 did not sustain any injury, he did not report the matter to anyone and even when the deceased came and intervened there was no quarrel, the accused did not try to assault the deceased nor the deceased

tried to beat the accused. Pointing out certain infirmities in the evidence of the sole eyewitness PW 1, Raju, J., found that his evidence was "doubtful and suspicious". PW 7 who sought to corroborate a part of the evidence of PW 1, according to Raju J., did not "inspire much confidence". Raju J., did not think it "safe to find the accused guilty by placing absolute reliance on the evidence of PW 1" and accordingly he acquitted both the accused.

2. Before us Mr. P. Ram Reddy for the State of Andhra Pradesh contends that it was not open to the third Judge to upset the concurrent finding of both the learned Judges composing the Division Bench that the accused were guilty of some offence; it is argued that as the difference between the two Judges of the Division Bench was confined to the nature of the offence only, the third Judge to whom the case was referred under Section 429 of the Code of Criminal Procedure, 1898 had no power to acquit the accused. Section 429 of the Code of Criminal Procedure, 1898 reads :

> When the Judges composing the Court of Appeal are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge of the same Court, and such Judge, after such hearing (if any) as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion.

In support of his contention Mr. Ram Reddy relies on the judgment of this Court in Bhagat Ram v. State of Rajasthan ((1972) 3 SCR 303 : (1972) 2 SCC 466, 471 : 1972 SCC (Cri) 751, 756). This was a decision by a Bench of two Judges. In that case Bhagat Ram, an Inspector of Police, was charged with having committed offences under Sections 120-B, 161, 218, 347 and 389 of the Indian Penal Code and also under Section 5(1)(a) read with Section 5(2) of the Prevention of Corruption Act. Another accused, Ram Swaroop, who was tried along with Bhagat Ram was charged with having committed offences under Sections 120-B and 165-A of the Indian Penal Code. The trial Court acquitted both Bhagat Ram and Ram Swaroop of all the charges framed against them. The appeal preferred by the State of Rajasthan against the acquittal was heard by a Division Bench composed of Tyagi and Lodha, JJ. The Division Bench confirmed the acquittal of Ram Swaroop. The acquittal of Bhagat Ram in respect of the charges under Sections 347, 218, 389 and 120-B was also affirmed. The judges however differed on the point whether the acquittal of Bhagat Ram regarding the charges under Section 161 of the Indian Penal Code and Section 5(1)(a) of the Prevention of Corruption Act should be maintained; according to Tyagi J. these charges had not been proved, in the opinion of Lodha, J. they had been. In view of this difference, the learned Judges passed the following order : [SCC p. 471 : SCC (Cri) p. 756,

The result is that the appeal of the State against the order of acquittal of respondent Ram Swaroop is dismissed. The appeal of the State so far as it relates to the acquittal of respondent Bhagat Ram under Sections 347, 218, 389 and 120-B Indian Penal Code is also dismissed. In view of the difference of opinion about the acquittal of Bhagat Ram under Section 161, Indian Penal Code and Section 5(1)(a) of the Prevention of Corruption Act, the matter may be laid before Hon'ble the Chief Justice for referring it to the third Judge.

Jagat Narayan, J., the third to whom the case was referred, held that Bhagat Ram was guilty of offences under Section 161 and also Sections 120-B, 218 and 347 of the Indian Penal Code. This Court held in Bhagat Ram v. State of Rajasthan ((1972) 3 SCR 303 : (1972) 2 SCC 466, 471 : 1972 SCC (Cri) 751, 756) that it was not permissible for the third judge to reopen the matter and convict Bhagat Ram of offences under Sections 120-B, 218 and 347 of the Indian Penal Code because : [SCC p. 471 : SCC (Cri) p. 756,

The present was not a case wherein the entire matter relating to the acquittal or conviction of Bhagat Ram had been left open because of a difference of opinion between the two Judges. Had that been the position, the whole case relation to Bhagat Ram could legitimately be considered by Jagat Narayan, J. and he could have formed his own view of the matter regarding the correctness of the order of acquittal made by the trial Judge in respect of Bhagat Ram. On the contrary, as mentioned earlier, an express order had been made by the Division Bench upholding the acquittal of Bhagat Ram for offences under Sections 120-B, 219, 347 and 389, IPC and the State appeal in that respect had been dismissed.

Clearly the decision in Bhagat Ram case ((1972) 3 SCR 303 : (1972) 2 SCC 466, 471 : 1972 SCC (Cri) 751, 756) turns on the construction put on the order of the Division Bench referring "the matter" to the third judge that he was to decide only the question on which the two judges had differed - whether Bhagat Ram's acquittal in respect of the offence under Section 161, Indian Penal Code and Section 5(1)(a) of the Prevention of Corruption Act was justified. The scope of Section 429 was not considered in Bhagat Ram case ((1972) 3 SCR 303 : (1972) 2 SCC 466, 471 : 1972 SCC (Cri) 751, 756), no question was raised whether the Judges of the Division Bench could restrict the powers of the third judge under Section 429, nor the notice of the court appears to have been drawn to three earlier decisions of this Court on the point. In Babu v. State of U. P. ((1965) 2 SCR 771 : AIR 1965 SC 1467 : (1965) 2 Cri LJ 539) a Bench of five Judges held :

> The section (Section 429) contemplates that it is for third Judge to decide on what points he shall hear arguments, if any, and that postulates that he is completely free in resolving the difference as he thinks fit.

