

Kammari Brahmiah

Vs

Public Prosecutor, High Court of A.P.

Criminal Appeal No. 64 of 1994

(G. B. Pattanaik, M. B. Shah JJ)

03.02.1999

JUDGMENT

M.B. Shah J

1. Short question in this appeal is whether some accused could be convicted for the offence punishable under Section 323 read with 149, when all of them were charged for an offence punishable under Section 302 IPC. The appeal is filed against the judgment and order passed by the High Court of Judicature of Andhra Pradesh at Hyderabad in Criminal Appeal No. 1088 of 1992 by which the High Court reversed the judgment and order passed by the Additional Sessions Judge, Mahabubnagar in Sessions Case No. 156 of 1992 acquitting he accused No. 1 to 6 for the offence punishable under Section 302 IPC and convicted the accused No. 1 for the offence punishable under Section 304 Part II IPC, accused No. 2 for the offence punishable under Section 325 IPC; and accused No. 3 to 6 for the offence punishable under Section 325 IPC read with Section 149. At the time of admission, the appeal filed by the original accused No. 1 & 2 was dismissed, leave was granted to the accused No. 3 to 6 and they were ordered to be released on bail.

2. Before deciding the contention raised by the learned counsel for the parties, it would be necessary to narrate few facts. It is the prosecution story that Accused No. 1, 2, 4 & 5 are brothers. On 17th November, 1989, the accused No. 1 had picked up the quarrel in the morning regarding the usage of passage in the field and thereafter at about 3.30 p.m., accused No. 1 to 6 came to the field belonging to the deceased and quarreled regarding the use of passage and water by the deceased. Deceased was beaten and he fell down. At that time, PW 3, younger brother of the deceased went to the rescue but he was prevented by accused No. 4 & 5 who held him tight. Accused No. 3 & 6 caught hold of the deceased and at that time accused No. 2 gave a stick below on the head and accused No. 1 stabbed twice the deceased with a barisa on his right flank and all of them ran away. As per the doctor's evidence, who performed post-mortem examination, the deceased was having the following injuries :-

1. Contusion over the right cheek i.e. 304" length 1" width.

2. Contusion over the right elbow joint over the lateral posterior part i.e., 3" below the right elbow joint 1" length X_<<" width.

3. A deep stab injury over the mid scapular region 1" length << width 4-5" depth.

4. A deep stab injury over the right infro-memory region 1" length X_<<" width X 4-5" depth. From the evidence of PW 1 to 4, the Court arrived at the conclusion that

the death of the deceased was the result of the injuries inflicted by accused No. 1 & 2 and the evidence was corroborated by the injuries caused to the deceased as mentioned in post-mortem examination. The Court also held that prosecution evidence establishes beyond reasonable doubt that accused No. 4 & 5 caught hold witness Venkataiah who went to rescue the deceased. Similarly, accused No. 3 & 6 caught hold of the deceased and at that time accused No. 1 & 2 inflicted injuries. On the basis of the aforesaid evidence led by the prosecution, High Court held that prosecution has made out a case that accused formed an unlawful assembly and during the course of the said unlawful assembly, they caused injuries and so they were liable to be convicted for the offence punishable under Section 148 of the IPC. The Court further held that it is true that there is no charge framed by the trial court for the offence punishable under Section 148 against the accused but since it was found that all participated and the main charge framed against the accused is under Section 302 and as no prejudice is caused to the accused the accused could be convicted for a lesser offence under Section 325 read with 149 IPC.

3. At the time of hearing of this appeal, learned Counsel appearing on behalf of the appellant submitted that the Order passed by the High Court convicting the appellants for the offence punishable under Section 325 read with 149 is on the face of it illegal as no charge under Section 149 was framed against the accused. He contended that all accused were charged only for the offence punishable under Section 302 of IPC for causing injuries to the deceased Itikala Mogulaiah. As against this, learned counsel for the State vehemently submitted that even though it is an error on the part of the Additional Sessions Judge of not framing the charge under Section 302 read with 149 of IPC, no prejudice is caused to the accused as relevant facts were placed before the Court and the attention of the accused also was drawn. Further, they are punished for lesser offence, therefore, the order passed by the High Court is justified and legal.

4. In this view of the matter, the only contention which requires decision is whether the conviction of the accused 3 to 6 for the offence punishable under Section 325 read with 149 of IPC can be maintained even if no charge under Section 149 was framed by the trial court. It is true that there is an error apparent on the part of the Additional Sessions Judge in not framing the charge for the offence punishable under Section 149 IPC despite the clear case of the prosecution that there was a quarrel in the morning between the deceased and the accused No. 1 on the question of passage for watering the fields and thereafter, at 3.30 p.m. all the accused came in the field of the deceased, they picked up the quarrel and inflicted injuries on the deceased. Still the question would be whether the conviction of A3 to A6 by the High Court for the offence under Section 325 read with 149 can be said to be illegal which requires to be quashed and set aside if no prejudice is caused by not framing of charge under section 148 and charge under section 302 read with 149.

