

MYSORE HIGH COURT

Hirianna Shetty

Vs

State of Mysore

Criminal Revn. Petn. No. 351 of 1971

(K. Bhimiah, J.)

10.05.1971. 08.10.1971

JUDGMENT

K. Bhimiah, J.

1. The petitioner was tried for an offence under Section 324 of the Indian Penal Code by the Additional Munsiff-cum-Magistrate (First Class), Udipi, on a charge-sheet filed by the Udipi Rural Police. The charge against the petitioner was that on 1.1.1970 at about 7 a.m. he voluntarily beat Gururaja Bhatta (P.W. 1) with a firewood and caused simple hurt. Six P.Ws. were examined in support of the prosecution case. But the Investigating Officer was not examined by the prosecution. The learned Munsiff, after considering the evidence produced by the prosecution, found the accused guilty of the offence punishable under Section 324 and sentenced him to undergo simple imprisonment till the rising of the court and to pay a fine of Rs. 100/- in default, to suffer simple imprisonment for one month.

2. The accused challenged the legality and correctness of his conviction and sentence before the Sessions Judge of South Kanara at Mangalore in Criminal Appeal No. 82 of 1970. The learned Sessions Judge, after hearing the parties found the accused guilty of the offence under Section 323, thus altering the conviction of the accused from Section 324 Indian Penal Code. He confirmed the sentence of simple imprisonment till the rising of the court. But the sentence of fine imposed by the Magistrate was reduced to Rs. 50/- in default, to undergo simple imprisonment for two weeks.

3. Aggrieved by this order, the accused has filed this revision petition.

4. The only contention urged by Mr. Ramachandra Rao learned Advocate for the petitioner is that the non-examination of the Investigating Officer is serious infirmity in the prosecution case which, according to him, has resulted in prejudice being caused to the accused. He therefore

urged that the conviction and sentence passed against the accused are not sustainable in law.

5. The learned Government Pleader appearing on behalf of the State submitted that both the trial court and the appellate court had taken note of this circumstances while finding the accused guilty of the offence with which he had been charged and that therefore, no prejudice had been caused to the petitioner. In my opinion, there is no force in this contention of the learned Government Pleader.

6. In para 9 of his Judgment the learned Magistrate has dealt with the question of non examination of the Investigating Officer and has noticed the contention raised on behalf of the accused. But strangely enough he reaches the conclusion which reads as under :-

".....But, at the same time it may be noted that due to the fault of the Investigating Officer, it may not be proper to discard the whole case and give benefit to the accused. There is a lacuna in the prosecution case and not a fatal one."

The learned Magistrate has not even pointed out the contradiction occurring in the evidence of the P.Ws. and has not shown how the accused has not been prejudiced by the non-examination of the Investigating Officer.

7. Before the learned Sessions Judge, this point was again urged and this is what the learned Sessions Judge has stated in his Judgment in regard to that –

"Sri S.P. Lobo, the learned Advocate for the appellant relying upon the decision reported at Item 112 of the Short Notes of recent decisions in 1971 Mys. LJ (SN) 48, urged that the non-examination of the Investigating Officer in this case is a serious infirmity in the prosecution case which has resulted in prejudice to the accused and the accused may be acquitted. But after going through the contradictions elicited by the defence in the cross-examination of P.Ws. 2 to 4. I find that they are not material and they are not such as to discredit their whole testimony. Hence, the accused has not been prejudiced by the non-examination of the investigating officer in this case."

8. This conclusion of the learned Sessions Judge is vitiated on two grounds. Firstly, the learned Sessions Judge was not within the rules of evidence in considering the contradictions which were not proved before the trial court according to law. Secondly, the learned Sessions Judge has not pointed out the contradictions in the cross-examination of P.Ws. 2 to 4 to show how the accused was not prejudiced by the non-examination of the Investigating officer.

9. Strong reliance was placed upon the decision of this court in *P. Rangappa v. State of Mysore*¹ In the said case Santhosh, J. has observed as follows :-

"It is needless to point out that the right of bringing on record contradictions in the statement of witnesses made before the Investigating officer is a very valuable right of the accused. It is by showing that the witness has made improvements or given evidence which contradicts his earlier statement, the accused is able to satisfy the court that the witness is not a reliable witness. The non-examination of the Investigating officer is a serious infirmity in the

¹(Cr. R. P. 397 of 1970 decided on 5.2.1971) (Mys)

prosecution case which results in prejudice to the accused." It is clear from the above decision that the examination of the Investigating officer is necessary in order to bring on record the contradictions in the statement of witnesses and that such a right is a valuable right of the accused. Further it is clear that non-examination of the Investigating officer is a serious infirmity in the prosecution case in so far as it deprived the accused of the opportunity to show to the court that witnesses were not reliable witnesses by proving contradictions in the earlier statement.

10. Thus in my opinion, the non-examination of the Investigating officer in the case is a serious infirmity resulting in prejudice to the accused and therefore, the conviction and sentence passed against him are liable to be set aside.

11. In the result, this revision petition is allowed, the convictions and sentences passed against the petitioner are set aside and the case is remanded to the Additional Munsiff-cum-First Class Magistrate, Udipi, for disposal according to law after summoning and examining the Investigating Officer in the case and after affording an opportunity to the petitioner-accused to cross-examine him.

Petition allowed.