SUPREME COURT OF INDIA

Chinnam Kameswara Rao

Vs.

State of A.P. Rep. by Home Secretary

Crl.A.No.1116 of 2011

(T.S.Thakur and Gyan Sudha Misra JJ.)

10.01.2013

JUDGMENT

T.S. THAKUR, J.

1. This appeal under Section 2(a) of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 assails a judgment and order dated 8th February, 2011 passed by the High Court of Andhra Pradesh at Hyderabad, whereby the High Court has partly allowed the acquittal appeal filed by the State and while reversing the judgment and order passed by the trial Court convicted the appellants for offences punishable under Section 302 read with Section 34 of the IPC and sentenced them to undergo imprisonment for life besides levying a fine of Rs.1,000/- each. In default of payment of fine the appellants have been sentenced to undergo simple imprisonment for a period of one month each. The appellants have been further convicted for an offence punishable under Section 324 read with Section 34 of the IPC and sentenced to undergo simple imprisonment for three months each with the direction that the sentences shall run concurrently.

2. Briefly stated the prosecution case is that on 27th April, 2003, at around 7.00 p.m., the appellants along with one Papisetti Praveen who was arrayed as accused no.4 stopped the deceased-Bezawada Srinivasa Rao and PW.1-Alapati Seshadri while the latter were on their way home at Bethavolu Park Centre - the place of occurrence. An altercation between the accused persons on the one hand and the deceased and PW-1 on the other had according to the prosecution taken place on the previous day i.e. on 26th April, 2003, while the deceased and PW.1 were bringing some palmyrah nuts from the fields. PW-3-Sonti Koteswara Rao, a shopkeeper who runs a pan shop in the vicinity, claimed to be a witness to that

incident and had intervened and pacified the parties which passed off without any physical harm to either side except that according to the prosecution appellant no.1- Chinnam Kameswara Rao had threatened the deceased with dire consequences. With the above incident in the background on 27th April, 2003, the accused persons allegedly confronted the deceased and PW-1-Alapati Seshadri, armed with stout casuarina sticks except accused no.4 who was unarmed. An altercation followed between the two sides as a sequel to the incident of the previous day in the course whereof appellant no.1-Chinnam Kameswara Rao is alleged to have struck a blow on the head of the deceased. When PW-1- Alapati Seshadri intervened, the remaining two appellants came down upon him and gave stick blows on his head also. The injured, as also Alapati Seshadri-PW-1 fell to the ground, whereupon A-4 is alleged to have kicked and given fist blows to the deceased while A-1 to A-3 continued to indiscriminately hit both of them with their sticks which caused bleeding injuries to both the injured. Taking both of them as dead, the appellants are alleged to have run away from the spot towards the house of appellant no.1. Sonti Srinivasa Rao S/o Nageswara Rao (PW-2), Sonti Koteswara Rao (PW- 3), Sonti Srinivasa Rao, S/o Veeraiah (PW-4) and M.V. Gopala Krishna Murthy (PW-6) are alleged to have witnessed the incident. PW-2-Sonti Srinivasa Rao with the help of one P. Vasudeva Rao shifted both the injured to the Government Hospital, Gudivada for treatment who informed the Gudivada Town I Police Station about the arrival of the injured in the hospital whereupon PW-9-B. Jaya Raju, ASI, reached the hospital and recorded the statement of the deceased, marked Exhibit P-6. A case under Section 324 read with 34 IPC was on the basis of that statement registered and the injured shifted to the University General Hospital, Vijaywada for further treatment. Around 2.50 a.m. on 28th April, 2003, the deceased succumbed to his injuries in the hospital at Vijayawada whereupon the Investigating Officer altered the offence from Section 324 read with Section 34 IPC to Section 302 read with Section 34 IPC.

3. After completion of investigation that included the arrest of the accused persons, post mortem of the dead body of the deceased, seizure of the weapons of offence, the police filed a charge sheet against the appellants for offences punishable under Sections 302 and 307 IPC while A-4 was charged under Sections 302 and 307 read with Section 34 IPC.

4. At the trial the prosecution examined as many as 13 witnesses including PWs.2, 3, 4 and 6, said to be eye witnesses to the incident. The accused did not lead any evidence in their defence. The trial Court all the same came to the conclusion that the prosecution had not been able to establish the charge framed against the accused persons and accordingly acquitted them.