The next case is Hethubha v. State of Gujarat ((1971) 1 SCR 31 : (1970) 1 SCC 720, 723 : 1970 SCC (Cri) 280, 283) which was decided by a Bench of two Judges. In that case the Sessions Judge acquitted three accused of the charge under Section 302 read with Section 34, Indian Penal Code but convicted them under Section 304, Part II read with Section 34. Two of them were also convicted under Section 323 and the third was convicted under Section 323 read with Section 34. On appeal to High Court one of the two judges composing the Division Bench held that it was the first appellant alone who inflicted the fatal injury on the victim and found him guilty under Section 302, while the second and third appellants were found guilty under Section 324 read with Section 34. The other learned Judge was of the view that all the accused must be acquitted as, according to him, the evidence was not satisfactory. The case was then placed before a third judge under Section 429 of the Code of Criminal Procedure, 1898 who convicted the first appellant under Section 302 of the Indian Penal Code, and the second and third appellants under Section 302 read with Section 34. The conviction of the first and the second appellants under Section 323 and of the third appellant under Section 323 read with Section 34 was upheld. In appeal to this Court it was contended that the third judge under Section 429 of the Code of Criminal Procedure, 1898 could only deal with the differences between the two judges and not with the whole case. Repelling this contention it was held : [SCC p. 723 : SCC (Cri) p. 283, para 10]

This Court in Babu v. State of Uttar Pradesh ((1965) 2 SCR 771 : AIR 1965 SC 1467 : (1965) 2 Cri LJ 539), held that it was for the third learned Judged to decide on what points the arguments would be heard and therefore he was free to resolve the differences as he thought fit. Mehta, J. here dealt with the whole case. Section 429 of the Criminal Procedure Code States "that when the judges comprising the Court of Appeal are equally divided in opinion, the case with their opinion thereon, shall be laid before another judge of the same court and such judge, after such hearing, if any, as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion". Two

things are noticeable; first, that the case shall be laid before another judge, and, secondly, the judgment and order will follow the opinion of the third learned Judge. It is, therefore, manifest that the third learned Judge can or will deal will the whole case.

3. In Union of India v. B. N. Ananti Padmanabiah (1971 Supp SCR 460 : (1971) 3 SCC 278, 280 : 1971 SCC (Cri) 535, 537), which was unreported when Bhagat Ram case ((1972) 3 SCR 303 : (1972) 2 SCC 466, 471 : 1972 SCC (Cri) 751, 756) was decided, a three-Judge Bench of this Court confirmed the decision in Hethubha case ((1971) 1 SCR 31 : (1970) 1 SCC 720, 723 : 1970 SCC (Cri) 280, 283). In this case the accused who were found guilty of offences under Sections 5(2) and 5(1)(c) and 5(1)(d) of the Prevention of Corruption Act, 1947 as well as Sections 467 and 471 of the Indian Penal Code by the Special Judge, Gauhati, challenged the order of conviction in the High Court of Assam and Nagaland. On difference of opinion between the two Judges of the Division Bench of the High Court, the case was referred to a third judge. Before the third judge a new plea was advanced that the Magistrate at Delhi had no jurisdiction to accord sanction to an Inspector of the Delhi Special Police Establishment to investigate the case in Assam. The third judge held that an order of a magistrate of the local jurisdiction was necessary, that only a magistrate of the district where the crime was committed and no magistrate outside the jurisdiction was competent to make an order for investigation and accordingly the learned Judge quashed the proceedings before the Special Judge. In appeal to this Court it was contended that the third judge could only deal with the difference between the two judges and not with the whole case. This contention was rejected with the observation : [SCC p. 280 SCC (Cri) p. 537, para 6]

This question came up for consideration in the recent unreported decision in Hethubha v. State of Gujarat ((1971) 1 SCR 31 : (1970) 1 SCC 720, 723 : 1970 SCC (Cri) 280, 283) .... This Court held that the third learned Judge could deal with the whole case. The language of Section 429 of the Code of Criminal Procedure is explicit that the case with the opinion of the judges comprising the Court of Appeal shall be laid before another judge of the same court. The other noticeable feature in Section 429 of the Code of Criminal Procedure is that the judgment or order shall follow the opinion of the third learned Judge.

In view of these authorities which were not noticed in Bhagat Ram case ((1972) 3 SCR 303 : (1972) 2 SCC 466, 471 : 1972 SCC (Cri) 751, 756) we are unable to agree that the learned third Judge in the instant case to whom it was referred under Section 429 overstepped the limits of his jurisdiction in deciding the case as he did.

4. On the merits of the case, we have already indicated how the learned third Judge viewed the evidence; it cannot be said that the view taken was unreasonable or perverse.

5. The appeal is accordingly dismissed.

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