5. For deciding this contention, we would first refer to Section 464 of the Criminal Procedure Code which read as under :

"Effect of omission to frame, or absence of, or error in charge - (1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may -

(a) If the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge.

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit;

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction."

6. The aforesaid section is in mandatory terms and it specifically provides ----- what is to be done in cases where charge is not framed or there is an error, omission or irregularity in framing of the charge. From the unequivocal terms of the section, it can be stated that finding, sentence or order could be set aside only in those cases where the facts are such that no valid charge could be preferred against the accused in respect of the facts proved. Secondly, if the facts are such that charge could be framed and yet it is not framed but there is no failure of justice, has in fact been occasioned thereby, the finding sentence or order of the court of competent jurisdiction is not to be set aside on that ground. Thirdly, if there is failure of justice occasioned by not framing of the charge or in case of an error, omission or irregularity in charge re-trial of the case is to be directed as provided under sub-section (2).

7. In the present case, the facts are clear. It establishes beyond reasonable doubt that because of the morning quarrel between the accused No. 1 and the deceased, the accused No. 1 to 6 went at the field of the deceased at about 3.30 p.m. They picked up the quarrel and inflicted injuries on the deceased. In view of the facts, the learned counsel for the appellant was not in a position to point out any prejudice caused to the accused by not framing of the charge under Section 148 or for the offence punishable under section 302 read with section 149 except by stating that by not framing charge properly accused have lost an opportunity of leading rebuttal evidence. He relied upon the decision rendered in the case of *Panduram v. State of Hyderabad, AIR 1955 SC 216* wherein the Court has observed that Section 149 unlike Section 34 creates a specific offence and deals with punishment of that offence alone; hence, strong reasons for using Section 149, when it is not charged even if it be possible to convict under that Section in the absence of any specific charge, is required and the Court has left the point undecided.

8. In our view, this question is concluded by the decision rendered in the case of *Ramkishan and others v. State of Rajasthan, 1997(7) SCC 518* wherein the Court has relied upon the decision of this Court in the case of *Willie (William) Slaney v. State of M.P., 1955(2) SCR 1140* and held that omission to mention Section 149 IPC specifically in the charge is only an irregularity and since no prejudice is shown to have been caused to the accused by that omission, it could not affect their conviction. The Court in that case from the established facts and circumstances convicted the accused under Section 304 part II IPC read with Section 149 IPC and not under Section 302 IPC even though no specific charge indicating the applicability of Section 149 IPC was framed.

9. Further, at this stage it would be worthwhile to refer to some discussions on the question involved from the case of *Willie (William) Slaney v. The State of Madhya Pradesh, 1955(2) SCR 1140*

wherein the larger bench has elaborately discussed the provisions of Sections 232, 233, 237, 238, 535 & 537 of the Criminal Procedure Code 1898 (Section 232, 535 and 537 are combined as section 464 in Criminal Procedure Code 1973) and observed that "the Code is a code of procedure and, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the Code is to ensure that an accused person gets a full and fair trial along certain well-established and well-understood lines that accord with our notions of natural justice. If he does, if he is tried by a competent court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a full and fair opportunity of defending himself, then, provided there is substantial compliance with the outward forms of the law, mere mistakes in procedure, mere inconsequential errors and omissions in the trial are regarded as venial by the Code and the trial is not vitiated unless the accused can show substantial prejudice. That, broadly speaking, is the basic principle on which the Code is based." After considering the various decisions, the Court further observed that "the swing of the pendulum has been away from technicality, and a greater endeavour has been made to regard the substance rather than the shadow and to administer justice fairly and impartially as it should be administered; fair to the accused, fair to the State and fair to the vast mass of the people for whose protection penal laws are made and administered."

