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Court : Karnataka

Decided On : Aug-05-1957

Reported in : AIR1958Kant1; AIR1958Mys1; 1958CriLJ54; ILR1957KAR81; (1957)35MysLJ237

Judge : Somnath Iyer and ;Malimath, JJ.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 221, 309, 342, 353, 356, 374, 509 and 537; Code of Criminal Procedure (CrPC) (Amendment) Act, 1955; Indian Penal Code (IPC), 1860 - Sections 34, 149 and 302; Evidence Act, 1872 - Sections 24 and 27

Appeal No. : Criminal Appeal Nos. 2 to 11 and 19 of 1957 and Criminal Ref. Case No. 1 of 1957

Appellant : Shankar Rao and ors.

Respondent : State

Advocate for Def. : Asst. Adv. General in Nos. 2 and 11 of 1957 and S.A. Peeran, Adv.

Advocate for Pet/Ap. : Asst. Adv. General in No. 19 of 1957, ;M.K. Sreenivasa Iyengar, ;K. Jagannatha Shetty and ;Appa Rao, Advs.

Judgement :

Somnath Iyer, J.

1. These ten appeals arise out of an unusual case, tried by the aid of Assessors in which ten police constables attached to the Police Station House in a village called Chincholi were the accused. The Police Sub Inspector attached to that Police Station house WHS A-11 and its head constable was. A-12. All the twelve accused were tried before the Court of Session for offences said to have been committed by them on the 6th of March, 1954. A-1 was convicted of an offence punishable under Section 302 of the Penal Code and sentenced to death. A-2 to A-10 were convicted of offences punishable under S. 302 read with Ss. 34 and 149 of the Penal Code.

They were sentenced to transportation for life and to pay a fine of Rs. 5/- or one month's rigorous imprisonment in default. A-11 and A-12 were acquitted of the charges on which they were tried. A-1 to A-10 have appealed to this Court against their convictions and sentences and the State has appealed from the order of 'acquittal of A-11. The learned Sessions Judge has submitted the proceedings to this Court for confirmation under Section 374 of the Code of Criminal Procedure. A-1 is the appellant in Criminal Appeal No. 2 of 57 and A-2 to A-10 are the appellants respectively in Criminal Appeals 3 to 11 of 1957. The State is the appellant in Appeal No. 19 of 57. All these appeals have been heard together.

2. The case for the prosecution is that at or about 10-30 P.M. on the night of March 6, 1954, A-1 killed one Siddaramappa in the village0 of Chincholi by discharging a rifle at him. In so far as A-2 to A-10 are concerned, the case for the prosecution is that they were members of an unlawful assembly and that Sidramappa was so k:illed by A-1 in prosecution of the common 'object of that assembly. It is stated by the prosecution that on, that night the residents of the village of Chincholi were celebrating their customary annual festival for which purpose, they had secured the presence of four courtesans from a nearby village.

On the evening of that day A-l to A-10who were as I have mentioned above, the police constables attached to the Police Station House of Chincholi, went to one Mohd. Khaja (P. W. 6), an Abkari Contractor of that village and secured from him the customary free supply of liquor. It is stated that after entertaining themselves in

that way, they went to the house of one Gundappa where the four, courtesans were staying. The courtesans, it is stated, were getting ready to proceed to the Arkodswamy Temple for performing a musical concert and also a dance.

A-1 demanded that those courtesans should be sent with him and P. W. 14 Marasappa who had to play on the harmonium during the musical concert at the temple, declined to comply with this demand. This appears to have led to an altercation in the course of which, the lantern in the house of Gundappa was smashed, the place became enveloped in darkness and the police constables started pulling, and pushing the women. At that stage, Mallappa P. W. 12 and one Irabhadrappa who has not been examined in the case, arrived and remonstrated against the police constables interfering with the programme arranged in the temple in that way.

There appears to have been a second altercation as a result of the intercession by these two persons and it is also said that not only was there a battle of abuses between the two parties, but that the persons belonging to each party gave blows to those belonging to the other. All the persons who engaged themselves in these skirmishes then appear to have come out of the house of Gundappa where they were met by the deceased Sidramappa who also similarly remonstrated against the behavior of A-1.

This again led to another further quarrel in the course of which, blows were exchanged and then A-1, together with A-2 to A-10 left the place threatening Sidramappa and the members of his party with reprisals. It is stated for the prosecution that thereafter Sidramappa and the other villagers went to the house of the Circle Inspector to report to him the conduct of the police constables and not finding him there, they went to the house of the police Sub-Inspector A-11, who, after hearing them, gave them an assurance that he would take necessary security measures.