5. Aggrieved by the judgment and order of the acquittal recorded by the trial Court the State filed Criminal Appeal No.1055 of 2007 before the High Court of Andhra Pradesh at Hyderabad which appeal was allowed in part reversing the acquittal of the appellants and convicting them for offences punishable under Section 302 read with Section 34 IPC and Section 324 read with Section 34 of the IPC. The acquittal of accused No.4 was, however, affirmed by the High Court. The appellants were consequently sentenced to undergo imprisonment for life apart from imprisonment for a period of three months under Section 324 IPC as already noticed above. The sentences were directed to run concurrently. The present appeal assails the correctness of the above judgment and order.

6. Appearing for the appellants Mr. M.S. Ganesh, learned senior counsel, made a three-fold submission. Firstly, he contended that the High Court was in error in embarking upon a fresh appraisal of the evidence adduced by the prosecution at the trial and interfering with the order of acquittal passed by the trial Court just because in the opinion of the High Court a second view was equally reasonable in the facts and circumstances of the case. He urged that acquittal of the accused persons reinforced their innocence and except in compelling circumstances where the acquittal is seen to have resulted in miscarriage of justice or where appreciation of evidence is perverse or manifestly unsatisfactory, the High Court should not have converted the acquittal into a conviction.

7. Secondly, he contended that the High Court could not have convicted the appellants for offences punishable under Sections 302 and 307 both read with Section 34 IPC when the charges framed against the appellants were only for offences punishable under Sections 302 and 307 of the IPC. It was also contended that accused No.4, since acquitted by the Courts below, alone was charged with Section 302 read with Section 34 IPC. The High Court was not, therefore, justified in convicting the appellants for the offence of murder or attempt to murder with the help of Section 34 of the Code. The absence of a charge under Section 34 had, according to the learned counsel, resulted in prejudice and miscarriage of justice to the appellants.

8. Thirdly, it was contended that on a true and proper appreciation of the evidence adduced at the trial there was no real basis for the High Court to hold that the appellants had the common intention to commit the murder of the deceased. In the absence of any evidence to support the allegation that the appellants had a common intention to kill the deceased, their conviction for the offence of murder punishable under Section 302 IPC was not justified. At any rate, the evidence did not support

the charge of murder which could be appropriately converted to culpable homicide not amounting to murder punishable under Section 304 Part I or II of the IPC.

9. We propose to deal with the submissions ad seriatim.

10. The powers of Appellate Court are stipulated in Section 386 of the Code of Criminal Procedure, 1973. A bare reading of the said provision leaves no manner of doubt that in an appeal against an order of acquittal the Appellate Court may reverse such order and direct that further inquiry be made or that the accused be re-tried, as the case may be or impose a sentence upon him according to law. Similarly in the case of appeal from a conviction the Appellate Court has the power to reverse the findings recorded by the trial Court and discharge the accused or pass an order for his re-trial etc.

11. The plenitude of the power available to the Appellate Court notwithstanding recent pronouncements of this Court has evolved a rule of prudence according to which the Appellate Court must bear in mind that in the case of acquittal the innocence of the accused is doubly assured by his acquittal. Consequently, if two reasonable conclusions are possible on the basis of the evidence on record the Appellate Court should not disturb the findings of the acquittal recorded in favour of the accused. A long line of decisions rendered by this Court have recognised that while deciding acquittal appeal the power of the Appellate Court is in no way circumscribed by any limitation and that power is exercisable by the Appellate Court to comprehensively review the entire evidence. The decisions of this Court in Dhanna etc. v. State of Madhya Pradesh (1996) 10 SCC 79 and Kallu @ Masih Ors. v. State of Madhya Pradesh (2006) 10 SCC 313 aptly summarise the legal position. A recent decision of this Court in Murugesan Ors. v. State 2012 (10) SCALE 378 is a timely reminder of the principles that were succinctly enunciated in an earlier decision of this Court in Chandrappa Ors. v. State of Karnataka (2007) 4 SCC 415, in the following words:

> "42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:
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> (1) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, substantial and compelling reasons, good and sufficient grounds, very strong circumstances, distorted conclusions, glaring mistakes, etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of flourishes of language to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5)If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court." (emphasis supplied)

12. What, therefore, needs to be examined in the light of the settled legal position is whether the view taken by the trial Court acquitting the accused was a reasonably possible view. If the answer is in the negative nothing prevents the Appellate Court from reversing the view taken by the trial Court and holding the accused guilty. On the contrary, if the view is not a reasonably possible view the Appellate Court is duty bound to interfere and prevent miscarriage of justice by suitably passing the order by punishing the offender. We have in that view no hesitation in rejecting the contention that just because the trial Court had recorded an acquittal in favour of the appellants the Appellate Court had any limitation on its power to reverse such an acquittal. Whether or not the view was reasonably possible will be seen by us a little later when we take up the merits of the contention urged by the appellant regarding involvement of the accused persons in the commission of the crime.