10. Thereafter, Court examined the scheme of relevant sections as well as Section 535 & 537 and held that "Section 535 uses the words "shall be deemed invalid" which indicate that a total omission to frame a charge would render the conviction invalid but for Section 535 which serves to validate it when that sort of "irregularity" has not occasioned a "failure of justice". Section 537 does not use any of these expressions but merely says that no conviction or sentence "shall be reversed or altered" unless there has in fact been a failure of justice." The Court thereafter negated the contention that total omission to frame the charge would not be covered by Section 535 or 537 and held as under, "Chapter XIX deals comprehensively with charges and sections 535 and 537 cover every case in which there is a departure from the rules set out in that Chapter. Such departures range from errors, omissions and irregularities in charges that are framed, down to charges that might have been framed and were not and include a total omission to frame a charge at all at any stage of the trial. In all these cases the only question is about prejudice. We say it because that accords with logic and principle and reason and because it touches the deep verities on which the structure of justice is erected and maintained." The Court pertinently further observed, "We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions that count and not their outward form. To hold otherwise is only to provide avenues of escape for the guilty and afford no protection to the innocent. We agree that a man must know what offence is he being tried for and that he must be told in clear and unambiguous terms and that it must all be "explained to him" so that he really understands (section 271(1) in sessions trials, section 255(1) in warrant cases) but to say that a technical jargon of words whose significance no man not trained to the law can grasp or follow affords him greater protection or assistance than the informing and the explaining that are the substance of the matter, is to base on fanciful theory wholly divorced from practical reality; and the same applies to the vast bulk of jurors who attend our courts. They are none the wiser because of a formal charge except in a vague and general way that is of no practical account. The essence of the matter is not a technical formula of words but the reality. Was he told ? Was it explained to him ? Did he understand ? Was it done in a fair way ?"

11. Thereafter, Court dealt with not framing the charge under Section 34 or 149 and held that "endeavour was made in the argument to draw a distinction between cases falling under section 34 of the Indian Penal Code and those under section 149 of the Indian Penal Code. It was contended

that even if no separate charge is necessary when section 34 is called in aid because section 34 does not create a separate offence, one is essential for a conviction under section 149 and that there, at any rate, the absence of a separate charge is fatal. This is not a case under Section 149 of the Indian Penal Code so the question does not really arise but it is necessary to advert to the argument because, on the view we take of sections 225, 535 and 537, *it is immaterial what the offence is and whether there is a charge at all. The only question is whether the irregularity occasioned prejudice.*" The Court further held "it is to be observed that section 535 of the Code of mandatory in its terms, just as mandatory as Section 233. If it be accepted that an absence of a charge would, but for its provisions, render a conviction invalid, this section cures such an invalidity when there is, in fact, not in theory but in fact, no failure of justice." Dealing with the facts in the case, the Court further held as under :-

"Put at its highest, all that the appellant can urge is that a charge in the alternative ought to have been framed, which in itself imports that it could have been so framed. As was said by the Privy Council in *Begu Vs. King-Emperor* (1) and also by this Court in *Lachman Singh Vs. The State* (2) -

"A man may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made. That is what happened here..... They were not charged with that formally, but they were tried on evidence which brings the case under section 237(1). The variation between murder and concealing evidence after the crime is no more than the variation between killing a man jointly with another, sharing his intention, or allowing the other to do the actual killing with the same common intention."

12. In a differing judgment, Chandrasekhara Aiyar, J. observed that "Sections 34, 114 and 149 of the Indian Penal Code provide for criminal liability viewed from different angles as regards actual participants, accessories and men actuated by a common object or a common intention; *and the charge is a rolled-up one involving the direct liability and the constructive liability* without specifying who are directly liable and who are sought to be made constructively liable. In such a situation, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence, without a charge, can be set aside, prejudice will have to be made out. In most of the cases of this kind, evidence is normally given from the outset as to who was primarily responsible for the act which brought about the offence and such evidence is of course relevant."

13. The aforesaid discussion leaves no doubt that non-framing of charge would not vitiate the conviction if no prejudice is caused thereby to the accused. As observed in the aforesaid case, the trial should be fair to the accused, fair to the State and fair to the vast mass of the people for whose protection penal laws are made and administered. Criminal Procedure Code is a procedural law and is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. In the present case, accused were tried on the prosecution version that all of them went at 3.30 p.m. in the field of the deceased; they picked up the quarrel with him, inflicted injuries to the deceased as narrated by the prosecution witnesses, accused No. 3 to 6 participated as stated above; the statements were recorded under section 313 of the CPC and the question were asked to the effect that they jointly came at 3.30 p.m. and caused injuries to the deceased as stated by the prosecution witnesses and the role assigned to accused No. 3 to 6 was also specifically mentioned. Hence, it is apparent that no prejudice is caused to the accused who were charged for the offence under section 302, by not framing the charge for the offence punishable under section 302 read with

149. In this view of the matter, the conviction of the accused No. 3 to 6 for the offence punishable under section 325 read with 149 cannot be said to be anyway illegal which requires to be set aside. In the result, appeal is dismissed.