Meanwhile, A-1 to A-10 went to the Police Station House and were pointing out to accused 12 the Head Constable the injuries which some of them had sustained in Gundappa's house. At that time A-2, A-3 and A-10 told the other accused that their presence was required by A-11 the Police Sub Inspector, on learning which, all the

accused there wore their uniforms, A-3, A-4 and A-12 armed themselves with rifles that were available in the Police Station House and all of them proceeded to the house of A-11.

Then, it is stated, that these accused made angry demonstrations against the villagers ofChincholi, shouting slogans near the house of A-11 the Police Sub Inspector, and that A-1 to A-11 together proceeded to the Arcoaswamy Temple, it is next stated that when A-1 to A-11 reached the Mutt in that way, the courtesans, Sidramappa and the other villagers of Chincholi were inside the Mutt where the musical concert was nearing conclusion and that at that stage P. W. 13 Narsing Rao, the police Patel of the village went inside the temple and informed Sidramappa that A-11 wanted him.

Sidramappa came out and after he came out, A-1 Shankar demanded that the courtesans who had been giving their performance inside the temple should be forthwith sent with him. This demand, it is stated, was repeated by some others who were standing behind 'Shankar. Sidramappa declined to so make available the courtesans to A-1 Shankar until the dance which had yet to take place was over. This infuriated Shankar A-1 who threatened to shoot down Sidramappa if he did not accede to his demand.

Sidramappa challenged him to do so whereupon, Shankar A-1, shot him down. Sidramappa felt down crying that he had died and A-11, the Sub Inspector, asked the other accused to get back. It is then stated that Accused 2, 3 and 4 were sent by A-11 to a village called Tandur situate at some distance from Chincholi with the information recorded in a document (Ext. P-5) in which it was state that the Police Station at Chincholi had been raided by the villagers of Chineholi, that two or three constables had been beaten and that the Deputy Supt. of Police should visit the scene of occurrence.

These three accused reached Tandur early in the morning, but even before they reached that place, A-11 had reached it and had handed over to the Deputy Supt. of Police P. W. 18 a copy of a wireless message which had been either dispatched or was intended to be dispatched from Chincholi to P. W. 18 during the night. This wireless message is recorded in a document Exbt. P-6 in the case. The Deputy

Supt. of Police thereupon took accused 2, 3 and 4 along with him to Chincholi and sent for the Circle Inspector of Chincholi who arrived at the village by about 11 A.M. that day.

The first information (Exbt. P-26) about this incident was given to the Deputy Supt. of Police by Irappa, father of Sidramappa at about 11-Q' Clock and that was in due course lodged in the Court of the First Class Magistrate at Chincholi by P. W. 19.

3. All the accused pleaded not guilty to the charges on which they were tried and some of them stated when they were questioned by the Court, that they were not at the scene of occurrence . When Sidramappa was killed. In this Court lengthy and elaborate arguments were addressed by the learned Advocates appearing for the appellants.

4. It is argued by the learned Advocates for the appellants that the learned SessionsJudge was wrong in believing the testimony of the prosecution witnesses and that the convictions of the appellants were vitiated by incurable illegalities committed by the Sessions Judge in the course of the trial and by grave irregularities committed by him which had caused serious prejudice to the appellants and occasioned a failure of justice.

5. The first contention raised on behalf of the appellants is that the learned Sessions Judge acted in contravention of the provisions of Section 309 of the Code of Criminal Procedure in not requiring each of the assessors to state his opinion on the charges on which the accused were tried. It is argued that the omission to so conform to the requirements of Section 309 of the Code of Criminal Procedure was an incurable illegality vitiating and invalidating the convictions of the accused. Reliance is placed in support of this contention on the decision in Supreme Court, repotted in Prem Nath v. State of Delhi (S) : 1956 CriLJ121 (A).

6. In order to understand this contention it is necessary to set out the charges framed against the accused and also the opinion of the assessors recorded by the learned Sessions Judge. The charges against accused 1, were as hereunder.-

'That you on March 6, 1954 at about 10 or 11 p.m. in the night at Arkod Swamy Math situated in the town of Chincholi did commit murder by intentionally causing the death of Sidramappa Bhandari s/o Irappa aged about 32 years and thereby committed an offence u/s. 302 I. P. C. and within the cognizance of this Court of Session.