13. That brings us to the question whether absence of a charge under Section 34 of the IPC would by itself operate as an impediment in the Appellate Court recording

a conviction with the help of that provision. The decision of this Court provide a complete answer to that contention to which we may immediately refer. In Krishna Govind Patil v. State of Maharashtra AIR 1963 SC 1413 the trial Court had acquitted all the accused persons while the High Court convicted them under Section 302 read with Section 34 IPC. This Court held that the High Court could convict the accused under Section 34 even if the named accused were acquitted provided the High Court held that there were other unnamed accused persons who were involved in the commission of the offence. The following passage from the said decision is, in this regard, apposite:

> "It is well settled that common intention within the meaning of the section implied a pre-arranged plan and the criminal act was done pursuant to the pre-arranged plan. The said plan may also develop on the spot during the course of the commission of the offence; but the crucial circumstance is that the said plan must precede the act constituting the offence. If that be so, before a court can convict a person under s.302, read with s.34, of the Indian Penal Code, it should come to a definite conclusion that the said person had a prior concert with one or more other persons, named or unnamed, for committing the said offence. A few illustrations will bring out the impact of s.34on different situations.
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> (1) A, B, C and D are charged under s.302, read with s.34, of the Indian Penal Code, for committing the murder of E. The evidence is directed to establish that the said four persons have taken part in the murder.
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> (2) A, B, C and D and unnamed others are charged under the said sections. But evidence is adduced to prove that the said persons, along with others, named or unnamed, participated jointly in the commission of that offence.
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> (3) A, B, C and D are charged under the said sections. But the evidence is directed to prove that A, B, C and D, along with 3 others, have jointly committed the offence.
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> xxx xxx xxx
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> But what is the position if the Court acquits 3 of the 4 accused either because it rejects the prosecution evidence or because it gives the benefit of doubt to the said accused? Can it hold, in the absence of a charge as well as evidence, that though the three accused are acquitted, some other unidentified persons acted conjointly along with one of the named persons? If the Court could do

so, it would be making out a new case for the prosecution: it would be deciding contrary to the evidence adduced in the case. A Court cannot obviously make out a case for the prosecution which is not disclosed either in the charge or in regard to which there is no basis in the evidence. There must be some foundation in the evidence that persons other than those named have taken part in the commission of the offence and if there is such a basis the case will be covered by the third illustration."

(underlined for emphasis)

14. The legal position was reviewed by a two-Judge Bench of this Court in Darbara Singh v. State of Punjab 2012 (8) SCALE 649. In that case also charges were framed against two of the accused persons under Section 302 IPC whereas against the third accused the charge framed was under Section 302 read with Section 34 IPC. The trial Court had acquitted the third accused but convicted the first two accused much in the same manner as is the position in the present case. The contention before this Court was that in the absence of a charge under Section 34 no conviction could be recorded against the appellants under Section 302 especially when the injury inflicted by one of the accused persons was not held to be sufficient in the ordinary course of nature to cause death. Repelling the contention this Court observed:

"12. It has further been submitted on behalf of the Appellant that, as the appellant was never charged under Section302r/w Section34Indian Penal Code, unless it is established that the injury caused by the Appellant on the head of the deceased, was sufficient to cause death, the Appellant ought not to have been convicted under Section302Indian Penal Code simplicitor. The submission so advanced is not worth consideration for the simple reason that the Learned Counsel for the Appellant has been unable to show what prejudice, if any, has been caused to the Appellant, even if such charge has not been framed against him. He was always fully aware of all the facts and he had, in fact, gone alongwith Kashmir Singh and Hira Singh with an intention to kill the deceased. Both of them have undoubtedly inflicted injuries on the deceased Mukhtiar Singh. The Appellant has further been found guilty of causing grievous injury on the head of the deceased being a vital part of the body. Therefore, in the light of the facts and circumstances of the said case, the submission so advanced does not merit acceptance.

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14. The defect in framing of the charges must be so serious that it cannot be covered under Sections464/465 Code of Criminal Procedure., which provide that, an order of sentence or conviction shall not be deemed to be invalid only on the ground that no charge was framed, or that there was some irregularity or omission or misjoinder of charges, unless the court comes to the conclusion that there was also, as a consequence, a failure of justice. In determining whether any error, omission or irregularity in framing the relevant charges, has led to a failure of justice, the court must have regard to whether an objection could have been raised at an earlier stage, during the proceedings or not. While judging the question of prejudice or guilt, the court must bear in mind that every accused has a right to a fair trial, where he is aware of what he is being tried for and where the facts sought to be established against him, are explained to him fairly and clearly, and further, where he is given a full and fair chance to defend himself against the said charge(s).