And I charge you further that you on the date and time mentioned above were a member of an unlawful assembly and in prosecution of the common object of which namely in bringing illegal compulsion with criminal intention on the dancing girls Seshamma and Chandramma and or to cause hurt to the deceased Sidramappa, one of the members, you, Shankar s/o Ganpat caused the offence of murder, and you are thereby u/s 149 of the Indian Penal Code guilty of causing the said offence, which is punishable u/s. 302 of the I. P. C. and within my cognizance.

And I hereby direct that you be tried by this Court of Session on the said charges."

The charges against accused 2 to 12 were as hereunder:--

"That you on 6th March, 1954 at about 10 or 11 p.m. in the night at Arkod Swamy Math situated in the town of Chincholi were members of an unlawful assembly and in prosecution of the common object of which namely in bringing illegal compulsion with criminal intention on the dancing girls named Seshamma and Chandramma and or to cause hurt to the deceased Sidramappa Bhandari s/o Irappa aged 32 years, one of the members, Shankar s/o Ganpat, Police Constable caused the offence of murder and you are thereby u/s. 149 of the Indian Penal Code guilt ofcausing the said offence of murder which is punishable u/s. 302 I P. C. and within my cognizance.

I charge you in the alternative that on and at the said date, time and place you did commit murder by intentionally causing the death of the above mentioned person Sidramappa and thereby committed an offence u/s. 302 I. P. C, read with Section 34 of the said Code and within the cognizance of this Court of Session. And I hereby direct that you be tried by this Court of Session on the said charges alternatively.'

Although the judgment of the learned Sessions Judge contains no reference to the opinion of the assessors recorded by him, there is, in this case, a record of those opinions. The question put to the assessors by the learned Sessions Judge and their opinion so elicited by him may conveniently be set out in order to determine whether the Sessions Judge violated in any manner the provisions of Section 309 of the Code and they are therefore, reproduced here:-

Question : 'Do you hold all the accused or some of the accused guilty of the murder o Sidramappa which occurred in the Arkod Swamy Muth on 6th March 1951 in the night ?'

Shri Minhajuddin :--

Shankar is responsible for the murder and accused 2 to 12 deserve acquittal and the Police Sub-Inspector and the Head Constable should be acquitted with honour. Shri Shankarrao Telkar :-

In my opinion accused 1 to 4 are liable for the murder and the rest deserve acquittal. Shri N. S. Desai : -

In my opinion A-l to A-9 are guilty of the murder and the rest should be acquitted. Shri Purushothamrao : -- In my opinion only Shankar Is guilty of the murder and the rest of the accused should be acquitted.

It is argued by the learned Advocates for the appellants that the learned Sessions Judge did not require each of the assessors to state his opinion on all the charges on which the accused had been tried. It is pointed out that the Sessions Judge did not ask each of the assessors for his opinion on the charge framed against accused 2 to 12 under section 302 read with Section 149 of the Penal Code or in respect of the charge framed under Section 302 read with Section 34 of the Penal Code.

The Only charge in respect of which the opinion of the assessors was elicited by the learned Sessions Judge was a charge of mere murder. Their opinion in respect of the other charges not having been recorded by the learned Sessions Judge as required by the Code, all the convictions it is argued, are illegal and have

to be set aside.

7. It is clear to my mind that the omission to comply with imperative requirements of Section 309 of the Code of Criminal Procedure is not a mere curable irregularity. It is equally clear that the conviction of an accused inrespect of a charge on which no opinion of the assessors was recorded is equally illegal. It is also clear that if an accused is convicted of an offence in respect of which the opinion of the assessors has been recorded but there were other charges against him in respect of which such opinion was not recorded, the conviction of the accused for the former offence in respect of which such opinion was recorded, would also be illegal if the two charges were so interconnected that the truth or otherwise of the one would reasonably react on the truth or otherwise of the other. (Vide (S) : 1956 CriLJ121 (A).)

The question therefore is whether in this case the Sessions Judge violated the provisions of Section 309 of the Criminal Procedure Code and if so, in respect of which of its requirements? As I have mentioned above, there were altogether four charges in the case on which the accused were tried. Accused 1 was tried on two of them and accused 2 to 12 were tried on the remaining two. Although there were these four charges on which the accused were so tried, the Sessions Judge required the opinion of the assessors only on one of those charges.

He asked the assessors whether they held all the accused or some of the accused guilty of the murder of Sidramappa. To my mind this was an entirely wrong way of eliciting the opinion of the assessors. The question in the form in which it was put to the assessors was clumsily worded and almost amounted to a suggestion from the Judge that the Assessors should hold the accused guilty, giving them the option to exonerate only some of them, if they chose to do so.

Apart from this curious feature of the question put by the Judge to the assessors, it is seen that the Judge did not require each of the assessors to state his opinion on the charge under Section 302 read with Section 149 of the Penal Code or on the charge under Section 302 read with Section 34 of the Penal Code. The assessors were only asked to state whether in their opinion all the accused or some of them had committed the murder of Sidramappa as if the Judge required the assessors

to state whether all or some of them had so committed Sidramappa's murder with their own hands which, if they had done, would have rendered them liable to be convicted of an offence under section 302 of the Penal Code.

It will be seen on a perusal of the charges against the accused which have been reproduced in this judgment that not only accused 1 but also accused 2 to 10 were tried on a charge under section 302 read with Section 149 of the Penal Code. In other words, their trial in that way amounted to a representation by the prosecution that in so far as that charge was concerned, even accused 1 was not the actual perpetrator of the offence hut was only constructively liable for an offence of murder committed by some member of the unlawful assembly whose common object he shared.

It is curious that while on the story of the prosecution on the basis of which accused 1 was tried on a charge under section 302 of thePenal Code, he should have been also quite inconsistently tried on a charge under section 302 read with Section 149 of the Penal Code. Be that as it may, it is clear that when once accused 1 was tried on a charge under section 302 read with Section 149 of the Penal Code in respect of an offence which has such an obvious integral connection with the charge under section 302 of the Penal Code, it was incumbent and obligatory on the part of the Judge to require each of the assessors to state his opinion on the charge under section 302 read with Section 149 of the Penal Code.

The learned Assistant Advocate General contended before us at one stage of his arguments that although the Sessions Judge required the assessors to state their opinions on a charge of mere murder, we have to regard his question as comprehensive enough so as to include a reference to all the four charges on which the accused were tried in this case. It seems to me that it is impossible to accept this contention.

It is now very clear that Section 149 of the Indian Penal Code creates an offence distinct from an offence under section 302 of the Penal Code. Further, while the charge under section 302 of the Penal Code involved the idea that accused 1 was himself the person who perpetrated the offence, the charge under section 302

read with Section 149 of the Penal Code rendered accused 1 constructively liable in the way I have mentioned above.

If the Judge had required the Assessors to state their opinion on the charge under section 302 read with Section 149 of the Code and the assessors had been of opinion that accused 1 was guilty of that offence, it is difficult to predicate in what manner that opinion of the assessors would have influenced the Judge in his consideration of the charge under section 302 of the Penal Code.

It cannot be disputed that the recording of the opinion of the assessors under Section 309 of the Code o Criminal Procedure is not a mere unmeaning formality and that the Judge cannot either neglect to record the opinion of the assessors as required by that section or refuse to take it into consideration. The learned Sessions Judge in this case by omitting to ask the assessors to state their opinion on the second charge framed against accused 1, deprived himself of an advantage which would otherwise have been available to him while he was considering the evidence against accused 1 on the charge under section 302 of the Penal Code.

It seems to me that this omission did prejudice a consideration by him of the charge in respect of which the opinion was taken particularly when it is seen that the two charges against accused 1 related to an offence said to have been committed in the course of the same transaction and if I may use the language of the Supreme Court in the case referred to by me above, constituted part of one transaction and were so integrallyconnected that the truth or falsity of the one was bound to react on the other.

8. In regard to the charges on which accused 2 to 12 were tried the question put by the Sessions Judge to the Assessors related to neither of the two charges on which they were tried. The first of those charges sought to render them liable constructively for an of-fence committed by accused 1, under the provisions of Section 149 of the Penal Code. On the second charge they were tried as the joint participators in the commission of an offence with a common Intention,

If as I have stated above, the only charge on which the assessors must be regarded to have been asked to state their opinion, was a charge under section 302 of the Penal Code, there is a clear omission on the part of the Sessions Judge to ask each of the assessors for his opinion not only on the charge under section 302 read with Section 149 of the Code but also on the charge under section 302 read with Section 34 of the Penal Cede, the ingredients of the offence relating to one charge being materially different from the ingredients constituting the offence under the other.

9. What then is the effect of the omission on the part of the Sessions Judge to comply with the mandatory requirements of Section 309 of the Code o Criminal Procedure? It is argued on behalf of the appellants that what the learned Sessions Judge did amounted to an incurable illegality vitiating the convictions of all the appellants. That contention has in my opinion, to be accepted and is, fully supported by the pronouncement of the Supreme Court the case to which I have already made reference.