15. The 'failure of justice' is an extremely pliable or facile expression, which can be made to fit into any situation in any case. The court must endeavour to find the truth. There would be 'failure of justice'; not only by unjust conviction, but also by acquittal of the guilty, as a result of unjust failure to produce requisite evidence. of course, the rights of the accused have to be kept in mind and also safeguarded, but they should not be over emphasized to the extent of forgetting that the victims also have rights. It has to be shown that the accused has suffered some disability or detriment in respect of the protections available to him under Indian Criminal Jurisprudence. 'Prejudice', is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial, and not with respect to matters falling outside their scope. Once the accused is able to show that there has been serious prejudice caused to him, with respect to either of these aspects, and that the same has defeated the rights available to him under jurisprudence, then the accused can seek benefit under the orders of the Court."

15. In Gurpreet Singh v. State of Punjab (2005) 12 SCC 615, this Court held that no prejudice could be claimed by the accused merely because charge was framed under Section 302 IPC simpliciter and not with the help of Section 34 IPC. The Court found that the eye witnesses had been cross- examined at length from all possible angles and from suggestions that were put to them to the eye witnesses, the Court was fully satisfied that there was no manner of prejudice caused. What, therefore, needs to be examined is whether any prejudice was caused to the

accused persons on account of absence of charge under Section 34 of the IPC. Mere omission of Section 34 from the charge sheet does not ipso facto or ipso jure lead to any inference or presumption of prejudice having been caused to the accused in cases where the conviction is recorded with the help of that provision. It is only if the accused persons plead and satisfactorily demonstrate that prejudice had indeed resulted from the omission of a charge under Section 34 of the IPC that any such omission may assume importance. We do not see any such prejudice having been caused in the present case. In fairness to Mr. Ganesh we must mention that although he had strenuously argued the legal proposition dealt with by us above when it came to demonstrating a prejudice on account of absence of charge under Section 34 he was unable to do so. The absence of charge under Section 34 of the IPC did not, therefore, affect the legality of the conviction recorded by the High Court.

16. That brings us to third and the only other submission urged by Mr. Ganesh to the effect that there was no evidence to show common intention on the part of the appellants to commit the murder of the deceased. We regret our inability to accept that submission. The evidence on record sufficiently proves that the appellants had confronted the deceased and PW- 1 Alapati Seshadri on the previous date which was defused with the interference of PW-3 Sonti Koteswara Rao, a shopkeeper in the vicinity who was, however, witness to the threat extended by the appellants to the deceased of dire consequences. There is evidence to show that on the date of occurrence the appellants were lying in wait near the Reading Room for the deceased. No sooner they saw him approaching the place where they were waiting that they went behind the Reading Room to fetch the stout sticks that they appear to have hidden from public view only to mount a surprise attack on the deceased. This implies that the appellants had made preparations for the commission of the offence and the incident was premeditated as a sequel to the confrontation that the two parties had on the previous date. The last and by no means the least important circumstance is the nature of the injuries inflicted upon the deceased on the vital part of the body resulting in fracture of the skull, sufficient in the ordinary course to cause death. The evidence on record suggests that all the three accused persons belaboured the deceased and continued their assault and aggression even when the deceased had fallen to the ground on account of the head injuries sustained by him. The appellants fled from the place of occurrence only when they felt that the deceased was dead. All these circumstances leave no manner of doubt that the appellants shared the common intention to kill the deceased and that they had acted under a premeditated plan. It is well settled that the common intention may develop during the course of the commission of the offence but the fact that the incident in instant case had a history behind it and that the appellants had not only

threatened the deceased previously but were lying in wait for his arrival at the place of occurrence clearly showed that the commission of the offence was preconcerted.

17. The High Court, therefore, committed no error in holding the appellants guilty especially when the statement of PW-1 Alapati Seshadri who was also injured in the incident was found to be credible. The depositions of PW-1 Alapati Seshadri, PW-2 Sonti Srinivasa Rao S/o Nageswara Rao, PW-3 Sonti Koteswara Rao, PW-4 Sonti Srinivasa Rao S/o Veeraiah, PW-6 M.V. Gopala Krishna Murthy all supported the prosecution version that the deceased was assaulted by the appellants resulting in grievous injuries to him that culminated in his death. The trial Court had obviously fallen in error in rejecting the testimony of these witnesses on minor contradictions which was not sufficient to shatter their credibility. The acquittal recorded by the trial Court was not thus a reasonably possible view in the matter which the High Court was entitled to reverse while hearing the appeal.

18. In the result this appeal fails and is hereby dismissed.