It has been pointed out in that case that a trial conducted in the way in which it was done by the Sessions Judge in this case in contravention of the provisions of Section 309 of the Code of Criminal Procedure, is no trial under the Code and not one in the eye of the law. The violation by the Sessions Judge of Section 309 of the Code of Criminal Procedure was not therefore, cured by Section 537 of the Code of Criminal Procedure on which at one stage during his arguments, the learned Assistant Advocate General sought to place reliance although eventually he had to abandon that stand.

In my opinion, the convictions of Accused 1 to accused 10 for the offences of which they have been convicted by the Sessions Judge are unsustainable and have to be set aside and there should be a retrial of all these accused on all the charges on which they were tried before the Court of Session. It is so ordered and the reference under Section 374 of the Code of Criminal Procedure is rejected. The Sessions Judge shall of course, be at liberty to alter or amend those charges in the light of the observations I have made in this judgment.

10. Although what I have stated above would be sufficient to dispose of the appeals of accused 1 to 10, there are in my opinion, a few features of the trial in this case aboutwhich I feel I should say something. It appears to me that in the course of the trial, the learned Sessions Judge committed some very grave irregularities. When P. W. 9 a Pancha-yatdar was examined by the prosecution to prove the recovery of a rifle on the inform approve furnished by accused 1, he was allowed to give evidence a portion of which was clearly inadmissible.

While this witness was referring to the information so given by accused 1 he stated that accused 1 hold him in the presence of the Investigating Officer that he would point out the rifle from which he had fired. It is strange that the Sessions Judge recorded that part of the information which amounted to a confession and so was clearly inadmissible. Again, when the accused were questioned under the provisions of Section 342 of the Code of Criminal Procedure, their examination was in some parts of it in the nature of a cross-examination. Accused 1 was asked when and where he was arrested.

He was asked whether there was any proof - oral or documentary to show that he was on guard duty from 9 to 12 P.M. On the night of March 6, 1954. The other accused were also asked similar questions and some of them were asked to state whether they could give any reasons as to why they had been falsely implicated. There can be no doubt that the way in which the Sessions Judge examined the accused was not permissible and quite unfair to the accused. It appears from the record of the proceedings in this case that before the Prosecution closed its case, the Public Prosecutor applied to the Sessions Judge for permission to examine additional witnesses who were present in Court.

The' Sessions Judge very strangely deferred the disposal of that application until after the accused had been questioned under Section 342 of the Code of Criminal Procedure and grant-, ed it only after they had been so questioned. This, to my mind, was quite an improper thing to do and can quite legitimately form the basis of an argument on behalf of the appellants that they had been thereby prejudiced in their trial.

11. In the Court of the committing Magistrate, one Govinda Rao who was the Medical Officer at Chincholi at the time of the occurrence was examined as a prosecution witness. He was the person who had conducted the post mortem on the dead body of Sidramappa and issued the post mortem certificate in which he mentioned the injuries he found on it. It was only the pleader for accused 11 that cross-examined this witness in that Court. Accused 1 to 10 did not cross-examine him and on behalf of accused 12, his Pleader requested the Court for permission to cross-examine him in the Court of Session.

This Medical Officer was however, not examined by the prosecution in the Court of session but instead, his deposition taken before the committal Court was allowed to be givenin evidence before the Court of Session. Al-though accused 1 to 10 did not cross-examine the witness before the committing Court when they had an opportunity to so cross-examine him and accused 12 had no right under the law to reserve his cross-examination in the way in which he did, it seems to me that in fairness to the accused and in conformity with the principles of natural justice the prosecution should have examined this Medical Officer as a witness on their behalf in the Court of Session instead of resorting to the provisions of Section 509 of the Code of Criminal Procedure. This they omitted to do and it is somewhat surprising that the learned Sessions Judge did not insist on the examination of the Medical Officer in his Court.

12. It is also seen in this case that the Sessions Judge adopted a somewhat unusual procedure in the recording of, the evidence of the witnesses who were examined before him. He recorded portions of their evidence in their own words and the other parts of it in the indirect form of speech. This was quite an improper procedure to adopt.

13. In the charges under section 302 read with Section 149 of the Penal Code, the learned Sessions Judge mentions the common knowledge of the unlawful assembly as the bringing of 'illegal compulsion with criminal intention on the dancing girls Seshamma and Chandramma'. It is difficult for me to understand what exactly the learned Sessions Judge meant by this when he described the common object in that manner. It should be remembered that a charge should be

clear and precise but the charges framed by the Sessions Judge to which I have referred, do not, to my mind, conform to that requirement.

14. Pronounced in open Court.

15. Malimath J.

I agree.

16. Order accordingly.

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